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The Unconstitutional Conditions Vacuum in Criminal Procedure

ABSTRACT. For more than a century, the Supreme Court has applied the unconstitutional conditions doctrine in many contexts, scrutinizing government efforts to condition the tradeoff of rights for benefits with regard to speech, funding, and takings, among others. The Court has declined, however, to invoke the doctrine in the area of criminal procedure, where people accused of crime are often asked to – and often do – surrender their constitutional rights under the Fourth, Fifth, and Sixth Amendments in return for some benefit. Despite its insistence that the unconstitutional conditions doctrine applies broadly across the Bill of Rights, the Court’s jurisprudence demonstrates that the doctrine functions as a selective shield that offers no support for certain rightsholders.

We argue that the Court’s approach undermines vital rights, with especially harmful consequences for people who most need judicial protection. Since individuals accused of crime are often extremely vulnerable to coercive government measures, the important safeguards offered by the unconstitutional conditions doctrine should be at their height in the criminal procedure setting. Indeed, lower federal courts and some state courts have applied the doctrine to criminal procedure issues, demonstrating the doctrine’s utility in this domain. We conclude that the Supreme Court’s aversion to leveraging the unconstitutional conditions doctrine in its criminal procedure docket rests not on a principled doctrinal distinction, but on a failure to take seriously the constitutional predicaments facing those charged with crimes. In accordance with its obligation to render equal justice under law, the Court must apply the unconstitutional conditions doctrine in this most critical area.

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Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

– *United States v. Scott* (9th Cir. 2005)¹

I’m thinking about all of the criminal law rights . . . where a state will condition your . . . getting a lesser recommendation . . . at sentencing, for example, with you giving up your right to a trial, giving up your right to appeal. I mean, those are really significant things. And the Court apparently doesn’t ask the question, is an unconstitutional condition happening in that circumstance?

– Justice Ketanji Brown Jackson (2022)²

INTRODUCTION

For more than a century, Supreme Court jurisprudence addressing when the government can legitimately require a person or entity to yield a constitutional right in return for a benefit has centered on the First Amendment, the Fifth Amendment’s Takings Clause, and, more recently, Article I’s Spending Clause. In contexts as diverse as taxation, licensing, federal employment, and funding for reproductive care, the Justices have considered the burdens imposed by conditional offers made by the government by referring to a range of factors that implicate or signal coercion. The factors include the strength of the government’s interest, the strength of the individual’s interest, the germaneness of the condition, and the degree of proportionality between the condition and the government’s interest.³ Taken together, these factors comprise the Court’s “unconstitutional conditions doctrine.” While scholars contest how coherent the doctrine is—some even asserting that it is not a “doctrine” in the formal sense of the

1. *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2005).

2. Transcript of Oral Argument at 61, *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023) (No. 21-1168) (concerning the constitutionality of states requiring a company to consent to general personal jurisdiction as a condition of conducting business in the state).

3. See *infra* Part II.

word⁴—its influence on the scope of many government programs and regulatory schemes is beyond dispute.

But as the opening quotation from Justice Jackson makes clear, the unconstitutional conditions doctrine and the accompanying set of analytical factors have remained conspicuously absent from the Supreme Court's jurisprudence on coercive rights-for-benefits arrangements in the criminal procedure context. When considering government tradeoff schemes that implicate the Fourth Amendment right to be free from unreasonable searches, the Fifth Amendment privilege against self-incrimination, the Fifth Amendment right to substantive due process in plea deals,⁵ and the Sixth Amendment rights to a jury trial and to confront witnesses, the unconstitutional conditions doctrine is nowhere to be found. When it comes to criminal procedure rights, the Justices appear utterly unwilling to police the fairness of the exchange for proportionality, germaneness, abuse of leverage by the government, or other signs of coercion.

We contend that the disparity between the Court's treatment of rights-for-benefits schemes in the criminal procedure context and in other contexts is harmful and unwarranted. It seems to elevate certain provisions of the Bill of Rights over others: free speech and property rights receive favored treatment,⁶ while rights against police or prosecutorial coercion are given the cold shoulder.⁷ Moreover, the Court applies constitutional principles inconsistently across the population, because different categories of rights are generally exercised by different categories of people. Property owners, organizations receiving federal funds, and government employees are permitted to use the unconstitutional conditions doctrine to challenge zoning regulations or burdens on their First Amendment rights.⁸ But the Court has refused to recognize unconstitutional conditions arguments made by individuals accused of crimes and those receiving social benefits—persons who tend to struggle socioeconomically.⁹ The Court's differential use of the unconstitutional conditions doctrine thus makes a bad

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4. See, e.g., Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013) (“Although courts and commentators often refer to the ‘unconstitutional conditions doctrine,’ if a doctrine is a set of rules or tests, then there is no such doctrine Better to think and speak of a ‘conditional offer problem’ or a ‘conditional offer puzzle’” (footnote omitted)).
 5. We use the Fifth Amendment due process language to refer to both the state and federal plea contexts, even though in state court the Fourteenth Amendment Due Process Clause technically controls.
 6. See *infra* Sections II.A, II.C.
 7. See *infra* Part III.
 8. See *infra* Part II.
 9. See *infra* Part III.

situation worse, further marginalizing already marginalized populations and giving advantaged populations one more mechanism to help advance their interests.

In keeping with Justice Jackson's recent observation, this Article is the first to thoroughly examine the complete absence of the unconstitutional conditions doctrine in the Court's criminal procedure jurisprudence and to discuss the consequences of that omission for vulnerable populations.¹⁰ The rights of the American populace have long been burdened by statutory schemes that impose, for example, implied consent to blood-alcohol testing on drivers (in exchange for the privilege of driving on public roadways),¹¹ drug testing on employees or students (in exchange for a job in the public sector or a place in a public-school extracurricular program),¹² evidentiary rules on prisoners (in exchange for a grant of parole or probation), and plea bargain terms on those charged with crimes (in exchange for the guarantee, or prospect, of a reduced sentence post-conviction).¹³ The unconstitutional conditions doctrine would offer a new way to gauge the constitutionality of these rights-for-benefits schemes and to

10. A small number of courts and earlier scholars have briefly observed this omission in particular settings, without sustained analysis of scope or impact. See Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 860 (1995) ("When we examine the full run of decided cases, we discover a fairly robust version of the doctrine in connection with First Amendment rights and certain separation of powers controversies; a much weaker version prevails with respect to reproductive rights and criminal procedural rights." (footnotes omitted)); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 558 n.112 (2012) ("Indeed, the waiver and forfeiture of procedural rights by criminal defendants tends to be discussed without even reference to the doctrine of unconstitutional conditions."); *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 725 (Minn. Ct. App. 2014) ("[T]he Supreme Court is disinclined to adopt the unconstitutional conditions doctrine in the context of the Fourth Amendment.").

The absence of unconstitutional conditions language in the Court's plea bargaining cases has also gained brief mention in the past twenty years. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 103 (2001) (noting in the context of the failure to apply unconstitutional conditions doctrine to plea bargaining a "near-wholesale abdication of the judicial responsibility to protect Sixth Amendment rights from state coercion"); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802 (2003) ("Plea bargains, however, are not analyzed under the unconstitutional conditions doctrine."); Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC, (Dec. 24, 2021), <https://amp.theatlantic.com/amp/article/621074> [<https://perma.cc/Y3B9-4MY8>]. These works did not, however, robustly compare the criminal procedure context to other rights-bearing contexts, offer a sustained analysis of the deficit in the criminal procedure docket across claims arising under different amendments, consider why this pattern exists, or discuss the impact of the Court's jurisprudence on vulnerable populations.

11. See *infra* Section III.A.1.

12. See *infra* Section III.A.2.

13. See *infra* Section III.B.

evaluate the level of government coercion experienced by those charged with or suspected of crimes. We advocate embracing the doctrine as a mode of analysis in the Court's criminal procedure docket and offer the first sustained exploration of what the doctrine might accomplish for rights jurisprudence in that area.

To be sure, application of the unconstitutional conditions doctrine would not always invalidate prosecutorial or police practices, but sometimes it will – resulting in more protection for disadvantaged populations.¹⁴ For example, the doctrine would prompt courts to carefully assess plea bargain terms on the basis of the level of coercion they impose, and to judge them accordingly as either appropriate or out of bounds. Distinctions between terms might take several forms. First, they might differ as to core function. Waiver of the rights to a jury trial, to cross-examine witnesses, and to examine physical evidence are implicit in the core bargain required for a defendant to plead guilty, but waiver of the right to appeal is not. For that reason, the appellate waiver should require more justification because it binds the individual too far into the future, beyond the trial itself.¹⁵ Second, terms differ in their ability to chill even an innocent person's desire to go to trial; terms that drastically increase the penalty a person faces after conviction at trial compared to conviction by plea have – in rare instances – been identified as unacceptably coercive, but with the unconstitutional conditions doctrine this conclusion should be more frequent.¹⁶ And terms that insulate the

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14. See, for example, *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006), where the Ninth Circuit wrote, “It may be tempting to say that such transactions—where a citizen waives certain rights in exchange for a valuable benefit the government is under no duty to grant—are always permissible But our constitutional law has not adopted this philosophy wholesale.”; *McDonell v. Hunter*, 809 F.2d 1302, 1304 (8th Cir. 1987), where the Eighth Circuit affirmed the district court's order enjoining the Iowa Department of Corrections from enforcing employee searches; and cases discussed in Section III.B.3.
 15. See PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 168 (2021) (“When conditions require a future sacrifice of a right, they demand more than merely the current nonexercise of the right; they give government a power to discourage and effectively prevent the exercise of a right—a sort of control forbidden by the Constitution's guarantees.”).
 16. *United States v. Jackson*, 390 U.S. 570, 571-72 (1968) (finding a kidnapping statute unconstitutional where the death sentence was authorized only for conviction after trial, not after conviction by plea, but not by using the unconstitutional conditions doctrine); see also *Shumpert v. S.C. Dep't of Highways & Pub. Transp.*, 409 S.E.2d 771, 774 (S.C. 1991) (finding that an implied consent statute that enlarges the length of driver's-license suspension after conviction at trial relative to conviction by guilty plea chills the defendant's right to go to trial and is therefore unconstitutional). But see *Brady v. United States*, 397 U.S. 742, 749-55 (1970) (finding guilty plea not invalid even though it was entered to avoid the death penalty for murder; not using unconstitutional conditions doctrine).

The risk of coercion “is particularly serious when steep discounts are combined with harsh baseline sentences.” Jenia I. Turner, *Plea Bargaining*, in 3 REFORMING CRIMINAL JUSTICE:

government from appellate review of structural errors or that “embargo . . . judicial and advocate mistakes,”¹⁷ such as waiver of the right to appeal or waiver of the right to raise habeas claims,¹⁸ should be rejected in the absence of significant and specific justification. In other areas of law, courts have recognized that certain structural interests are so important that the government cannot condition a benefit on their waiver;¹⁹ the same standard should apply here. Invoking the doctrine to address Fourth, Fifth, and Sixth Amendment questions should, in other words, force the Court to directly and transparently address how the coercion faced by those charged with crimes compares to the coercion faced by other rightsholders, using concepts such as germaneness, proportionality, and the like. The Court should acknowledge the various ways in which the tradeoff of rights-for-benefits exploits the vulnerability of people throughout the population. The selective shield of the unconstitutional conditions doctrine should no longer extend only to those wielding rights to free speech or property.

The Court’s choice of favored rights and rightsholders seems hard to justify under any theory of the judicial role. In its unconstitutional conditions jurisprudence, the Court has expressed compassion for rightsholders who are “especially vulnerable”²⁰ to government coercion—and its attention to the “vulnerable”

TRIAL AND PRETRIAL PROCESSES 73, 81 (Erik Luna ed., 2017). When there is “a significant differential between the negotiated sentence and the sentence expected upon conviction after trial,” empirical evidence suggests the conditions are ripe for innocent defendants to plead guilty. *Id.* at 82.

17. *United States v. Townsend*, No. 19-20840, 2021 WL 777191, at *1 (E.D. Mich. Mar. 1, 2021).
18. In accordance with current Supreme Court jurisprudence, the lower federal courts routinely “allow[] . . . parties to waive the right to appeal,” thereby limiting the “reviewability of negotiated judgments.” *Turner*, *supra* note 16, at 79 (citing *United States v. Toth*, 668 F.3d 374, 378 (2012); *Keller v. United States*, 657 F.3d 675, 681 (7th Cir. 2011)); see also Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *DUKE L.J.* 209, 212 (2005) (“In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review.”). On the unconstitutionality of requiring defendants to sign a waiver of the right to file habeas petitions, see HAMBURGER, *supra* note 15, at 165–66.
19. For example, the United States Supreme Court has held that a state cannot condition the privilege of doing business in the state on a company’s waiving its right to remove a case from state to federal court. See *Barron v. Burnside*, 121 U.S. 186, 196–98 (1887); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 453, 456–58 (1874). In her dissent in *Mallory*, Justice Barrett referenced this line of cases:

The right to remove a case to federal court, for instance, is primarily personal At the same time, however, it serves federal interests by ensuring that federal courts can vindicate federal rights. Recognizing this dual role, we have rejected efforts of States to require defendants to relinquish this (waivable) right to removal as a condition of doing business.

Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 171 (2023) (Barrett, J., dissenting) (citations omitted).

20. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

represents a logical focus of judicial concern. But the Court uses this language most prominently in its Takings Clause cases and in recent fiscal-federalism jurisprudence, not in the criminal procedure docket.²¹ In our view, those involved in the criminal legal system or in the public-benefits system – who do not receive any protection from the doctrine – are much more “vulnerable” to coercive government pressure than property owners who seek zoning exemptions or states that resist federal entreaties to expand Medicaid coverage.²²

The Court’s discounting of criminal procedure rights in the unconstitutional conditions line of cases also directly contradicts its language in the incorporation line of cases. Considering incorporation under the Fourteenth Amendment requires the Court to assess whether state (and local) law enforcement and courts should be held to the same standard as their federal government counterparts.²³ In this set of cases, the Court has repeatedly stressed that the Fourth, Fifth, and Sixth Amendment protections are “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”²⁴ They are the literal foundation of our justice system.²⁵ Viewed from this perspective, even

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21. See, e.g., *id.* at 604-05 (“[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits”); Nat’l Fed’n of Indep. Bus. (*NFIB*) v. Sebelius, 567 U.S. 519, 580-82 (2012) (expressing concern about the impact on state budgets of losing Medicaid funding); *NFIB*, 567 U.S. at 687-88 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (similarly expressing concern about the impact on state budgets of losing Medicaid funding).
 22. We agree with and build on the insight of Kathleen M. Sullivan, who warned that the Court embraces/creates an “undesirable caste hierarchy in the enjoyment of constitutional rights” with its unconstitutional conditions doctrine jurisprudence. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1490 (1989). Criminal defendants are exactly the kind of unpopular minority that deserve special protection under process-based theories of judicial review. See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 594 (2005) (“Criminal defendants are not popular; to the contrary, they are the quintessential discrete and insular minority identified by political process theorists.”); see also Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 723 (2017) (“Criminal law scholars argue that the political process does not adequately include the voices of those disproportionately affected by poor criminal laws and criminal enforcement practices, particularly African-Americans and other minorities.”). Those convicted of crimes may even lose their legal ability to participate in the democratic process through voting. See, e.g., GA. CONST. art. II, § 1, para. III(a) (“No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.”).
 23. See Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251, 261-62 (2020) (describing the Court’s shift in incorporation from a fundamental fairness approach to a selective incorporation approach during the twentieth century).
 24. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).
 25. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (“This Court has long explained that the Sixth Amendment right to a jury trial is ‘fundamental to the American scheme of justice.’” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968))).

within the self-referential jurisprudential universe that it has created, the Court's decision to embrace property owners and states while neglecting those charged with crimes appears asymmetrical.

Some might argue that injecting the unconstitutional conditions doctrine into the criminal procedure realm would severely disrupt the criminal legal system, or perhaps render it unworkable. While those fears ought not to be taken lightly, we believe that they are misplaced. Lower courts have invoked the doctrine to evaluate a range of state statutes and regulations;²⁶ these efforts show that unconstitutional conditions analysis is entirely compatible with the criminal legal system's administrative requirements. What the unconstitutional conditions doctrine offers is a greater respect for the rights of the defendant population than the jurisprudence we have now. Moreover, even if using the doctrine imposes a significant practical burden on the government in some instances, such burdens also accompany other areas of government-citizen encounters, such as zoning rules. These are the costs associated with identifying rights as fundamental.

We begin in Part I by situating our project within the existing scholarly treatment of the unconstitutional conditions doctrine. Unlike other commentators, we focus not on the overall coherence of the doctrine, nor on the factors that courts employ when applying it, but instead on the doctrine's limited reach based on Supreme Court precedent. Part II takes the reader on a quick tour of the existing doctrinal landscape, reviewing the primary contexts in which statutory or regulatory rights-for-benefits schemes have been litigated before the Supreme Court.

The heart of the article begins in Part III, as we examine the neglected fields of criminal procedure in which the unconstitutional conditions doctrine could have, but so far has not, played a role in developing the underlying jurisprudence. We consider first the range of Fourth Amendment warrant exceptions that have emerged independently of the unconstitutional conditions doctrine and then address two issues in Fifth and Sixth Amendment jurisprudence that likewise have not received the doctrine's protection: self-incrimination in post-conviction prisoner proceedings and the set of rights that must be waived during plea deals. In this Part of the Article we also spotlight instances of lower courts using the unconstitutional conditions doctrine to address Fourth, Fifth, and Sixth Amendment controversies. These cases serve three purposes in this Article: they establish that the doctrine can be effectively deployed in these areas; they provide concrete, real-world examples of what the unconstitutional conditions analysis looks like in the criminal procedure context; and they show the effect on case outcomes that the doctrine sometimes produces. The Supreme

26. See *infra* Part III.

Court's consistent failure to invoke the doctrine to address criminal procedure issues thus appears to reflect not an inherent limitation of the doctrine, but a choice by the Court to protect only certain rights and certain rightsholders.

The final two Parts of the Article offer the reader a chance to step back from the particular doctrines discussed in Parts II and III, to examine the origins and larger implications of the overall pattern we have documented. In Part IV, we explore potential reasons for the Supreme Court's refusal to apply the unconstitutional conditions doctrine in the context of criminal procedure. We turn our attention first to features of the legal system and then address aspects of the social and political landscape that might explain the Court's decision-making in this area. In Part V, we consider what it means for the Court to have excluded entire sections of the Bill of Rights from the shield provided by the doctrine. We begin by looking closely at two cases from the lower federal courts in which use of the doctrine led to clear victories for the defendants. We then analyze the harmful impact produced by the Court's preference for protecting property and monetary rights over the rights of vulnerable populations in its analysis of government coercion. We argue that the shield offered by the unconstitutional conditions doctrine must be stripped of its selectivity, and that the Court must bring criminal procedure rights into alignment with the remaining provisions of the Bill of Rights in order to afford equal justice under law to people across the socioeconomic spectrum.

I. CURRENT SCHOLARSHIP ON THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The unconstitutional conditions doctrine has famously defied scholarly exposition. Commentators have characterized the doctrine as “notoriously hard,”²⁷ “incoherent,”²⁸ and “riven with inconsistencies.”²⁹ More poetic descriptions have ranged from “a sort of Gordian knot”³⁰ to “an enormous hairball.”³¹ While scholars generally agree on the components that courts cite when deciding cases under the doctrine, understanding why some challenges prevail and others fail has

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

28. Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1030 (2011).

29. Sullivan, *supra* note 22, at 1416.

30. Hamburger, *supra* note 10, at 480.

31. Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 395 (2016).

proven more elusive. The variables are clear enough, but the formula that explains the result is not.³²

Going back as far as Robert Hale's classic account in 1935,³³ scholars have identified certain common elements in the judicial application of the doctrine. Hale noted that the Court considers several factors when addressing unconstitutional conditions, such as the germaneness of the conditions,³⁴ the nature of the right at issue,³⁵ and the character of the benefit.³⁶ In addition to identifying key aspects of the judicial treatment of unconstitutional conditions, Hale also offered a critique of existing scholarship. He noted a scholarly focus on whether the imposition of the condition constitutes "compulsion."³⁷ Hale expressed doubt about the utility of "compulsion" as an analytic concept in this area,³⁸ asserting that the imposition of a condition in a sense always constitutes "compulsion."³⁹ As Hale explained his broad construction of the concept: "[e]very price paid for a commercial necessity is paid under compulsion."⁴⁰ Accordingly, Hale questioned whether the concept of compulsion could distinguish between permissible and impermissible governmental conditions.⁴¹

While acknowledging ongoing judicial reference to the factors Hale identified, recent commentators have tried to reestablish the notion of compulsion or coercion as at the center of unconstitutional conditions analysis. Seth F. Kreimer has outlined several factors to help establish a baseline from which to judge acceptable levels of government pressure to yield rights.⁴² Mitchell N. Berman has argued that the government violates the Constitution if it imposes a condition

32. In a related work, we describe this scholarship in more detail and argue that scholars have neglected to consider the role of the unconstitutional conditions doctrine in shaping the contours of state constitutional rights. See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *Protecting State Constitutional Rights from Unconstitutional Conditions*, 56 U.C. DAVIS L. REV. 247, 258-65 (2022).

33. Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 321-22 (1935).

34. See *id.* at 350.

35. See *id.* at 357; see also *id.* at 343 (discussing the inability of the state to require the waiver of the right to remove a case to federal court).

36. See *id.* at 357.

37. See *id.* at 322.

38. See *id.* at 357 ("In all the cases, the fact that a constitutional right is surrendered under the compulsion of a sanction that can ordinarily be imposed outright, is not conclusive.").

39. See *id.* at 341.

40. See *id.*

41. See *id.* at 321.

42. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359-74 (1984).

with the purpose of inducing a person to forgo a constitutional right.⁴³ Adopting an economic perspective, Einer Elhauge has drawn on contract law to define impermissible coercion, distinguishing between conditional offers that actually make the government and the individual better off and those that amount only to government threats that would reduce the welfare of one or both parties.⁴⁴

Other scholars have continued Hale's project of identifying certain rights that deserve special judicial protection and particular areas that merit broad governmental prerogative.⁴⁵ Kathleen M. Sullivan, for example, has focused on the broad systemic effects of the government's conditioning benefits on the forgoing of constitutional rights.⁴⁶ Her approach emphasizes the overall distribution of power in society.⁴⁷ In her view, the unconstitutional conditions doctrine should seek to ensure that the government respects the boundary between the public and private spheres, treats beneficiaries evenhandedly, and prevents a caste system from arising due to differential circumstances, such as wealth, that skew the beneficiaries' decisions to waive their rights in return for government benefits.⁴⁸

The debate over the significance of the various elements, and the prediction of how courts will apply the formula, has produced scholarly skepticism about the coherent and principled nature of the doctrine. Cass Sunstein has even rejected the existence of unconstitutional conditions as a recognizable legal doctrine.⁴⁹

Our objective in this Article is different. Instead of examining how courts have applied the doctrine to determine which factors are most salient or whether

43. See Berman, *supra* note 10, at 35 (arguing that the state unconstitutionally penalizes the exercise of a constitutional right “when the state imposes a burden for the purpose of discouraging or punishing assertion of a protected right”); Berman, *supra* note 4, at 1347 (“[T]he state may not penalize the exercise of constitutional rights . . . for the purpose of punishing or discouraging the exercise of the right.”).

44. See Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 506-07 (2016) (emphasizing the importance of coercion in the unconstitutional conditions doctrine).

45. See Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1214-16 (2019) (noting the relevance of distinctions among rights for unconstitutional conditions analysis); cf. Sullivan, *supra* note 22, at 1419 (explaining that the unconstitutional conditions doctrine begins from the “assum[ption] that some set of constitutionally preferred liberties has been agreed upon, and that burdens on those liberties require especially strong justification”).

46. See Sullivan, *supra* note 22, at 1421.

47. See *id.*

48. See *id.* at 1491-99.

49. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 291-318 (1993); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594-95 (1990).

the results are coherent across cases, we emphasize a critical area in which the Supreme Court steadfastly refuses to invoke the doctrine *at all*. When criminal procedure rights are burdened by state and local regulations, the puzzle is not who wins or loses under the unconstitutional conditions doctrine or which elements are dispositive, but why the Court consistently disregards the doctrine in this very important area, and what impact that omission has on rights and rightsholders across the country.

As the next Part makes clear, the Supreme Court is not generally averse to the unconstitutional conditions doctrine. To the contrary, the Court deploys the doctrine across many areas of inquiry, just not—as we show in Part III—in the essential area of criminal procedure.

II. THE UNCONSTITUTIONAL CONDITIONS LANDSCAPE IN SUPREME COURT JURISPRUDENCE

Unconstitutional conditions issues can arise when a government at any level imposes limitations on who can receive its “largesse.” Irrespective of which political party is in power, the federal government of the United States spends a great deal of money and employs many people. The same can be said of state and local governments.⁵⁰ When the government conditions its offer of money or employment on the recipient yielding a constitutional right, the recipient might contend that the condition is an unconstitutional burden on the right. Recently, claims of unconstitutional burdens have been raised by (1) the beneficiaries of taxing and spending programs,⁵¹ (2) government workers,⁵² (3) land-use permit applicants,⁵³ and (4) states participating in federal grant programs.⁵⁴

Private litigants in the first two categories complain that conditions placed on their receipt of tax benefits or subsidies, or on their employment with a government agency, burden their First Amendment rights in significant and troubling ways. People and organizations enjoy broad constitutional protections to speak about matters of public concern and to engage in political activity. At the same time, the Constitution does not confer a right to government subsidy or

50. Many more people are employed by state and local governments than by the federal government. See *Total Number of Governmental Employees in the United States from 1982 to 2022*, STATISTA (June 2023), <https://www.statista.com/statistics/204535/number-of-governmental-employees-in-the-us> [<https://perma.cc/UVX4-VAFS>].

51. See, e.g., *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 219 (2013).

52. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“We have applied this general principle to denials of tax exemptions, unemployment benefits, and welfare payments. But, most often, we have applied the principle to denials of public employment.” (citations omitted)).

53. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

54. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580-82 (2012).

employment; these are discretionary benefits that the government offers, or threatens to withhold, in order to advance its interests. The Court's jurisprudence in this area thus seeks to identify the limits, if any, on the government's ability to require one to forgo one's freedom of speech in return for receiving the benefit of a subsidy or a government job.

We see a similar pattern in the third category with respect to the Fifth Amendment Takings Clause, although with local rather than federal government conditions being subject to challenge. In that setting, issues arise when local city councils or zoning boards place conditions on permits for land use. Property owners contest the authority of the permitting agency to condition the grant of the permit on the property owners' willingness to make some sort of change to their land or to grant an easement for public access. These kinds of conditions interfere with the landowners' right to use their property as they please. As in the First Amendment context, the government's ability to require a person to relinquish a constitutional right (here, the right to property) in order to obtain a benefit (here, a land-use permit) is not unlimited, but those limits are contested.

Finally, in the fourth category, the federal government's conditional grants of money to the states pose special issues under the unconstitutional conditions doctrine. This area of jurisprudence aligns with the general theory of the doctrine, that courts should scrutinize the government's attempt to use its power to do indirectly what it could not do directly. As a means of safeguarding federalism principles, the doctrine constrains the federal government from using its spending power to coerce state activity. This federalism branch of the doctrine had largely lain dormant until it roared back to life in *National Federation of Independent Business v. Sebelius*, when the Court invalidated a key part of the Affordable Care Act as federal overreaching.⁵⁵

In the pages below, we consider the various areas in which the Court has actively deployed the unconstitutional conditions doctrine to regulate the interplay between regulations, statutes, and constitutional rights. These cases demonstrate the Court's emphasis on proportionality, germaneness, and the like as key factors influencing the acceptability of coercion in rights-for-benefits schemes. While individual citizens do not always prevail in their challenges to regulations and statutes, the Court's careful attention to the importance of their rights – even when subject to tradeoff schemes – is consistent throughout. Such careful attention is lacking in the Court's criminal procedure cases, as we discuss later in the Article.

55. *Id.* at 588 (holding that the ACA's Medicaid expansion plan violates the Constitution because, while "Congress may offer the States grants and require the States to comply with accompanying conditions, . . . the States must have a genuine choice whether to accept the offer").

A. *First Amendment Unconstitutional Conditions Jurisprudence: Funding*

A variety of unconstitutional conditions cases have concerned the ability of the national government to require recipients of federal money to refrain from activity that would generally be protected by the First Amendment. When the First Amendment prohibits the national government from directly imposing the restrictions at issue, the Court must address whether and when these restrictions can be imposed indirectly. The indirect route ties the receipt of certain federal funds to the recipients' agreement not to engage in the protected conduct.

With respect to funding programs, the Supreme Court has tried to distinguish acceptable conditions from prohibited conditions. It has drawn a line, albeit a blurry one, between the government's permissible choice about what activities to subsidize and the government's impermissible attempt to leverage its funds to suppress expressive or other constitutionally protected activity. Sometimes the Court has contrasted government attempts to define the limits of a spending or subsidy program with government attempts to regulate activity outside of the contours of the program itself.⁵⁶ Similarly, the Justices have found analytical distinctions between permissible regulation of *programs* and impermissible regulation of *recipient organizations* who run those programs.⁵⁷ Funding restrictions violate the unconstitutional conditions doctrine in "situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," the Court has said.⁵⁸ In other words, the government may tailor its programs, but the government may not require recipients to forgo rights in other spheres.

The Court has allowed the government fairly broad authority to regulate the conduct of those who receive federal money, in terms of encouraging or discouraging certain actions. The government may ensure that its resources are not diverted to support unwanted activities. What the government may not do is impose restrictions on the recipients themselves, rather than on the subsidized conduct. The Court has sought to operationalize the distinction between programs and recipients by assessing whether an organization could continue to pursue protected activities through alternative means.

56. See *All. for Open Soc'y Int'l*, 570 U.S. at 214-15.

57. See *id.* at 217; see also *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) ("Title X expressly distinguishes between a Title X grantee and a Title X project.").

58. *Rust*, 500 U.S. at 197 (upholding a Department of Health and Human Services regulation that provided funding to family-planning services on the condition that they not counsel or encourage abortion as a family-planning technique).

Applying this principle of unconstitutional conditions analysis, the Court has, for example, upheld the denial of federal tax exemptions to organizations that undertake political advocacy.⁵⁹ In *Regan v. Taxation with Representation*, the Court emphasized that even with a restriction on political advocacy, the tax-exempt organization could establish a separate entity to carry out its lobbying activities.⁶⁰ Where the acceptance of a federal tax benefit would not completely prevent the expressive activity but would merely channel the speech into a different organizational form, the restriction was not unconstitutional under the doctrine. Similarly, the Court has upheld the denial of federal family-planning funds to organizations that engage in abortion-related counseling and activities.⁶¹ In *Rust v. Sullivan*, the Court concluded that because the recipients of family-planning funds could have an affiliate organization that offers abortion-related counseling and services, the Constitution was not offended by a program that denied federal funding to clinics that offer abortions while providing funding to those that support childbirth.⁶² Reading these cases together, it seems the government can avoid an unconstitutional conditions issue if it prudently defines the uses of public funds; careful boundaries permit an organization to engage in constitutionally protected activity through a different mechanism.

As evidence of this distinction, the Court has struck down funding conditions when the recipient could not mitigate the constitutional burden through alternate channels. For instance, the Court held in *FCC v. League of Women Voters* that the federal government cannot prohibit educational broadcasting stations from engaging in editorializing just because they receive federal grants.⁶³ The public-television stations subjected to the FCC's rule apparently had no option to make use of an affiliate, which therefore rendered the regulation an unconstitutional condition.⁶⁴ Based on similar reasoning, the Court declared in *Agency for International Development v. Alliance for Open Society International, Inc.* that requiring recipients of HIV/AIDS funding to affirm opposition to prostitution

59. *Regan v. Tax'n with Representation*, 461 U.S. 540, 551 (1983).

60. *See id.* at 544 (upholding the denial of federal tax exemptions to organizations that undertake political advocacy).

61. *Rust*, 500 U.S. at 177-78.

62. *Id.* at 197-98 (reviewing the distinction between restrictions on a recipient and restrictions on a program); *see also* *Harris v. McRae*, 448 U.S. 297, 312-18 (1980) (reaching a similar result as to constitutionality when the challenge was based on substantive due process grounds). This litigation took place before *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), which overruled *Roe v. Wade*, 410 U.S. 113 (1973), on the issue of the federal constitutional right to abortion.

63. 468 U.S. 364, 395 (1984).

64. *Id.* at 400-01.

violated the First Amendment.⁶⁵ In this instance, the Court found the affiliate option to be unworkable; the burden of forcing an organization to espouse a view it did not hold could not be cured by creating an affiliate.⁶⁶ A similar result was reached in *Sherbert v. Verner*, when a Seventh Day Adventist refused to work on Saturdays and was denied unemployment benefits.⁶⁷ The Court found that observing Saturday as a sabbath day was nonnegotiable for persons of her faith, and that there was no alternative channel for her to practice her faith.⁶⁸ Accordingly, enforcing the Saturday-work rule created an undue burden on her First Amendment right to free exercise of religion.⁶⁹

To be sure, funding conditions may impose a substantial burden and still not amount to an unconstitutional condition. Robert M. Cover has argued that “the politics of spending” offers the government opportunities for regulation that go far beyond what is achievable through direct statutory enactments.⁷⁰ Philip Hamburger likewise warns of the “cascad[ing]” effects of regulatory programs that greatly increase the government’s ability to control the citizenry beyond constitutional boundaries.⁷¹ Taking a closer look at these criticisms, in financial terms it may be difficult for an organization to survive without government expenditures. In expressive terms, the ability to communicate a message through an affiliate may be an inferior option, compared to the possibility of speaking oneself.⁷² Notably, outside of the unconstitutional conditions context, the Supreme Court has refused to recognize the ability to speak through an affiliate as sufficient for First Amendment purposes. In *Citizens United v. FEC*, for example, the Supreme Court affirmed the right of a corporation to make campaign contributions, without the need to resort to an affiliated political action committee.⁷³ Nevertheless, the Court has accepted these kinds of burdens on constitutional rights as a way of permitting the government to control the uses of proffered financial benefits.

65. 570 U.S. 205, 221 (2013).

66. *See id.* at 219-20.

67. 374 U.S. 398, 399-402 (1963).

68. *See id.* at 403-06.

69. *See id.*

70. *See Federalism and Administrative Structure*, 92 YALE L.J. 1342, 1343 (1983) (summarizing a paper reportedly presented by Robert M. Cover). Cover apparently lamented that funding allows the government to “co-opt local opposition, [and] purchase acquiescence.” *Id.*

71. HAMBURGER, *supra* note 15, at 89.

72. *See* Hamburger, *supra* note 10, at 488-89.

73. 558 U.S. 310, 337-40, 372 (2010).

B. First Amendment Unconstitutional Conditions Jurisprudence: Employment

Government employment is another context in which the Supreme Court has deployed the unconstitutional conditions doctrine to review burdens on First Amendment rights. These decisions analyze the extent to which the government can require its employees to forgo activity safeguarded by the First Amendment as a condition of their employment. With respect to the employment of individuals, the distinction between regulating the recipient of government funds and merely regulating government-funded activities has proved more difficult to maintain. The Court has grappled directly with the range of permissible restrictions on persons working for the government.

More than fifty years ago, the Court set out a framework for analyzing the free speech rights of government workers in *Pickering v. Board of Education*.⁷⁴ In holding that a teacher could not be discharged for sending a letter to a local newspaper criticizing the board of education, the Court articulated a balancing test that recognized both the employee's rights and the employer's interest:

[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], 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.⁷⁵

This balancing test weighs the burden on the worker's expressive activities against the government's interest in providing efficient public services.

The Justices have applied that test to uphold certain categorical restrictions on the First Amendment rights of federal employees. The Hatch Act, enacted in 1939, prohibits federal employees from participating in certain kinds of political activities, even outside of working hours.⁷⁶ The law also restricts the political activities of state and local employees working on projects involving federal funding. In *United Public Workers v. Mitchell*, for example, the Court upheld the firing of George Poole from the United States Mint.⁷⁷ He lost his job because he

74. 391 U.S. 563, 565 (1968).

75. *Id.* at 568.

76. Hatch Political Activity Act, ch. 410, § 9, 53 Stat. 1147, 1148 (1939). Congress has narrowed both the scope of the prohibited activities and the categories of covered employees, most significantly in the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001, 1005, and the Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, 126 Stat. 1616.

77. 330 U.S. 75, 101, 103-04 (1947).

served on the Democratic Ward Executive Committee in Philadelphia and engaged in political activities on Election Day, including working at the polls and assisting in paying party workers for their services on Election Day.⁷⁸ The Court concluded that freeing governmental service from the taint of partisan influence justified the broad prohibition on political activity, and the Hatch Act furthered the longstanding ideal of federal employment as a civil service rather than a spoils system.⁷⁹ The Hatch Act is not, in other words, an unconstitutional condition on the First Amendment. But when Congress banned all federal employees from receiving honoraria for speeches or articles (even on subjects unrelated to official duties), that was a bridge too far. Identifying the prohibition on receiving compensation as a burden on expression, the Court in *United States v. National Treasury Employees Union* held that the honoraria ban was an unconstitutional condition on the First Amendment speech rights of lower-level executive employees.⁸⁰

While the cases discussed above generally concern whether career officials may engage in partisan activities outside of work hours, some recent controversies involve the restrictions that apply to political appointees acting within their official positions. For example, in May 2019, the U.S. Office of Special Counsel (OSC) recommended that Counselor to the President Kellyanne Conway be dismissed for repeated violations of the Hatch Act.⁸¹ The OSC found that Conway had on numerous occasions transgressed the Act's prohibition on using "official authority or influence for the purpose of interfering with or affecting the result of an election."⁸² In particular, the OSC noted that Conway had repeatedly criticized Democratic candidates for President while speaking in her official capacity, sometimes on White House grounds.⁸³ The OSC further faulted Conway for using her Twitter account to promote partisan political goals, while also using the account for official purposes.⁸⁴ Notably, the Trump White House rejected the OSC allegations on several bases, including the potential threat to First Amendment values: "OSC's overbroad and unsupported interpretation of the Hatch Act

78. *See id.* at 92 n.24.

79. *See id.* at 98-100.

80. 513 U.S. 454, 477 (1995).

81. *See* U.S. OFF. OF SPECIAL COUNS., OSC FILE NOS. HA-19-0631 & HA-19-3395, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT 2 (2019).

82. 5 U.S.C. § 7323(a)(1) (2018).

83. *See* U.S. OFF. OF SPECIAL COUNS., *supra* note 81, at 6-13.

84. *See id.* at 13-15.

risks violating Ms. Conway’s First Amendment rights and chills the free speech of all government employees,” the White House said.⁸⁵

C. *Fifth Amendment Unconstitutional Conditions Jurisprudence: Takings*

No area of law offers a better example of the Supreme Court’s explicit embrace of the unconstitutional conditions doctrine than the takings and exactions field.⁸⁶ The Takings Clause generally limits the government’s ability to interfere with the property rights of private parties, unless it provides just compensation. The issue is whether the government may require property owners to accept burdens on their property rights as a condition of receiving government permission to use their property in a particular way.

A trifecta of cases decided over the past four decades has established the degree to which the Fifth Amendment’s Takings Clause limits the government’s authority to deploy exactions (proposed conditions) when it regulates land use.⁸⁷ The first case in the series was *Nollan v. California Coastal Commission*,⁸⁸

85. Letter from Pat A. Cipollone, Couns. to the President, to Henry Kerner, U.S. Off. of Special Couns. 1 (June 11, 2019), <https://int.nyt.com/data/documenthelper/1168-pac-osc-06-11-2019-letter/11f2a2d73d1e14d197f3/optimized/full.pdf> [<https://perma.cc/8S25-7SGZ>].

The Hatch Act recently appeared in the news again, when Mark Meadows asserted that actions taken to support Donald Trump’s 2020 presidential campaign were part of his job as White House Chief of Staff. The Eleventh Circuit disagreed, offering as an alternative ground for its holding the rationale that the Hatch Act prohibits federal employees from engaging in political activities. See *State v. Meadows*, 88 F.3d 1331, 1346-48 (11th Cir. 2023). The current presidential administration has also had run-ins with the Hatch Act. See Katherine Doyle, *The White House Ran Afoul of the Hatch Act After Initial Warning, Government Watchdog Says*, NBC NEWS (Dec. 1, 2023, 10:20 AM EST), <https://www.nbcnews.com/politics/white-house/white-house-ran-afoul-hatch-act-initial-warning-government-watchdog-sa-rcna127456> [<https://perma.cc/WVV8-5HF4>].

86. See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013) (“[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.”); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 294 (“The Court has characterized its exactions jurisprudence as an application of the unconstitutional conditions doctrine.”).

87. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). The Court has held that the Fourteenth Amendment incorporates the Takings Clause. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

88. 483 U.S. 825 (1987).

decided in 1987. In *Nollan*, the Supreme Court asserted for the first time that an exaction is unconstitutional if the government's proposed condition lacks an "essential nexus" to the goal advanced by the law's default prohibition of the development at issue.⁸⁹ In its 1994 decision in *Dolan v. City of Tigard*, the Court added a requirement to its unconstitutional conditions analysis: to pass constitutional muster, the exaction sought also must bear a "rough proportionality" to the impact of the proposed development.⁹⁰ Finally, in its 2013 decision in *Koontz v. St. Johns River Water Management District*,⁹¹ the Court held that the *Nollan-Dolan* framework applies even where (i) the permitting authority denies the permit unless certain conditions are met (as opposed to granting the permit subject to certain conditions),⁹² and (ii) the conditions call for payment of money (as opposed to action with respect to property).⁹³ In *Koontz*, the Court laid bare the value of the unconstitutional conditions doctrine in constitutional jurisprudence: it prevents the government from using "coercive pressure" to induce individuals to forgo their constitutional privileges.⁹⁴

While some commentators criticize the Court's exactions jurisprudence as muddled,⁹⁵ the test for what amounts to an unconstitutional exaction is surely one of the clearer aspects of takings law,⁹⁶ and the Court's application of the tests it has announced has been relatively straightforward. In *Nollan*, for instance, the

89. *Id.* at 837 ("The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.").

90. 512 U.S. 374, 391 (1994).

91. 570 U.S. 595 (2013).

92. *See id.* at 606-08. The *Koontz* Court explicitly relied upon the unconstitutional conditions doctrine to bolster its conclusion. Noting that the lower court had "puzzled over" how a demand for property could violate the Takings Clause before any property had actually been taken, the Supreme Court explained:

[T]he unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Id. at 607.

93. *See id.* at 611-19.

94. *See id.* at 607.

95. *See, e.g.*, Zygmunt J.B. Plater & Michael O'Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions—Making Use of a Muddy Supreme Court Exactions Case*, 89 U. COLO. L. REV. 741, 775-82 (2018).

96. *See* Michael A. Heller & James E. Krier, Commentary, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1023-24 (1999).

Court declared that a local land-use commission could not condition a permit to build a new, larger house on landowners' beachfront property upon the landowners' agreement to convey a lateral easement allowing the public to access the beach from their property.⁹⁷ The Court explained: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."⁹⁸ That connection, the Court noted, "does not meet even the most untailed standards."⁹⁹

The *Dolan* Court invalidated a city's attempt to condition a permit for a storeowner to expand her store and pave her parking lot on the storeowner's agreement to dedicate some of her property to the city for use as a floodplain and, subject to a public recreational easement, a bicycle path.¹⁰⁰ While recognizing that paving a parking lot could increase the risk of flooding, the Court noted that "[t]he city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control."¹⁰¹ With respect to the bicycle path, while acknowledging that a larger store would draw more traffic on the city's streets, the Court reasoned that "on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate[s] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."¹⁰²

At issue in *Koontz* was a water-management district's denial of land-use permits unless the landowner agreed to fund offsite wetlands mitigation on public lands. The Court held that the permitting condition (and subsequent denial of the landowner's request) was subject to the test announced in *Nollan* and *Dolan*.¹⁰³ Because the state supreme court had yet to apply the *Nollan-Dolan* test to the facts, the Supreme Court remanded for consideration of whether the water-management district's action violated the constitutional standard.¹⁰⁴ This line of cases highlights the Supreme Court's robust use of the unconstitutional conditions doctrine to safeguard private development rights from public regulation.

97. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838-39, 841-42 (1987).

98. *Id.* at 838. A claim that the new, larger house would obstruct others' views of the beach was the reason the landowners were subject to the Coastal Commission's authority in the first place.

99. *Id.*

100. *See Dolan v. City of Tigard*, 512 U.S. 374, 392-96 (1994).

101. *Id.* at 393.

102. *Id.* at 395.

103. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-19 (2013).

104. *Id.* at 619.

D. Federalism Jurisprudence: Conditional Federal Grants

Under current interpretations of the Tenth and Eleventh Amendments, the states are protected in a variety of ways from federal intrusion on their ability to govern. For example, the national government may not commandeer the administrative or legislative processes of a state and order it to regulate in accordance with a federal plan,¹⁰⁵ nor can the national government require state or local officials to enforce federal law.¹⁰⁶ And states cannot be sued in federal court for damages.¹⁰⁷ However, the states may waive these constitutional protections, and the national government may use financial inducements to encourage such waivers.

Financial inducements of this sort are both common and extensive. In fiscal year 2019, for example, the federal government spent approximately \$750 billion on these grants, which constituted about 16.5% of total federal expenditures and 3.5% of the national gross domestic product.¹⁰⁸ As a percentage of federal spending and of the national economy, these figures are typical of the past decade.¹⁰⁹

Federal grants of this sort are not free gifts, though; state and local governments accepting these funds must agree to a variety of conditions set by Washington.¹¹⁰ In other words, through conditional spending the national government offers powerful inducements for states and localities to act in accordance with federal objectives. This arrangement makes the unconstitutional conditions doctrine relevant. For example, when the federal government wanted to raise the drinking age to twenty-one, it faced a potential constitutional barrier to direct federal action.¹¹¹ Instead, it conditioned receipt of federal highway funds on states' willingness to amend their laws to conform to this standard.¹¹² States and localities can in theory decline to accept the money (for this and other initiatives), but budgetary realities often severely constrain their practical ability to refuse. States thus must swallow the set of conditions the federal government

105. See *New York v. United States*, 505 U.S. 144, 161 (1992).

106. See *Printz v. United States*, 521 U.S. 898, 925-35 (1997).

107. See *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996).

108. See ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 5 tbl.2 (2019).

109. See *id.*

110. See *id.* at 3-4 (reviewing types of conditions).

111. The Twenty-First Amendment, which repealed Prohibition, arguably conferred plenary power on the states to regulate the distribution and sale of alcoholic beverages within their borders. See *South Dakota v. Dole*, 483 U.S. 203, 205-06 (1987) (noting, without deciding, the question of plenary state authority).

112. See *id.* at 208-09 (approving this program).

imposes—which amounts to making changes in state law they have a right not to make and otherwise would not make—in return for the money the federal government offers.

The Supreme Court validated the national government’s use of this funding mechanism as consistent with our system of federalism in 1937.¹¹³ At the same time, it acknowledged the possibility that federal spending conditions might conceivably constitute an “exertion of a power akin to undue influence”¹¹⁴ and that there might be a “point at which pressure turns into compulsion, and ceases to be inducement.”¹¹⁵ Between 1937 and 2012, the Court occasionally referenced these potential limitations on the national government’s spending authority,¹¹⁶ but it never actually concluded that the constitutional line had been crossed.

This deference changed in 2012 with *National Federation of Independent Business (NFIB) v. Sebelius*.¹¹⁷ In *NFIB*, the Court concluded that the federal government had imposed an unconstitutional condition on a federal grant through the Medicaid expansion scheme in the Affordable Care Act. Through the Medicaid program, the federal government provides grants to states to fund indigent medical care. The federal payments are structured as matching funds: states are required to finance certain medical services, and the federal government matches state expenditures at a rate that varies depending on the per-capita income in each state.¹¹⁸ The minimum federal match is 50%.¹¹⁹ On average, states spend approximately 29% of their budgets on Medicaid.¹²⁰ The Affordable Care Act sought to expand the Medicaid program to cover more categories of indigent

113. See *Steward Machine v. Davis*, 301 U.S. 548, 598 (1937).

114. *Id.* at 590.

115. *Id.* In 1987, the Court reaffirmed the permissibility of this use of conditional federal spending while clarifying additional requirements for such arrangements. The spending must be in pursuit of the general welfare; the conditions must be unambiguous; the conditions must be germane to the purpose of the federal spending program; and the conditions must not induce the states to engage in unconstitutional activities. See *Dole*, 483 U.S. at 207-11.

116. See *Dole*, 483 U.S. at 211 (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” (quoting *Steward Machine*, 301 U.S. at 590)).

117. 567 U.S. 519 (2012).

118. See ALISON MITCHELL, ANGELA NAPILI, EVELYNE P. BAUMRUCKER, CLIFF BINDER, KIRSTEN J. COLELLO & SARAH K. BRAUN, CONG. RSCH. SERV., R43357, MEDICAID: AN OVERVIEW 1-2, 15 (2019).

119. *Id.* at 15.

120. See *State Expenditure Report: Examining Fiscal 2015-2017 State Spending*, NAT’L ASS’N OF STATE BUDGET OFFICERS 3 (2017), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-ofca152d64c2/UploadedImages/SER%20Archive/State_Expenditure_Report__Fiscal_2015-2017_-S.pdf [<https://perma.cc/PVB4-U5LQ>].

adults.¹²¹ The federal government committed to pay all of the additional costs for several years, with its contribution declining to no less than 90% thereafter.¹²² States that did not wish to shoulder the added expense would be required to withdraw from the Medicaid program.

In *NFIB*, the Supreme Court held that the conditional funding for Medicaid expansion violated the Constitution: the structure of the congressional program constituted not a financial inducement but “a gun to the head.”¹²³ States that refused to participate faced a loss of federal funds amounting to 10% or more of their budget. The Court characterized the plan as “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”¹²⁴ Accordingly, the Court concluded that this kind of conditioned-spending scheme amounted to impermissible coercion.¹²⁵

States have brought other federalism-based challenges to conditional spending in the wake of *NFIB*. For example, in the American Rescue Plan Act of 2021, the federal government offered \$200 billion to states subject to a variety of conditions, including a requirement that states not use the funds to reduce taxes.¹²⁶ Some states have challenged the funding scheme as unduly coercive,¹²⁷ but most of these cases are still working their way through the courts.

* * *

As evidenced by the cases reviewed in this Part, the Court employs a few key concepts when conducting unconstitutional conditions analysis: the strength of the individual and government interests, the germaneness of the condition, and the coercive potential of the policy. In *Mitchell* and *Pickering*, for example, the Court explicitly weighed the interest of the individual rightsholder against the government’s interest in demanding the forbearance of the constitutional

121. See *NFIB*, 567 U.S. at 542.

122. See Jean C. Sullivan & Rachel Gershon, *State Fiscal Considerations and Research Opportunities Emerging from the Affordable Care Act’s Medicaid Expansion*, 40 AM. J.L. & MED. 237, 238 (2014).

123. *NFIB*, 567 U.S. at 581.

124. *Id.* at 582.

125. See *id.* at 585.

126. Pub. L. No. 117-2, § 9901(a), 135 Stat. 223 (2021) (codified at 42 U.S.C. § 802).

127. The United States Court of Appeals for the Eighth Circuit held that Missouri lacked standing to bring this challenge. *Missouri v. Yellen*, 39 F.4th 1063, 1070 (8th Cir. 2022). Other challenges remain pending. See, e.g., *Texas v. Yellen*, No. 21-CV-079-Z, 2022 WL 989733, at *2 (N.D. Tex. Mar. 4, 2022); *Ohio v. Yellen*, 539 F. Supp. 3d 802, 807 (S.D. Ohio 2021); *West Virginia v. U.S. Dep’t of Treasury*, No. 21-cv-00465, 2021 WL 2952863, at *3 (N.D. Ala. July 14, 2021); *Kentucky v. Yellen*, 563 F. Supp. 3d 647, 649 (E.D. Ky. 2021); *Arizona v. Yellen*, 550 F. Supp. 3d 791, 794 (D. Ariz. 2021) (finding that the state lacked standing), *rev’d*, 34 F.4th 841 (9th Cir. 2022).

right.¹²⁸ These cases also considered the relationship between the condition the government sought to impose and the goal it sought to advance. The takings and exactions cases similarly reviewed the germaneness¹²⁹ and the coercive force of the condition.¹³⁰ Further, in *NFIB*, the Court recognized that a benefit may be so substantial that the threat to withhold it may be unconstitutionally coercive. As we argue next, these analytic concepts are conspicuously missing from the Court's criminal procedure jurisprudence. This omission has produced significant consequences for rightsholders in those cases, who are often the most vulnerable among us.

III. CRIMINAL PROCEDURE JURISPRUDENCE: WHITHER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE?

The Supreme Court's aversion to using the unconstitutional conditions doctrine in the criminal procedure arena has been unyielding. In litigation involving state actions that encroach on the Fourth Amendment right to be free from unreasonable searches, the Fifth Amendment right to be free from self-incrimination, and the Fifth and Sixth Amendment rights waived as part of plea bargaining, the Court has had numerous opportunities to assess the tradeoff of rights for benefits using the doctrine. Yet in each instance, the Court has declined to frame the government's behavior as a potentially unconstitutional condition or to compare that behavior to the rights-for-benefits tradeoffs that occur in other settings. It has instead limited its analysis to measuring the borders of the underlying right, and then asking whether the government's behavior complied with the right as marked in those terms. Almost without exception, that framing choice—to define the problem as exclusively about the right's elasticity in a new situation—has led to wins for the government, as the Court has concluded that the right offers no protection or less protection than might otherwise have been available. This approach has generated a rights jurisprudence marked by

128. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94 (1947) (“When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel.”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (“The problem in any case is to arrive at a balance between the interests of the [employee], 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.”).

129. See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (stating the “essential nexus” test).

130. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (“[T]he unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”).

stinginess (rigidity) rather than generosity (elasticity) in the criminal procedure arena.

In Fourth Amendment territory,¹³¹ we can identify several jurisprudential areas that could have been governed by unconstitutional conditions analysis in the Supreme Court but have so far fallen outside this territory: (1) the taking of a blood or breath sample from a driver pursuant to an “implied consent” statutory scheme but justified instead as an “exigent circumstance” or a “search incident to arrest”; (2) suspicionless drug testing of certain public employees, public-school students, or public-benefits recipients pursuant to a state rule or regulation but justified instead as a “special needs” search of an at-risk population; (3) suspicionless searches of the homes of probationers and welfare recipients pursuant to a state rule or regulation but justified instead under the “special needs” umbrella to promote the aims of a government regulatory policy; and (4) surprise warrantless inspections of certain workplaces pursuant to a state or federal regulatory scheme but justified instead under the “pervasively regulated industry” warrant exception.¹³² In all of these settings, the Court’s unwillingness to take a close look at the regulatory scheme in favor of reflexive application of warrant exceptions has led to an erosion of the Fourth Amendment right to be free from unreasonable searches, as the warrant exceptions now threaten to overwhelm the default rule that searches conducted without warrants are presumptively unreasonable.

In the Fifth and Sixth Amendment landscape,¹³³ the unconstitutional conditions doctrine is conspicuously missing from Supreme Court opinions about evidentiary use of silence in nontrial settings (such as prison disciplinary proceedings or clemency hearings), as well as opinions about the legitimacy of plea bargaining. In the first category, process rules burden prisoners’ self-incrimination rights by forcing them to choose between the risk of actively participating in these hearings and the risk of remaining quiet. In the second category—plea bargaining—the Court routinely validates bargains in which the defendants must give up their Fifth and Sixth Amendment rights in return for a reduced charge or sentence. Although the defendants must be advised of the rights they are waiving and must state on the record their willingness to waive those rights in return for the benefit offered by the government, the Justices are generally unwilling to police the fairness of the exchange for lack of proportionality or abuse of leverage by the government.

131. See *infra* Section III.A.

132. This is meant to be an illustrative, rather than exhaustive, list of criminal procedure areas in which the unconstitutional conditions doctrine does not—but should—appear. These examples represent (to us) the most obvious omissions, but there certainly could be others worthy of future scholarly attention.

133. See *infra* Section III.B.

Notably, the aversion to using the unconstitutional conditions doctrine to address these issues seems to be an affliction affecting just the Supreme Court. We offer below several examples of the circuit courts resting their criminal procedure decisions on the doctrine. Some state courts have engaged with the doctrine as well when addressing Fourth, Fifth, and Sixth Amendment questions. These opinions offer real-world evidence of how the unconstitutional conditions doctrine can impact both analyses and outcomes, if only the Supreme Court would opt to use it. Lower courts' applications of the doctrine, of course, cannot substitute for the Supreme Court's invocation of the unconstitutional conditions doctrine; only the Supreme Court can create precedent that is binding throughout the federal and state court systems. But the Supreme Court's current avoidance of the doctrine may well inspire other courts to follow its lead and neglect this vital analytical tool.

We recognize that in the criminal procedure arena, the Court sometimes considers issues that would be relevant to an analysis under the unconstitutional conditions doctrine. The Court's treatment of "implied consent," for example, explores what kinds of burdens on rights individuals must accept in exchange for their ability to exercise a privilege, such as driving on a road. But those opinions remain tethered to the framework of previously articulated warrant exceptions. By refusing to adopt the unconstitutional conditions framework, the Court avoids conducting the more robust analysis of the exchange that is evident in other doctrinal domains (and is evident in some lower-court opinions). We also recognize that some people suspected of or charged with crimes would not prevail even if the Court used the unconstitutional conditions doctrine, because arguments about germaneness and proportionality will favor the government in some circumstances. However, other defendants should and do succeed in mounting winning arguments using the doctrine, as the lower court cases show. Because some criminal defendants should prevail and the Court should be forced to confront its disparate treatment of rightsholders,¹³⁴ the Court should embrace the unconstitutional conditions doctrine in its criminal procedure cases.

A. Forgone Opportunities to Apply the Unconstitutional Conditions Doctrine in Fourth Amendment Settings

The Fourth Amendment offers the people the right to freedom from unreasonable searches and seizures of their persons, homes, papers, and effects and insists that warrants must be issued by a neutral and detached magistrate based on probable cause.¹³⁵ While there is no textual connection between the

^{134.} See *infra* Part V.

^{135.} U.S. CONST. amend. IV.

reasonableness of a search and the issuance of a warrant, in the late 1960s, the Supreme Court decided that searches conducted in the absence of a warrant are presumptively unreasonable.¹³⁶ That decision in turn gave rise to a series of warrant exceptions, authorizing searches that the Court believes are reasonable even though they are not premised on the warrants issued by magistrates. As Yale Kamisar has observed, the “succinct and majestic . . . [b]ut . . . vague and general” wording of the Fourth Amendment has “generated great controversy” each time courts try to apply it in a previously unexamined space.¹³⁷

Our discussion below focuses on several of the warrant exceptions that have generated controversy over time: exigent circumstances, consent, search incident to arrest, special needs, and the pervasively regulated industry exception. While we leave most of the controversy for other authors to explore, we argue that the Court could—and should—have addressed these issues in terms of unconstitutional conditions. In doing so, it might have created a more consistent line of search jurisprudence, peppered by fewer distinct warrant exceptions and instead linked by common principles and analogies. Shifting the focus from the warrant exception’s reach to the burden imposed by the government regulatory scheme, we believe, would have provided more of an opportunity to honor the principles of privacy that lie at the core of the Fourth Amendment itself.

1. *DUI Arrests and Implied Consent Statutes*

In the past decade, the Supreme Court has considered on three different occasions the Fourth Amendment implications of collecting blood- and breath-alcohol samples from drivers arrested for driving under the influence (DUI): *Missouri v. McNeely*,¹³⁸ *Mitchell v. Wisconsin*,¹³⁹ and *Birchfield v. North Dakota*.¹⁴⁰ In all three cases, the officer’s request for a blood or breath sample stemmed from a state statute¹⁴¹ that said, in effect, all drivers on state roads implicitly consent to have their blood or breath taken and tested following a DUI arrest. Failure to

136. *Katz v. United States*, 389 U.S. 347, 357 (1967). The creation and growth of warrant exceptions in the years since *Katz* have dramatically expanded the scope of searches that count as reasonable, even in the absence of a warrant.

137. Yale Kamisar, *The Fourth Amendment: The Right of the People to Be Secure in Their Persons, Homes, Papers, and Effects*, in *A TIME FOR CHOICES* 31, 31 (Claudia A. Haskel & Jean H. Otto eds., 1991).

138. 569 U.S. 141 (2013).

139. 139 S. Ct. 2525 (2019).

140. 579 U.S. 438 (2016).

141. MO. ANN. STAT. §§ 577.020.1, 577.041 (West 2011); N.D. CENT. CODE ANN. §§ 39-20-01(3)(a), 39-08-01(2), 39-20-01, 39-20-14 (West 2015); MINN. STAT. § 169A.51, subd. 2 (2014); WIS. STAT. §§ 343.305(2), (3) (2016).

comply with an officer's request to submit to a test can be punished with evidentiary consequences (argument at trial that refusal is a sign of guilt), administrative consequences (loss of driver's license for a period of time), and/or criminal consequences (the addition of a new criminal charge for the refusal). These statutes are known colloquially as "implied consent laws," and they exist in all fifty states.¹⁴² In the unconstitutional conditions analytical framework, these laws are state regulations that require drivers to trade their constitutional rights to be free from an unreasonable search in order to receive the benefit of a driver's license. But in all three cases, the Court's assessment of the legality of the search ignored the unconstitutional conditions framework and focused exclusively on the scope of certain exceptions to the search warrant requirement.

The Supreme Court decided both *McNeely*¹⁴³ and *Mitchell*¹⁴⁴ on exigent circumstances grounds; it refused to address the statutory implied consent scheme that governed the interaction between the officer and the driver, even though that was one of the State of Wisconsin's primary arguments in *Mitchell*. Under the exigent circumstances exception to the warrant requirement, the government asserts that a great harm is likely to occur if the officer must take the time to go through the warrant process. In DUI cases, that harm is the inevitable

142. See *McNeely*, 569 U.S. at 161 ("[A]ll 50 states have adopted implied consent laws that require motorists, as a condition of operation of a motor vehicle within the State to consent to [blood alcohol] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense."); see also *Drunk Driving Laws and Penalties: 50-State Survey*, JUSTIA, <https://www.justia.com/50-state-surveys/drun-driving-dui-dwi> [<https://perma.cc/3BH3-655L>] (listing drunk-driving statutes in every state). See generally *South Dakota v. Neville*, 459 U.S. 553 (1983) (acknowledging and approving of such schemes as a way to address highway safety concerns). More recently, the Supreme Court has recognized the use of implied consent schemes, see *Birchfield*, 579 U.S. 438; *Mitchell*, 139 S. Ct. 2525, although in *Mitchell* it declined to approve of such schemes as a form of actual consent to search, 139 S. Ct. at 2532.

143. Tyler McNeely refused to submit a sample, but the officer forced him to provide a blood sample anyway; the only issue on appeal was whether the dissipation of alcohol in Mr. McNeely's blood was a *per se* exigent circumstance that alone justified the forced taking of the sample. *McNeely*, 569 U.S. at 145-47. The Court held that it was not. *Id.* at 145.

144. In *Mitchell*, blood was taken from an unconscious driver after an accident, and the State of Wisconsin first asserted that statutory implied consent amounted to actual consent. Brief for Respondent at 20, *Mitchell*, 139 S. Ct. 2525 (No. 18-6210). This argument was the basis on which the Court granted certiorari. Wisconsin also tried to justify the blood draw using the unconstitutional conditions doctrine, arguing, "[w]here it is reasonable, this Court has recognized that a public benefit or privilege may be conditioned on compliance with a search." *Id.* at 44. The state contended that the search was reasonably imposed as a condition of driving on public roads "to combat intoxicated driving." *Id.* at 47. Notably, Wisconsin cited to the pervasively regulated industry cases as supportive examples for this argument, *id.* at 44-45, even though, as we show in Section III.A.3, those cases studiously avoid the unconstitutional conditions doctrine. The Court ultimately validated the search using exigent circumstances (a theory not put forth by the parties), declining to decide the case on either basis offered by Wisconsin. *Mitchell*, 139 S. Ct. at 2530.

destruction of blood-alcohol evidence caused by the body's metabolism over time. Following these two opinions, the prosecution may not routinely justify the taking of a blood sample from a DUI driver using the exigent circumstances doctrine; if, however, the driver would have her blood drawn for medical reasons or the officer has a strong need to focus on other law-enforcement needs (like accident investigation), exigent circumstances will normally justify the procedure.

In *Birchfield*, the Justices considered whether an officer could compel a refusing individual to provide a sample using the search incident to arrest doctrine (not exigent circumstances). They also addressed the mechanism by which a state could punish a recently arrested DUI driver who refused to submit after being told of the implied consent law. The parties in *Birchfield* argued to the Court that the legality of the underlying implied consent statute could and should be judged using the unconstitutional conditions doctrine, rather than straightforward warrant exception analysis. They explicitly addressed whether the state could condition the granting of a driver's license on one's future consent to be searched, which amounts to a waiver of one's Fourth Amendment rights. The petitioner in *Birchfield* argued:

Of course, it may be true that the State need not permit anyone to drive, but that is no answer to the constitutional claim here; the Court has “repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights.” “Virtually all of [the Court’s] unconstitutional conditions cases involve a gratuitous governmental benefit of some kind,” but the “greater authority” to deny a benefit altogether “does not imply a lesser power to condition [the grant of the benefit] on petitioner’s forfeiture of his constitutional rights.” . . . Like a city that uses its monopoly on land use permits to impose unconstitutional conditions on homeowners or a State that conditions government employment on refraining from protected speech, these States use their regulatory authority over driving to coerce the surrender of constitutional rights.¹⁴⁵

Beyond the parties' arguments, the unconstitutional conditions issue was front and center in the state court opinion from which the Supreme Court granted

145. Brief for Petitioner at 34-35, *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (No. 14-1468) (citations omitted). The State argued that criminal penalties are not sufficiently coercive as a regulatory mechanism to burden the driver's Fourth Amendment rights, see Brief of Respondent at 24-34, *Birchfield*, 579 U.S. 438 (No. 14-1468), and that if the Court were to “balance the individual's interest in refusing consent against the State's interest in public safety,” it would find that the penalty scheme is not an unconstitutional condition, *id.* at 34.

certiorari—the North Dakota Supreme Court had directly considered whether the doctrine applies to the Fourth Amendment.¹⁴⁶

Despite these exhortations to consider the unconstitutional conditions doctrine as its primary analytical framework, the Supreme Court opted to ignore it. The Court instead crafted the *Birchfield* opinion using the search incident to arrest exception to the warrant requirement. The majority declared that while a state could, as a search incident to arrest, compel a driver to provide a breath sample, blood draws cannot be compelled through threat of criminal punishment because they involve much more significant privacy invasions. For that reason, compelled blood draws in the absence of a warrant or exigent circumstances are unreasonable searches.¹⁴⁷ The Court's assessment of the level of coercion imposed by the implied consent regulatory scheme could have drawn on the unconstitutional conditions doctrine, comparing coercion in this context with coercion in the First Amendment or Takings Clause context. But the Court held fast to notions of reasonableness at the core of the Fourth Amendment warrant exception analysis. In so doing, it drew a sharp line between officers' authority under the search incident to arrest doctrine to take a breath sample versus a blood sample but refused to regard implied consent as a form of rights-for-benefits tradeoff. The Court thereby left unexplored critical issues relating to the government's use of the "privilege" of driving—a central feature of many people's lives—as leverage to compel individuals to waive their constitutional rights.

In contrast to the U.S. Supreme Court, some states have taken seriously the possibility of using the unconstitutional conditions doctrine to assess the legality of implied consent schemes.¹⁴⁸ Defendants often lose these challenges, and the

146. Brief for Petitioner, *supra* note 145, at 34 n.9.

147. There is an important caveat here regarding the breadth of compulsion. The majority in *Birchfield* specifically declared that a state could not *criminally* punish a driver's refusal to submit to a blood sample; they left in place prior jurisprudence authorizing a state to respond to the refusal with administrative consequences or evidentiary consequences. See *Birchfield*, 579 U.S. at 476-77 (citing *McNeely*, 569 U.S. at 160-61 and *South Dakota v. Neville*, 459 U.S. 553, 560 (1983)). Threatening to impose criminal consequences for a refusal amounts to a form of coercion that goes beyond the bounds of Fourth Amendment reasonableness. *Birchfield*, 579 U.S. at 478. The Court stated: "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. . . . [W]e conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield*, 579 U.S. at 477.

148. A portion of the implied consent statute of South Carolina was also declared unconstitutional, but for imposing longer penalties for conviction after trial than for conviction after a guilty or *nolo contendere* plea. *Shumpert v. S.C. Dep't of Highways & Pub. Transp.*, 409 S.E.2d 771, 774 (S.C. 1991). This qualifies as an unconstitutional conditions conclusion, but in the field of plea bargaining rather than Fourth Amendment jurisprudence.

analysis in the cases is often fairly cursory. However, at least some lower courts recognize the significance of the issue as an independent check on the coercive power of the state. At a minimum (and even when the defendant loses) these cases demonstrate that the unconstitutional conditions doctrine can readily be invoked in the criminal procedure context, and they provide clues as to the sort of analysis the Supreme Court should do: balancing the fundamental nature of the Fourth Amendment right, the potential oppressiveness of a burden on that right imposed via implied consent schemes, and the degree of connection (in terms of germaneness and proportionality) between any such scheme and a state's asserted interest in highway safety.¹⁴⁹

In *Stevens v. Commissioner of Public Safety*,¹⁵⁰ for example, the Minnesota Court of Appeals entertained unconstitutional conditions arguments about its DUI implied consent framework, even while noting that there was no precedent in state or federal jurisprudence for applying the unconstitutional conditions doctrine to Fourth Amendment issues.¹⁵¹ Five years earlier, in *State v. Netland*,¹⁵² the Minnesota Supreme Court considered the defendant's argument that the state's implied consent scheme imposed an unconstitutional condition on her Fourth Amendment rights. However, the court did not decide whether the unconstitutional conditions doctrine should apply to Fourth Amendment rights or to violations of the state constitution more broadly¹⁵³ because it concluded that the warrantless collection of the biological sample was justified by exigent circumstances.¹⁵⁴

In *Schwindt v. Sorel*,¹⁵⁵ the North Dakota Supreme Court rejected an unconstitutional conditions challenge to the revocation of a driver's license as a sanction for refusing a blood-alcohol test. The court relied on its 2015 case, *Beylund*

149. We assess these factors in greater detail in our companion article published in the *UC Davis Law Review* in 2022. See Levine, Nash & Schapiro, *supra* note 32, at 26-29 (discussing how the strength of government interest, germaneness, and proportionality ought to be viewed when considering an implied consent law).

150. 850 N.W.2d 717 (Minn. Ct. App. 2014).

151. *Id.* at 724-25. The Minnesota court ultimately concluded that because the statutory scheme included a requirement that drivers give express consent at the time of their arrests, the legality of the samples at issue did not rest on the implied consent portion of the statutory scheme, even if the unconstitutional condition doctrine applied. *Id.* at 725-26. For that reason, the court said that the issue of whether that scheme placed an unconstitutional burden on drivers' rights was not necessary to its decision.

152. 762 N.W.2d 202 (Minn. 2009).

153. *Id.* at 212.

154. *Id.* at 205. This conclusion would be vitiated by the Supreme Court's 2013 holding in *McNeely*, a fact that the Minnesota Supreme Court recognized in *State v. Lindquist*, 869 N.W.2d 863, 866 (Minn. 2015).

155. 942 N.W.2d 849, 853 (N.D. 2020).

v. Levi,¹⁵⁶ which rebuffed a similar challenge. *Beylund* had emphasized the compelling nature of the state's interest in fighting drunk driving and the reasonable relationship between that interest and the condition that drivers consent to a blood-alcohol test if arrested on suspicion of DUI.¹⁵⁷

In *State v. Rajda*,¹⁵⁸ the Vermont Supreme Court upheld the prosecution's introducing into evidence the defendant's refusal to submit to a blood-alcohol test. The court framed the issue in terms of the unconstitutional conditions doctrine by referencing the privilege of driving: "The implied consent statute establishes a bargain in which, in exchange for the privilege of engaging in the potentially dangerous activity of operating a motor vehicle on the highway, motorists impliedly consent to testing for impaired driving to protect the public."¹⁵⁹ The court did not, however, probe the fairness of the exchange.

Similarly, in permitting an adverse evidentiary inference in *Commonwealth v. Bell*, the Pennsylvania Supreme Court stated that implied consent laws "are based on the notion that driving is a privilege rather than a fundamental right."¹⁶⁰ In his dissent, Justice Wecht expressly referenced the unconstitutional conditions doctrine and focused the readers' attention on the precise right at issue—the Fourth Amendment right to be free from an unreasonable search. He asserted:

Under the unconstitutional conditions doctrine, it is immaterial that driving an automobile is a privilege rather than a fundamental right. . . . Under this doctrine, and notwithstanding that driving an automobile is a privilege or a "gratuitous government benefit," the government cannot condition the exercise of this privilege upon motorists' relinquishment of their Fourth Amendment rights.¹⁶¹

Notably, Justice Wecht cited a Takings Clause case from the U.S. Supreme Court in his effort to explain the role of the unconstitutional conditions doctrine in this Fourth Amendment decision. He thus recognized the importance of cross-pollination of doctrinal areas and refused to regard the criminal procedure question as immune from comparison.

156. 859 N.W.2d 403 (N.D. 2015), *vacated sub nom.* *Birchfield v. North Dakota*, 579 U.S. 438 (2016).

157. *See Beylund*, 859 N.W.2d at 413-14.

158. 196 A.3d 1108 (Vt. 2018).

159. *Id.* at 1120 (citing *State v. Morale*, 811 A.2d 185, 188 (Vt. 2002)).

160. *Commonwealth v. Bell*, 211 A.3d 761, 770 (Pa. 2019) (citing *PennDOT v. Scott*, 684 A.2d 539, 544 (Pa. 1996)).

161. *Id.* at 784-85 (Wecht, J., dissenting) (citations omitted) (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013)).

More than seventy years ago, the Michigan Supreme Court addressed the coercive nature of implied consent schemes generally in *People ex rel. Roth v. Younger*.¹⁶² That case involved a challenge to a state statute that empowered conservation officers to require a permit to engage in the privilege of hunting, fishing, or trapping and—pursuant to such permit—subjected individuals to warrantless searches of their boat, conveyance, vehicle, automobile, hunting or fishing camp, fish box, fish house, net house, fish basket, game bag, game coat, or any other receptacle in which wildlife may be kept, carried, or transported.¹⁶³ Finding implied consent schemes unduly coercive, the court presciently warned of the various ways the legislature could use such schemes to undermine and corrode Fourth Amendment rights:

Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, [or] practice law . . . without a license from the state. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search . . . ? . . . Were we to hold that in every instance in which a license may lawfully be required its granting may at the same time be conditioned upon waiver of constitutional rights against unreasonable search, what area could conceivably remain immune and beyond legislative reach . . . ? . . . [I]t is not the genius of our system that the constitutional rights of persons shall depend for their efficacy upon legislative benevolence.¹⁶⁴

In sum, the Supreme Court has repeatedly dodged the opportunity to engage the unconstitutional conditions doctrine in the implied consent context. In contrast, state supreme courts have engaged the issue, recognized the applicability of the doctrine, and offered a path forward.

2. *Special Needs Searches*

Over the years, the Supreme Court has had the opportunity to consider the legality of suspicionless searches of the home or workplace of certain groups,

^{162.} 42 N.W.2d 120, 125 (Mich. 1950).

^{163.} Our research has uncovered many similar schemes among the fifty states, where one's hunting or fishing license is premised on implied consent to allow a wildlife officer to search one's belongings or to provide a blood or breath sample upon request. See Levine, Nash & Schapiro, *supra* note 32, at 265-67 (documenting the range of implied consent provisions in state statutes).

^{164.} *Younger*, 42 N.W.2d at 125.

such as welfare recipients¹⁶⁵ and probationers.¹⁶⁶ It has also considered the constitutionality of government schemes that authorize suspicionless drug testing¹⁶⁷ of employees in certain kinds of workplaces, such as railroad workers after an accident,¹⁶⁸ U.S. Customs Service employees involved in security-risk positions,¹⁶⁹ and candidates for designated state political offices.¹⁷⁰ Finally, the Court has approved of suspicionless drug testing for public-school children participating in extracurricular activities, including, but not limited to, athletics.¹⁷¹

In all of these cases, the Court was faced with a statute, regulation, or ordinance that required an individual to forgo her Fourth Amendment right to contest a search in order to receive a government benefit—such as Aid to Families with Dependent Children,¹⁷² community release,¹⁷³ continued employment,¹⁷⁴ or access to school activities.¹⁷⁵ Yet in each context, whether considering search of a home or search of a body, the Court declined to evaluate the rights-for-benefits tradeoff using the unconstitutional conditions doctrine or even to acknowledge the doctrine as a legitimate tool of analysis; it relied instead on the search warrant exception known as the “special needs” search.¹⁷⁶ In this line of

165. *Wyman v. James*, 400 U.S. 309, 313-14 (1971).

166. *United States v. Knights*, 534 U.S. 112, 115 (2001).

167. Drug testing occurs through urinalysis. This process falls under the Fourth Amendment “because one has a reasonable and legitimate expectation of privacy in the personal information contained in one’s bodily fluids. Moreover, a urine test will often be conducted under the close surveillance of a government representative, an embarrassing, if not a humiliating, experience.” *Kamisar*, *supra* note 137, at 32-33.

168. *Skinner v. Ry. Lab. Execs.’ Ass’n*, 489 U.S. 602, 609 (1989).

169. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 660 (1989).

170. *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

171. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658-60 (1995); *Bd. Educ. Indep. Sch. Dist. No. 92 Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830-31 (2002).

172. *Wyman v. James*, 400 U.S. 309, 315-16 (1971).

173. *United States v. Knights*, 534 U.S. 112, 116 (2001).

174. *Skinner v. Ry. Lab. Execs.’ Ass’n*, 489 U.S. 602, 609 (1989); *Von Raab*, 489 U.S. at 660.

175. *Acton*, 515 U.S. at 648; *Earls*, 536 U.S. at 825.

176. For arguments about the low threshold posed by the special needs balancing test, see Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO L.J. 1721, 1726 (2014); and I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 975 (2013). In *Wyman v. James*, 400 U.S. 309, 315-26 (1971), the Court went even further, as it decided that a home visit by a caseworker to confirm continued eligibility for welfare did not qualify as a search because the caseworker was not a police officer and was not looking for evidence of a crime. Because the behavior was not a search, it fell outside the bounds of the Fourth Amendment altogether. Nowhere in the opinion did the Court consider whether the state could lawfully require submission to home searches as a condition of receiving welfare, which would have placed the issue squarely in unconstitutional conditions territory.

jurisprudence, once the Court believes that the search is motivated by non-criminal-investigation purposes, it considers the appropriateness of the state actor's behavior by simply balancing the degree of intrusion suffered by the individual against the importance of the government interest at stake. In all but one of these cases, the Court found a lesser expectation of privacy in the subject population receiving government benefits, declared that the intrusion was minimal, and agreed with the importance of the asserted government interest, consequently finding the challenged action reasonable.¹⁷⁷

A closer look at *United States v. Knights* reveals the depth of the Court's reluctance to apply the unconstitutional conditions doctrine when searches of "risky" populations are at issue. *Knights* involved the suspicionless search of a man on probation, pursuant to a term of his probation arrangement that required him to consent to such searches by police or probation officers. The case was argued on unconstitutional conditions grounds when it came up through the Ninth Circuit,¹⁷⁸ although that court ultimately held for *Knights* on a different theory.¹⁷⁹ Following the Ninth Circuit decision in favor of *Knights*, the parties directly relied on the doctrine in their briefs before the Supreme Court.¹⁸⁰

In the petition for certiorari and its supporting briefs, the United States acknowledged that while

"[t]his Court's unconstitutional conditions jurisprudence suggests that a State may not condition an individual's release on probation upon his agreement to forgo the exercise of a constitutional right—e.g., the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a probationer[.] . . . [a] search designed to assess the probationer's compliance with the conditions of his

177. The dissenters in *Skinner* and *Von Raab* opined that this result is hardly surprising when the Court reflexively adopts "a formless and unguided 'reasonableness' balancing inquiry." *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting); see also *Von Raab*, 489 U.S. at 679-80 (Marshall, J., dissenting) ("Here, as in *Skinner*, the Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable.").

178. Appellant's Brief at 14-18, *United States v. Knights*, 219 F.3d 1138 (9th Cir. 2000) (No. 99-10538) (arguing that *Knights*' agreement to the search term as a condition of probation constituted a waiver of his Fourth Amendment rights).

179. *Knights*, 219 F.3d at 1142-43, *rev'd and remanded*, 534 U.S. 112 (2001) (holding that a probationer's consent must be limited to probation searches and could not extend to investigation searches of the sort conducted there).

180. Petition for Writ of Certiorari at 14-15, *Knights*, 534 U.S. 112 (No. 00-1260); see also Brief for the United States, *Knights*, 534 U.S. 112 (No. 00-1260), 2001 WL 799254, at *8 (explicitly referencing "[t]his Court's 'unconstitutional conditions' jurisprudence"); Brief for Respondent, *Knights*, 534 U.S. 112 (No. 00-1260), 2001 WL 1758051, at *42 (same).

release . . . is . . . reasonably related to the benefit offered by the government [(release into the community in lieu of incarceration) and ought to be upheld].¹⁸¹

Mr. Knights responded that while “this Court does not ordinarily apply the unconstitutional conditions doctrine to resolve a Fourth Amendment challenge,”¹⁸² the blanket search waiver required by probation both ran afoul of the special needs exception and “fail[ed] the second prong” of the unconstitutional conditions analysis, which he termed the requirement of “rough proportionality” in both settings.¹⁸³ Despite being invited to consider the probation search issue on unconstitutional conditions grounds and the extensive briefing on this issue, the Supreme Court explicitly declined to do so, opting instead to rest its entire analysis on a lesser expectation of privacy for probationers and the reasonableness of searching probationers to ensure compliance with probation rules.¹⁸⁴

In contrast to the Supreme Court, the lower federal courts have been willing to engage the unconstitutional conditions doctrine as a tool of analysis in similar kinds of cases. Their opinions demonstrate what a robust unconstitutional conditions analysis looks like, and what it can yield for a defendant alleging a violation of his or her Fourth Amendment rights. For example, the Eleventh Circuit confronted the issue of suspicionless drug testing for welfare recipients in *Lebron*

181. Petition for Writ of Certiorari, *supra* note 180, at 14-15; Brief for the United States, *supra* note 180, at *8-9.

182. Brief for Respondent, *supra* note 180, at *42.

183. *Id.* at *40-43. Knights wrote that “in the Fourth Amendment context, the Court would assess proportionality by ‘weighing the intrusion on the individual’s privacy interest against the “special needs” that supported the program’ [which is] the test already applied under the special needs approach.” *Id.* at *43 (citations omitted). He then pointed the Court to its rejection of a blanket waiver in *Minnesota v. Murphy*, 465 U.S. 420 (1984), where a defendant was subject to a requirement that he answer truthfully questions posed by his probation officer. In that case, Knights argued, the “Court made clear that a condition requiring such an advance waiver would be an unconstitutional condition.” Brief for Respondent, *supra* note 180, at *43-44.

184. In contrast to the home welfare checks conducted by caseworkers in *Wyman*, suspicionless, warrantless searches of probationers qualify as searches, the *Knights* Court said. 534 U.S. at 118. And, the Court acknowledged, probation searches are often motivated by a desire to find evidence of a crime. *Id.* at 120-21. However, they are reasonable under the Fourth Amendment because probationers enjoy a lesser expectation of privacy than regular citizens. *Id.* at 121-22. In the years following *Knights* (and the analog case for parolees, *Samson v. California*, 547 U.S. 843 (2006)), courts have approved various limitations on the privacy and liberty of persons convicted of crimes who live in the community, including terms that limit a person’s right to protest, prohibit participation in certain social clubs, require permission to marry, and restrict the ability to have children, to name a few. See Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1320-28 (2023). These probation terms restrict rights outside of the Fourth Amendment context.

v. Secretary of the Florida Department of Children & Families.¹⁸⁵ In that case, Florida conditioned receipt of Temporary Assistance for Needy Families (TANF) benefits on a person's agreement to submit to drug testing when requested by the agency.¹⁸⁶ Florida argued, among other things, that consenting to receive the benefits amounted to an automatic waiver of the recipient's privacy rights.¹⁸⁷ The Eleventh Circuit held, on unconstitutional conditions grounds, that the Florida requirement was unconstitutional—that threatening to remove welfare benefits for failure to consent to what was otherwise an unconstitutional search was itself unconstitutional.¹⁸⁸ In a civil class action filed the following year against the same agency for the same policy, a case known as *Lebron II*, the Eleventh Circuit reiterated that the state could not seek a waiver of the Fourth Amendment search right conditioned on receipt of welfare benefits.¹⁸⁹

Employment is another area in which we can observe unconstitutional conditions activity in the lower federal courts. For example, prior to the Supreme Court's jurisprudence in *Skinner*,¹⁹⁰ *Von Raab*,¹⁹¹ and the other drug-testing employment cases, the Sixth and Eighth Circuits employed the unconstitutional conditions doctrine to address implied consent searches in multiple employment contexts. Consider *McDonell v. Hunter*, in which the Eighth Circuit reviewed an Iowa policy that required employees of a correctional institution to consent to suspicionless searches of their vehicles, as well as drug testing, on demand.¹⁹² When an employee who refused to submit was fired, the *McDonell* court held

185. 710 F.3d 1202 (11th Cir. 2013). For commentary about this case and the underlying issue, see generally Ilan Wurman, Note, *Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153 (2013).

186. 710 F.3d at 1205.

187. *Id.* at 1214.

188. *Id.* at 1217-18. We consider the facts of this case in more detail in Part V of this article.

189. *Lebron v. Sec'y of Fla. Dep't of Child. & Fams. (Lebron II)*, 772 F.3d 1352, 1356, 1376 (11th Cir. 2014). A related concern arose in the public-housing context in the 1990s. After a federal court enjoined the Chicago Housing Authority from conducting suspicionless sweeps of public housing, see *Pratt v. Chi. Hous. Auth.*, 848 F. Supp. 792, 797 (N.D. Ill. 1994), the Department of Housing and Urban Development (HUD), in conjunction with the Department of Justice, proposed modifying public-housing contracts to require each tenant to provide blanket consent for police searches. See Guy-Uriel E. Charles, Note, *Fourth Amendment Accommodations: (Un)compelling Public Needs, Balancing Acts, and the Fiction of Consent*, 2 MICH. J. RACE & L. 461, 491 (1997). For scholarly assessments of the benefits and burdens of the proposal, see, for example, Charles, *supra*, at 510; and Jason S. Thaler, Note, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777, 1805-07 (1995).

190. See *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602 (1989).

191. See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

192. 809 F.2d 1302, 1304 (8th Cir. 1987). The case was brought as a class action on behalf of all corrections personnel in Iowa who were subject to the search policy. *Id.*

that, because these suspicionless searches were unconstitutional, a mandatory-consent policy could not render them constitutional: requiring “advance consent to future *unreasonable* searches is not a reasonable condition of employment,”¹⁹³ the court said. It cited a series of unconstitutional conditions cases as support for the proposition that unreasonable searches cannot be saved by coerced consent.¹⁹⁴ The following year the Sixth Circuit held that conducting unreasonable searches via urinalysis of firefighters (simply because they held city jobs) was impermissible explicitly because of the unconstitutional conditions doctrine.¹⁹⁵ The same rule (and the same result) emerged when the city of Cleveland tried to require all police cadets to submit to drug testing through urinalysis.¹⁹⁶ The Sixth Circuit expressed its concerns about government-imposed employment search terms like this:

If the government could freely condition its many jobs and countless other benefits on the waiver of constitutional rights, then the promises of the Constitution and Bill of Rights would be largely hollow and symbolic. Such conditions must be recognized for what they are: constitutionally unauthorized enlargements of government power. Constitutional conditions that restrict the status quo of constitutional liberty enjoyed by citizens, and which do not significantly advance legitimate

193. See *id.* at 1310 (quoting *McDonell v. Hunter*, 612 F. Supp. 1122, 1131 (S.D. Iowa 1985)).

194. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926); *Armstrong v. N.Y. State Comm'r of Corr.*, 545 F. Supp. 728, 731 (N.D.N.Y. 1982)).

195. *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1547 (6th Cir. 1988). This decision was later vacated by the circuit sitting en banc, as the court realized the Supreme Court was prepared to address a similar question in *Skinner* and *Von Raab*. *Lovvorn v. City of Chattanooga*, 861 F.2d 1388 (6th Cir. 1988). Following those two Supreme Court decisions, the Sixth Circuit reheard this case, as well as a companion case involving drug testing of police officers, *Penny v. Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986), in a consolidated appeal. It vacated and remanded both cases to the district court for rehearing and reconsideration of the government's drug testing procedures, in light of the Supreme Court's drug testing decisions. *Penny v. Kennedy*, 915 F.2d 1065, 1068 (6th Cir. 1990). It did not revisit the unconstitutional conditions doctrine argument. *Id.*

196. *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 592, 593 (N.D. Ohio 1987) (holding that urinalysis was an unreasonable search because there was no individualized reasonable suspicion to believe further evidence of drug use would be revealed, and that since the search was unreasonable, consenting to it could not be a condition of public employment). This decision is no longer good law after the *Skinner* line of cases declared drug testing reasonable in certain employment contexts.

government interests, should be treated no differently than any direct infringement of constitutional rights.¹⁹⁷

While the factual holdings of these cases have been undermined or abrogated by the Supreme Court's subsequent drug-testing jurisprudence, the consistent willingness of the Sixth and Eighth Circuits to apply the unconstitutional conditions doctrine in this setting remains notable. This lower federal court precedent offers an avenue by which the Supreme Court could recognize the applicability of the doctrine in the special needs context and beyond.

3. *Pervasively Regulated Industry Searches*

Like the special needs cases, many court decisions that have been catalogued under the “pervasively regulated industry” exception to the warrant requirement could have been decided on unconstitutional conditions grounds but were not. First emerging several decades ago, the pervasively regulated industry exception allows state actors, including law enforcement, to conduct surprise warrantless inspections of businesses that are subject to extensive government regulatory schemes. This warrant exception is premised on the theory that, because anyone who launches such a business is made aware of the regulatory framework that governs the business landscape, a person implicitly consents to surprise inspections (as part of that scheme) when applying for and receiving a business license. In other words, people knowingly trade their Fourth Amendment privacy rights to obtain the benefit of a business license when they enter this industry.¹⁹⁸ The discretion of officials conducting the inspections is curtailed by the regulatory scheme that authorizes them; statutes or regulations prescribe the manner and scope of the allowable search, the time frame during the day when such searches are allowed, and the notice (if any) that is supposed to be provided to the

197. *Louvorn*, 846 F.2d at 1548 (footnote omitted). In support of this position, the court cited other unconstitutional conditions cases, including *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987).

198. Criminal procedure scholar William Stuntz has argued that these results are largely right, but not because the regulatory scheme causes a lesser expectation of privacy. Instead, he proposes that the government often has regulatory options outside of suspicionless searching, and if an innocent target would have agreed to such searches rather than having the government take more drastic regulatory measures (such as sending inspectors every day to audit workplaces), then the condition should be allowed to stand as a reasonable one. See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 568-69, 572-75 (1992). However, where the threat to engage in more drastic regulatory measures is not credible, as in the drug-testing special needs cases (where politics would prevent large-scale group searching on a regular basis), these “implicit bargains” are fallacious. See *id.* at 588-89.

business owner. According to the Court, the details of the inspection process are spelled out in the statutes and keep these inspections within reasonable bounds.

The Supreme Court has applied the pervasively regulated industry exception to authorize surprise, warrantless inspections only to businesses that it believes are “intrinsically dangerous,”¹⁹⁹ a label that so far includes just four categories: firearms dealers,²⁰⁰ auto junkyards,²⁰¹ mines,²⁰² and liquor-sales establishments.²⁰³ Lower courts have identified a much wider range of industries as falling within the scope of this exception, including rabbit dealers,²⁰⁴ day-care facilities,²⁰⁵ nursing homes,²⁰⁶ jewelers,²⁰⁷ barbershops,²⁰⁸ and commercial fisheries.²⁰⁹ For instance, in *United States v. Gonsalves*, the First Circuit concluded that because pharmaceutical offices—places where drugs are manufactured and sold—are subject to pervasive regulation, the owners must permit inspections that comply with the regulatory scheme in terms of timing and scope.²¹⁰ Given the increasing tendency for searches and seizures to be “based on a preexisting legislative or administrative plan,” rather than on “unexpected police-suspect street encounters,” the growth of this warrant exception through the lower courts is particularly concerning.²¹¹

Most recently, the Supreme Court in *City of Los Angeles v. Patel*²¹² considered whether hotels are pervasively regulated industries, based on the City’s municipal code requiring record-keeping and inspections.²¹³ Finding that hotels do not fit the model of intrinsically dangerous industries,²¹⁴ the Court next considered

199. *City of Los Angeles v. Patel*, 576 U.S. 409, 424 n.5 (2015).

200. *United States v. Biswell*, 406 U.S. 311, 315-16 (1972).

201. *New York v. Burger*, 482 U.S. 691, 707-708 (1987).

202. *Donovan v. Dewey*, 452 U.S. 594, 596 (1981).

203. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

204. *Lesser v. Espy*, 34 F.3d 1301, 1306-07 (7th Cir. 1994).

205. *Rush v. Obledo*, 756 F.2d 713, 720 (9th Cir. 1985).

206. *People v. Firstenberg*, 155 Cal. Rptr. 80, 85-86 (Ct. App. 1979).

207. *People v. Pashigian*, 388 N.W.2d 259, 261 (Mich. Ct. App. 1986) (per curiam).

208. *Stogner v. Kentucky*, 638 F. Supp. 1, 3 (W.D. Ky. 1985).

209. *United States v. Raub*, 637 F.2d 1205, 1211 (9th Cir. 1980).

210. 435 F.3d 64, 67-68 (1st Cir. 2006).

211. Scott E. Sundby, “*Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*,” 94 COLUM. L. REV. 1751, 1786 (1994).

212. 576 U.S. 409, 412 (2015).

213. See L.A., CAL., MUN. CODE § 41.49 (2008). Los Angeles’s brief pointed the Court to “more than 100 similar register-inspection laws in cities and counties across the country.” *Patel*, 576 U.S. at 434 (Scalia, J., dissenting).

214. *Patel*, 576 U.S. at 424 n.5.

the City's other justification for allowing surprise inspections of hotel records: administrative searches.²¹⁵ The Court was not convinced that this exception justified the behavior at issue; it held that officers concerned about human trafficking or drug sales at hotels may not simply demand to see a hotel's registry by citing the city ordinance, and the city may not punish refusal to cooperate based simply on the licensing scheme.²¹⁶ Notably, "the Court could have said that the [ordinance] attached submission to a warrantless search as a condition on the right to . . . operate a warehouse [or business],"²¹⁷ and thereby decided the issue using unconstitutional conditions analysis. But it did not portray the problem in those terms and thus limited its analysis to potentially applicable warrant exceptions.

Patel is not unusual in this regard. With one exception, none of the litigants challenging the licensing schemes in these cases drew the Court's attention to the unconstitutional conditions doctrine. The exception is Loarn Anthony Biswell, who quoted extensively from the Michigan Supreme Court's decision in *People ex rel. Roth v. Younger* to assert that the regulatory scheme authorizing surprise inspections of firearms dealers placed an unconstitutional burden on his Fourth Amendment rights.²¹⁸ The Court ignored his suggestion. Rather than examining these licensing schemes as potentially undue burdens on the rights of business owners, these cases suggest that the Court believes the existence of a regulatory scheme makes it reasonable to subject a business owner to a surprise inspection. The regulation thus validates its own existence if it is pervasive enough. Such language indicates that gauging the constitutionality of the search depends only on general standards of Fourth Amendment reasonableness, not on compliance with unconstitutional conditions principles.

215. *Id.* at 420-22. Under the administrative search exception to the warrant requirement, a court can issue an administrative warrant based on generalized probable cause to authorize inspections for code-enforcement purposes by municipal-code inspectors. See *Camara v. Mun. Ct.*, 387 U.S. 523, 534-39 (1967). The *Camara* Court reached this conclusion by balancing the nature of the intrusion against the importance of the government's interest in the inspection (such as public health or safety). This exception thus gave rise to the special needs exception, discussed above, spreading the balancing approach into many new areas beyond code inspections.

216. Instead, the Court held, "a hotel owner must be afforded an *opportunity* to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces penalties for failing to comply." *Patel*, 576 U.S. at 421.

217. Brief for Petitioner at 32, *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (No. 14-1468).

218. See Answer to Brief on Writ of Certiorari at 15, *United States v. Biswell*, 406 U.S. 311 (1972) (No. 71-81) ("May the legislature condition the granting of . . . licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office, or other place where a licensed activity occurs?" (quoting *People ex rel. Roth v. Younger*, 42 N.W.2d 120, 125 (Mich. 1950))).

We do not have a lower-court case to offer up in this area as a model for the Supreme Court to follow. Instead, we draw on insights from cases in the other Fourth Amendment settings, which we believe suggest the appropriate analytical framework for the Supreme Court (and other future courts) to follow. A court analyzing a business-regulatory search program using the unconstitutional conditions doctrine should first acknowledge the importance of the Fourth Amendment right to the business owner. It should then explain that implied consent—derived only from general regulations and willingness to start a business—is not an acceptable way to circumvent the Fourth Amendment’s protections. The government cannot establish consent to search simply because the regulations declare such consent exists. Having found implied consent inoperable as a legal theory, the court should then require the government to establish that the regulatory scheme is both germane and proportionate to the burden on the business owner’s right. In short, reflexive acceptance of the scheme (the hallmark of the pervasively regulated industry exception) should be replaced by careful scrutiny of the scheme’s terms, purpose, and impact on the business owner.

* * *

To be fair, framing the Fourth Amendment question as an unconstitutional conditions problem—instead of whether the search should fall under a given warrant exception—might not have led to a victory for all of the defendants in the cases discussed in this Section. The Court’s conclusions about the nature of the invasion and the importance of the government interest at stake may well have led the Justices to characterize most of these regulatory burdens on the Fourth Amendment as *de minimis*. But if they had discussed the unconstitutional conditions doctrine, the Justices would have been forced to acknowledge and to address the regulatory burden imposed by the government in this environment. The Court should have compared and contrasted burdens, with an eye toward developing a consistent set of principles about how much is too much for search targets to bear when considered against the burdens imposed on homeowners, public speakers, federal employees, and states. In deciding the criminal procedure cases on the basis of a growing body of warrant exceptions instead—and by identifying several new classes of people who have a lesser expectation of privacy than the general population—the Court allowed these sorts of regulatory burdens to remain hidden from view. And in balancing away²¹⁹ the newly identified lesser privacy interests in favor of myriad government objectives, the Court in

219. One commentator has astutely observed that the balancing approach, writ large, requires a trial court to perform what seems like an impossible task, to “separate the individual’s privacy interest(s) from the government’s interest(s), place them on opposite sides of an (imaginary) constitutional scale, and with a sagacious constitutional eye, scrupulously ascertain which side is most weighty.” Charles, *supra* note 189, at 486.

effect has “diminish[ed]”²²⁰ Fourth Amendment rights relative to the rights protected by the shield of the unconstitutional conditions doctrine, such as the First Amendment’s Free Speech Clause or the Fifth Amendment’s Takings Clause.

B. Forgone Opportunities to Apply the Unconstitutional Conditions Doctrine in Fifth and Sixth Amendment Settings

Both the Due Process Clause and the Self-Incrimination Clause of the Fifth Amendment protect a defendant from various forms of state coercion in criminal prosecutions. The Due Process Clause prohibits state actors from actively coercing suspects or defendants to speak or otherwise participate in the investigation of their crimes. Active coercion by a state actor includes not only acts or threats of physical violence, but also exploitation of known weaknesses or situational vulnerabilities such as lack of sleep or food.²²¹ The Self-Incrimination Clause instructs that persons accused of crime cannot be forced to serve as witnesses against themselves. This right applies not just to compelling a person’s testimony in a criminal trial but extends backwards into the pretrial context, ever since *Miranda v. Arizona* recognized (and sought to diffuse) the inherent compulsion of the custodial interrogation setting.²²² Failure to comply with jurisprudential rules governing due process or self-incrimination impacts the prosecution’s ability to use the defendants’ statements against them in their criminal trials.

While these constitutional provisions reflect a sense of compassion for the accused concerning the decision to speak or to remain silent, the Court has construed “coercion” quite sparsely over time,²²³ thereby circumscribing the reach of both clauses. In making these judgments about what qualifies (or, more frequently, does not qualify) as coercion, the Court has signaled that the Constitution is not offended by rules that subject people accused of crimes to hard

220. See generally Marc A. Stanislawczyk, Note, *An Evenhanded Approach to Diminishing Student Privacy Rights Under the Fourth Amendment: Vernonia School District v. Acton*, 45 CATH. U. L. REV. 1041 (1996) (observing that the Court’s balancing approach to answering Fourth Amendment questions has resulted in diminishing individual rights).

221. *Spano v. New York*, 360 U.S. 315, 322–23 (1959); *Ashcraft v. Tennessee*, 322 U.S. 143, 149–50 (1944) (involving a confession made after sleep deprivation); *Payne v. Arkansas*, 356 U.S. 560, 564 (1958) (involving a confession made after food deprivation). See generally Yale Kamisar, *What Is an Involuntary Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963) (discussing objectionable methods used in criminal interrogations).

222. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

223. For example, the Court has declared that only coercion exerted by a state actor poses a constitutional problem; coercion from other sources (including mental illness, for example) might influence the reliability of evidence, but does not warrant exclusion of a defendant’s statements on due process grounds. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

choices. Fifty years ago, the Court observed that the criminal process “is replete with situations requiring ‘the making of difficult judgments’ as to which course to follow.”²²⁴ “Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses,” the Court has said, “the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved.”²²⁵ More recently, the Court declared that while “there are undoubted pressures” that “pus[h] the criminal defendant to testify[.] . . . it has never been suggested that such pressures constitute ‘compulsion’ for Fifth Amendment purposes.”²²⁶ For those suspected of or charged with criminal behavior, it seems that hard choices are simply the constitutionally acceptable norm;²²⁷ in this view, only the extremely rare defendant would be “dragoon[ed]”²²⁸ by a government bargain or feel that the pressure exerted on him by the government is equivalent to a “gun to the head.”²²⁹

Below we provide examples of two strands of jurisprudence in the Fifth and Sixth Amendment settings in which use of the unconstitutional conditions doctrine might have slowed the Court’s erosion of the concept of coercion: (1) the *Griffin-Doyle* right, which prohibits the government from commenting on a defendant’s silence during trial and a court from instructing the jury that any inference may be drawn from a defendant’s silence; and (2) the rules surrounding plea bargaining, which require a defendant to waive a series of Fifth and Sixth Amendment rights in order to take advantage of a reduction in charge or sentence.

224. *McGautha v. California*, 402 U.S. 183, 213 (1971) (quoting *McMann v. Richardson*, 397 U.S. 759, 769 (1970)).

225. *Id.*

226. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 287 (1998).

227. One good example concerns the consequences of deciding to testify. A defendant who testifies on direct examination exposes himself to broad cross-examination by the prosecutor, where topics are not limited by the scope of the direct examination as they would be for any other witness. See *Spencer v. Texas*, 385 U.S. 554, 560-61 (1967) (noting that a defendant’s testimony opens the door to otherwise inadmissible evidence, such as cross-examination about prior convictions). The only way a defendant can avoid facing open-access cross-examination is not to testify in his own defense at all.

228. This language comes from one of the Court’s federalism cases but is apt even as applied to the criminal procedure context. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012) (finding it unconstitutional for Congress to threaten to cut all Medicaid funding as a means of encouraging states to adopt the Affordable Care Act’s Medicaid expansion, as such a budgetary threat represents coercion rather than choice).

229. *Id.* at 581.

1. *The Griffin-Doyle Right to Penalty-Free Silence*

In the self-incrimination line of cases, the Court has held that neither the trial court nor the prosecution may suggest that a defendant's post-arrest, post-*Miranda* silence is probative evidence of guilt. As it pertains to court-issued jury instructions, this prohibition is known as the *Griffin* right – after *Griffin v. California*.²³⁰ The prohibition on prosecutorial behavior is called the *Doyle* right, after *Doyle v. Ohio*.²³¹ Both rights are based on the notion that people should be free from worry about the costs of their silence when deciding whether to speak to the police or to the court in their own defense.²³²

With respect to our unconstitutional conditions analysis, neither *Griffin* nor *Doyle* was an unconstitutional conditions case; there was no tradeoff of rights for government-issued benefits at stake in either setting. (The benefit a defendant can receive by remaining silent is acquittal, but that is not a government-created program.) However, the Court has decided that persons seeking a posttrial,²³³ government-created benefit, such as treatment or clemency, can be penalized for their silence. In other words, rules that impose consequences for silence during a prison-based sex-offender treatment session,²³⁴ a prison disciplinary

230. 380 U.S. 609, 613–614 (1965) (holding that it is a constitutional error for a state court to instruct a jury in a criminal case that it may draw an inference of guilt from the defendant's failure to testify about facts relevant to his case); *see also* *Carter v. Kentucky*, 450 U.S. 288, 303 (1981) (holding that a trial judge is required to instruct the jury that the defendant's decision not to testify is not dispositive of guilt and should not prejudice the defendant in any way, when the defendant requests such an instruction); *Mitchell v. United States*, 526 U.S. 314, 327–28 (1999) (holding that judges are also not permitted to draw an adverse inference from the defendant's silence at sentencing).

231. 426 U.S. 610, 619 (1976) (finding a due process violation when the prosecution used a defendant's post-arrest, post-*Miranda* silence to impeach him).

232. *Griffin*, 380 U.S. at 614–15 (stating that a court's opining on a defendant's silence unfairly prejudices said defendant); *Doyle*, 426 U.S. at 618 (declaring that the exercise of one's *Miranda* right to silence should not carry a penalty).

233. The Court has also decided that the *Griffin-Doyle* right does not apply before custodial interrogation has begun. *See Salinas v. Texas*, 570 U.S. 178, 181 (2013) (plurality opinion) (holding that the use at trial of the petitioner's precustodial silence to suggest "that he was guilty" was constitutional because the petitioner did not invoke the Fifth Amendment privilege against self-incrimination).

234. *McKune v. Lile*, 536 U.S. 24, 35 (2002) (finding no self-incrimination problem with the Kansas prison system's requirement that convicted sex offenders, as part of their sex-offender treatment, had to disclose all of their prior sexual activities, even if such disclosures might trigger a new criminal investigation). The Court viewed this program as simply giving prisoners a choice: providing the information or being kicked out of treatment and subjected to harsher prison conditions outside of the treatment setting. *Id.* at 41–47.

hearing,²³⁵ or a voluntary clemency hearing²³⁶ do not—and cannot as a categorical matter—burden the self-incrimination right.²³⁷ In support of its position that *Griffin-Doyle* ought not to apply during post-adjudication procedures, the Court has declared that these procedures are not constitutionally required; a state may provide them or not, at will.²³⁸ Moreover, because these hearings serve “important state interests other than conviction for crime,”²³⁹ the state can use a person’s statements or silence against them to further these other interests.

In these cases, the Court has highlighted (and simultaneously reinforced) the restricted scope of the self-incrimination right even when the parties have suggested that the unconstitutional conditions doctrine is the proper channel for analysis. In *Woodard v. Ohio Adult Parole Authority*, for example, the parties argued—and the Sixth Circuit concluded—that state rules governing a voluntary clemency interview imposed an unconstitutional condition on the inmate’s self-incrimination right.²⁴⁰ Mr. Woodard argued that he risked self-incrimination by participating in an “optional” clemency interview because his likelihood of receiving clemency was linked to his willingness to admit his guilt to the underlying offense, which he was still litigating through the appellate process. He alleged that, in order for the clemency rule not to burden his self-incrimination right, it had to be modified to assure him immunity for any statements he made during the clemency process.²⁴¹ But the Supreme Court was not persuaded that he faced a constitutionally cognizable self-incrimination dilemma; it ruled that its prior jurisprudence insulating prison disciplinary proceedings from self-

235. *Baxter v. Palmigiano*, 425 U.S. 308, 316–18 (1976) (holding that a hearing adjudicator could give due weight to a convict’s silence during a prison disciplinary hearing for misconduct without violating the prisoner’s self-incrimination *Griffin* right).

236. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (holding that giving a prisoner the option of participating in a “voluntary” interview prior to a clemency hearing where adverse inferences could be drawn from his silence did not violate his Fifth Amendment rights).

237. See Levine, Nash & Schapiro, *supra* note 32, at 271 fig.1 (stating that the first step in an unconstitutional conditions analysis is to determine if the statute or regulation at issue intersects with the right under discussion).

238. *Woodard*, 523 U.S. at 282–85 (holding that Ohio’s clemency process is a matter of “grace” and that the Governor’s discretionary use of clemency is not subject to due process protections because the process is not constitutionally required).

239. *Baxter*, 425 U.S. at 319.

240. *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1189 (6th Cir. 1997), *rev’d*, 523 U.S. 272 (1998).

241. Brief for Respondent, *Woodard*, 523 U.S. 272 (1998) (No. 96-1769), 1997 WL 661800 at *45–46.

incrimination claims²⁴² all but answered this question in the clemency setting too.²⁴³

In erecting the walls of the *Griffin-Doyle* right at the narrowest possible juncture, the Court foreclosed all future self-incrimination claims brought by post-conviction litigants where statements made in post-conviction proceedings will not actually be used in new criminal trials. In so doing, the Court insulated the self-incrimination right from any possible burden that might be placed on it in the post-conviction setting, thus eliminating the need for an unconstitutional conditions analysis. The Court's approach rests on policy concerns about extending the scope of the right to a class of people (those already convicted of crimes) who are regularly faced with hard choices about whether to speak or remain silent. These choices are just a fact of life to the Justices – a challenging, but not particularly regrettable, feature of our constitutional framework.

If the Court recognized that self-incrimination rights could be held by prisoners in the post-conviction setting, the unconstitutional conditions doctrine would require a reckoning of sorts, as the post-conviction procedures discussed above (clemency proceedings, applications for treatment while incarcerated) often rest on the tradeoff of rights for benefits. In order to obtain the benefit of clemency or treatment, the incarcerated person would have to forego his right to remain silent to explain to the relevant decision maker why he is suited to receive this benefit and perhaps to answer questions posed by a skeptical government attorney. But statements made by the prisoner in this context – if unprotected – could then also be used against him in other settings (such as to deny him parole or to counter claims being made in an ongoing appeal). This is the precise kind of coercion the unconstitutional conditions doctrine is meant to address.

2. *Plea Bargaining*

Plea bargaining raises especially serious unconstitutional condition concerns that span both the Fifth and Sixth Amendments. When defendants accept a plea offer from the government, they must waive a series of rights and agree to speak on the record about their guilt in order to obtain the benefit of a reduced set of charges or a reduced punishment; such reductions are generally only available to those who admit their guilt.²⁴⁴ Other thoughtful scholars have noticed the absence of unconstitutional conditions terms in the plea bargaining setting too. For example, Jason Mazzone laments that the Court “does not recognize the waiver

242. *Baxter*, 425 U.S. at 314-15.

243. *Woodard*, 523 U.S. at 285-88.

244. *But see* *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (allowing defendants to plead guilty by referencing the advice of counsel and without admitting their guilt).

of criminal protections through plea bargains to entail a form of the unconstitutional conditions problem.”²⁴⁵ Carissa Hessick recently made the same observation in an article for *The Atlantic*, asserting that the Supreme Court’s myopic focus on scarce resources in the court system is largely to blame for this result.²⁴⁶ But aside from these mentions, academic writing about the unconstitutional conditions doctrine regularly fails to mention the plea bargaining context.²⁴⁷

When one looks even superficially at the mechanics of a plea deal, the tradeoff of rights for benefits becomes apparent. Let’s start with what a person accused of a crime has to give up in order to plead guilty: one must waive the right to trial, the right to confront and cross-examine witnesses, and the right against self-incrimination. These are collectively known as the Boykin rights, after *Boykin v. Alabama*.²⁴⁸ But people who give up their right to trial are also giving up the right to contest – or even to see – the government’s evidence; thus the waiver implicitly includes a waiver of potential evidentiary challenges under the Fourth, Fifth, and Sixth Amendments,²⁴⁹ as well as a waiver of the right to receive material impeachment evidence under *Brady v. Maryland*.²⁵⁰ And of course it includes waiver of the Sixth Amendment right to the assistance of counsel.²⁵¹ Sometimes the government also insists on a waiver of the right to appeal, which

245. Mazzone, *supra* note 10, at 801; *see also* Berman, *supra* note 10, at 103 (noting that there has been a “near-wholesale abdication of the judicial responsibility to protect Sixth Amendment rights from state coercion”). More than forty years ago, Howard Abrams raised this point briefly as well. Howard E. Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 128 (1981).

246. Hessick, *supra* note 10. Hessick convincingly argues that judicial resources are greater today than they were thirty years ago, and yet the number of trials being conducted in the courts is far smaller. *Id.*

247. *See* Mazzone, *supra* note 10, at 801 n.4 (citing RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993) as a “striking example of this trend”). Philip Hamburger has warned that nonprosecution agreements represent a similar kind of evil, because through such agreements, prosecutors “use their power in court to impose regulatory conditions without going to court . . . [Such agreements] divest Congress of its legislative powers and vest such powers in prosecutors or agencies.” HAMBURGER, *supra* note 15, at 97.

248. 395 U.S. 238 (1969).

249. A person can preserve certain challenges for appeal, but these reservations must be explicitly noted in the plea deal.

250. 373 U.S. 83 (1963); *see also* *United States v. Ruiz*, 536 U.S. 622, 629–33 (2002) (finding no due process violation where the defendant pled guilty without having received impeachment material).

251. *See generally* *Johnson v. Zerbst*, 304 U.S. 458 (1938) (identifying a right to counsel for people charged with felonies in federal court); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (identifying a right to counsel for people charged with felonies in state court). Waivers of the right to counsel in the appellate context are discussed in *Halbert v. Michigan*, 545 U.S. 605, 616–17 (2005) (holding that the government cannot require a waiver of the right to appointed counsel on appeal, as that would only disadvantage poor defendants).

goes above and beyond the rights that are baked into the idea of a guilty plea.²⁵² In return for this bounty of waivers, a person will receive a reduced charge or set of charges, and/or a reduced sentence for the crime(s) of conviction. Those benefits are not available to people who do not waive their rights and plead guilty. To borrow language from Robert Cover, the government “purchase[s] acquiescence” through the currency of reduced custody or probation time.²⁵³

The prosecution does not have to offer a deal,²⁵⁴ and persons under indictment do not have to accept the offer on the prosecution’s terms; they can reject it or counteroffer as they see fit. A person who rejects the deal will eventually get a trial, which is what the Constitution guarantees. But comparably few people pursue that route; whether in state or federal court, the overwhelming majority of filed criminal cases conclude with a plea bargain.²⁵⁵

The Supreme Court sees this offer of “conditional benefits” from the prosecution as “represent[ing] more, not less, choice”²⁵⁶ for those accused of crimes. A person always retains the right to plead not guilty and go to trial, the Court

252. See, e.g., *People v. Seaberg*, 541 N.E.2d 1022, 1023 (N.Y. 1989) (holding that a defendant’s plea deal is not invalidated when he is required to waive his right to appeal). Courts permit the waiver of other rights too that are nonessential to the crux of the deal. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (validating a plea where the government insisted that the defendant give up his right to prevent the introduction into evidence of statements made during plea negotiations if negotiations did not succeed and the case eventually went to trial). Whether a defendant can be forced to waive his right to a claim of ineffective assistance of counsel is a matter of some controversy. See Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 IOWA L. REV. 2103, 2117-28 (2014).
253. See *Federalism and Administrative Structure*, *supra* note 70, at 1343. The government sometimes bargains with the possibility of a death sentence, agreeing to take death off the table in return for the person’s guilty plea to life without parole for first-degree murder. See generally Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313 (2008) (offering evidence of prosecutors’ and defense attorneys’ experiences with plea bargaining in capital murder cases).
254. See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“[T]here is no constitutional right to plea bargain.”).
255. Ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas, often pursuant to an agreement with the prosecution. See William Ortman, Essay, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 462 (2021) (citing *Missouri v. Frye*, 566 U.S. 134, 143 (2012)). According to data collected in 2009 by the Bureau of Justice Statistics (and published in 2013), the vast majority of felony defendants in large urban counties resolve their cases via guilty pleas. BRIAN A. REAVES, NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTRIES, 2009—STATISTICAL TABLES, BUREAU OF JUSTICE STATISTICS (2013).
256. Mazzone, *supra* note 10, at 833. See generally Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083 (2016) (describing the Supreme Court’s unwillingness to evaluate systemic coercion in the plea bargaining process and arguing that the Court has “redefined prevailing plea bargaining practice as the benchmark”).

reminds us.²⁵⁷ People can also do an “open plea” to the court, but in that instance, they must plead guilty to all nonredundant charges in the indictment and punishment will be limited only by statutory guidelines. Striking a plea deal with the prosecutor is just a third option – one that gets around the limitations of the open-plea option and provides the certainty not available through the trial option. In *Corbitt v. New Jersey*, the Court approved of this tradeoff: “We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.”²⁵⁸ The Court was even more emphatic about the constitutionality of this third option in *Bordenkircher v. Hayes*: “[I]n the ‘give-and-take’ of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”²⁵⁹ The acceptable give-and-take of plea bargaining even permits the prosecutor to warn about dire consequences that might result if the person does not take the deal, such as an increase in charges or withdrawal of the plea offer entirely.²⁶⁰ Scholars have called this behavior a form of legally sanctioned extortion.²⁶¹

In short, the Supreme Court believes that as long as defendants receive full information about the courses of action open to them, they are autonomous actors making choices they believe are in their best interest. The Court makes no assumption that “when the government promises a benefit or threatens a penalty it coerces an individual to give up constitutional protections.”²⁶² This approach places its plea jurisprudence in direct contention with its unconstitutional conditions jurisprudence, where coercion tends to be presumed (or at least inquired about) from schemes in which the government exerts leverage on (“draagoon[s]!”²⁶³) citizens or states to convince them to waive their rights in

257. See *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) (holding that the defendant need not admit guilt and that he is entitled to put the government to the test of proving guilt beyond a reasonable doubt).

258. 439 U.S. 212, 219 (1978).

259. 434 U.S. 357, 363 (1978).

260. Increasing charges after a defendant files a notice of appeal gives rise to a claim of vindictive prosecution (in violation of due process), see *Blackledge v. Perry*, 417 U.S. 21, 25-29 (1974), but such behavior during the pretrial stage does not give rise to that presumption, see *United States v. Goodwin*, 457 U.S. 368, 381 (1982).

261. HAMBURGER, *supra* note 15, at 223 (“The basic danger of extortion is familiar from prosecutors. They frequently overstate charges, and then offer accommodations, allowing the defendants to escape further litigation and the risk of a high fine – as long as they agree to conditions, including regulatory limits not required by law.”). To our knowledge, the Supreme Court has not regarded plea bargains in this manner, but it has used the term “extortionate” when discussing the government’s power to impose land-use conditions on property owners. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013).

262. Mazzone, *supra* note 10, at 834.

263. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012).

exchange for a benefit. The Court justifies its approach in the plea context by emphasizing the mutual advantage of plea bargains and by pointing to the efficiency benefits, or even the necessity, of plea bargains for the smooth administration of justice.²⁶⁴ It has also been clear in the plea bargain cases that not every burden on a constitutional right, nor form of pressure or encouragement from the government, is invalid; people accused of crimes face difficult choices, the Court says.²⁶⁵ The Justices seem to think those choices are the result of the person's own decisions when it comes to criminal behavior. This reasoning is unpersuasive, though, because many other contexts in which the unconstitutional conditions doctrine has been applied also involve conflicts that arise because of decisions made by the rightsholder, such as a landowner wanting to build a new home.²⁶⁶ The rightsholder's responsibility for creating the situation thus does not render unconstitutional conditions considerations irrelevant in the First Amendment, takings, or substantive due process areas; in fact, it gives rise to the problem itself.

3. *Lower Courts' Willingness to Use the Unconstitutional Conditions Doctrine to Address Criminal Adjudication Questions*

Although the Supreme Court has been reluctant to use the unconstitutional conditions framework to consider challenges brought by those accused of crimes, lower federal courts—and occasionally state courts—have ventured into this territory with mixed results. The most conspicuous example concerns the process by which courts assess a person's "acceptance of responsibility" at the time of sentencing to properly calculate the length of incarceration time or the amount of fines the person should receive. People who are fully contrite for their misconduct will usually be granted leniency; those who are seen as unapologetic will receive no such benefit and may even have their punishment increased. The theory behind the acceptance of responsibility deduction is linked to the functions of criminal punishment.²⁶⁷ Courts often say that full contrition is a

264. *Mazzone*, *supra* note 10, at 835-37; *Hessick*, *supra* note 10.

265. *McGautha v. California*, 402 U.S. 183, 213 (1971) (noting that a person subject to a criminal case must make all kinds of "difficult judgments"). The Constitution, the Court said, does not forbid requiring a person to make such choices. *Id.*

266. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827-28 (1987).

267. Because the recognized functions of punishment are varied, a range of sentence terms could be considered germane and proportional as part of plea agreements, even under the unconstitutional conditions doctrine. We do not believe that use of the doctrine will automatically invalidate terms of a sentence. Rather, it would require courts to assess the degree of coercion inherent in demanding that a defendant yield a constitutional right in return for a reduced

predictor of rehabilitative success;²⁶⁸ moreover, the person's disclosures can sometimes assist the government with future investigations or prosecutions.

In federal courts, litigants have sometimes challenged what they see as a *requirement* that they plead guilty in order to receive the acceptance of responsibility deduction outlined in the Sentencing Guidelines.²⁶⁹ People making this argument have claimed that, because guilty pleas require self-incrimination, it is unfair to limit the deduction only to those who are willing to incriminate themselves. This argument has gone nowhere, as the Sentencing Guidelines technically make it possible for a person who goes to trial to get the benefit; success depends on the facts, which presumably include the particular defense advanced at trial and whether the accused personally testified.²⁷⁰

While the generic guilty plea argument has gained no traction, whether federal prosecutors can compel a person to admit uncharged conduct in the plea (as well as the crime(s) in the indictment) in order to receive the acceptance deduction is a ripe controversy.²⁷¹ Litigants have argued that forcing admissions about "relevant" but uncharged conduct in return for a sentencing benefit would amount to an unconstitutional burden on their self-incrimination right. The First, Second, and Ninth Circuits agree with this assertion;²⁷² the Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits do not.²⁷³ The latter group of

sentence or other benefit. Here, we focus on one such sentencing practice: requiring defendants to admit certain conduct in order to establish their remorse and likelihood of rehabilitative success.

268. Martha Grace Duncan, "So Young and So Untender": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1476 (2002) ("Courts and legislatures have assumed that contrition for past wrongdoing augurs well for rehabilitation.").
269. U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.1 (U.S. SENT'G COMM'N 2011).
270. See, e.g., *United States v. Saunders*, 973 F.2d 1354, 1363 (7th Cir. 1992) (referencing U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.2 (U.S. SENT'G COMM'N 2011), which says that "[i]n rare situations" a defendant who goes to trial could qualify for the reduction); *United States v. Cohen*, 171 F.3d 796, 804-06 (3d Cir. 1999).
271. See U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.1(A) (U.S. SENT'G COMM'N 2011) (stating that a defendant is not required to admit "relevant" conduct in order to get the deduction, but that they cannot falsely deny it). See, for example, *Kinder v. United States*, 504 U.S. 946, 947 (1992) (mem.) (White, J., dissenting), in which a district court declined to grant a responsibility deduction after the defendant denied culpability for criminal conduct beyond the offense charged. The Supreme Court denied the defendant's petition for a writ of certiorari brought on self-incrimination grounds. Justice White dissented and noted the circuit split on this issue. *Id.* at 948.
272. See *United States v. Perez-Franco*, 873 F.2d 455, 456 (1st Cir. 1989); *United States v. Oliveras*, 905 F.2d 623, 632 (2d Cir. 1990); *United States v. Rutledge*, 28 F.3d 998, 1002 (9th Cir. 1994).
273. See *United States v. Frierson*, 945 F.2d 650, 656 (3d Cir. 1991); *United States v. Gordon*, 895 F.2d 932, 936-37 (4th Cir. 1990); *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir.

circuits emphasizes that the trial court's decision about acceptance of responsibility is not the imposition of a penalty (if denied), but rather the granting of a benefit that the defendant must earn.²⁷⁴ For that reason, federal prosecutors, as well as federal judges, are within their rights to insist on full disclosure of all relevant conduct in return for the reward.²⁷⁵ The former group of circuits believes that uncharged conduct is not germane, and thus it is unfair to penalize people who refuse to incriminate themselves on such matters or to condition a benefit on their willingness to do so.

Acceptance of responsibility appears in other contexts as well, and the unconstitutional conditions doctrine has guided courts in their assessment of how this requirement intersects with litigants' criminal procedure rights. For example, in *United States v. Whitten*,²⁷⁶ Ronell Wilson, one of the defendants, asserted his innocence during the guilt phase but expressed contrition during the sentencing phase of a capital trial. The prosecutor argued to the jury in the sentencing phase that Mr. Wilson's contrition should not be believed, and therefore should not count as acceptance of responsibility, because he asserted his innocence during the trial. The appellate court held that the prosecutor's comments unconstitutionally "trench[ed]" on Mr. Wilson's Sixth Amendment right to a jury trial because his decision to take the case to trial was constitutionally protected and could not be used as a reason to sentence him to death.²⁷⁷ A superior court in Pennsylvania likewise held (although without direct reference to the unconstitutional conditions doctrine) that a trial court could not use failure to accept responsibility as the basis for transferring a case from juvenile into adult court.²⁷⁸ The Commonwealth had argued that acceptance of responsibility was an important indicator of amenability to treatment and capacity for rehabilitation, but the court in *Commonwealth v. Brown* held that hinging the transfer decision on acceptance of responsibility was a direct infringement of the youth's

1990); *United States v. White*, 993 F.2d 147, 149-51 (7th Cir. 1993); *United States v. Anderson*, 15 F.3d 979, 981 (10th Cir. 1994); *United States v. Ignancio Munio*, 909 F.2d 436, 439-40 (11th Cir. 1990).

274. See, e.g., *United States v. Cojab*, 978 F.2d 341, 343 (7th Cir. 1992).

275. See *Mourning*, 914 F.2d at 705. The intersection of the relevant-conduct admission and the self-incrimination right can be contested. For example, in jurisdictions that permit prosecutors to compel relevant-conduct admissions, federal prosecutors and defense attorneys argue about what behavior counts as "relevant" conduct during plea negotiations, and sometimes the defense opts not to challenge the proffer rather than affirmatively admitting anything.

276. 610 F.3d 168, 194-95 (2d Cir. 2010).

277. *Id.* at 194 (quoting *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990)).

278. *Commonwealth v. Brown*, 26 A.3d 485, 489 (Pa. Super. Ct. 2011).

right against self-incrimination.²⁷⁹ In contrast, a Connecticut Supreme Court concurring opinion invoked the unconstitutional conditions doctrine to question whether a failure to apologize for *uncharged* conduct would be germane (an issue the defendant had not raised) and thus whether penalizing such behavior would be constitutional.²⁸⁰

The Fourth Circuit has offered up a more nuanced approach to judging penalties for incomplete remorse. In *United States v. Frazier*,²⁸¹ the court distinguished between a “substantial penalty” and a run-of-the-mill penalty in terms of the level of coercion experienced by people who otherwise wanted to assert their self-incrimination rights; only “substantial penalties” unconstitutionally burden the self-incrimination right, the court said.²⁸² In this case, Malcom Frazier had admitted his own fraudulent conduct but refused to identify his customers in the fraud scheme.²⁸³ The prosecution contended that Mr. Frazier had to provide such information to demonstrate his acceptance of responsibility, but he claimed that doing so might subject him to future prosecution on new charges.²⁸⁴ In assessing whether the government’s position amounted to an unconstitutional condition on Mr. Frazier’s self-incrimination right, the appellate court compared the level of coercion experienced by Mr. Frazier to that experienced by others in the usual guilty plea process,²⁸⁵ as well as to people threatened with loss of political office or loss of government contracts if they refused to cooperate.²⁸⁶ It found that Mr. Frazier’s experience was more akin to the guilty plea process than to the latter set of examples; consequently, the government’s threatened penalty (refusal to recommend the acceptance of responsibility deduction) did not qualify as substantial. The Sixth Circuit has explicitly endorsed this view.²⁸⁷

A concrete example of the unconstitutional conditions doctrine influencing state court plea bargaining jurisprudence comes from South Carolina. In

279. *Id.* at 506 (holding that encouraging the defendant to give up his right against self-incrimination in exchange for the possibility of transfer to the juvenile system and a lesser sentence at the conclusion of the case amounts to a constitutional violation).

280. *State v. Angel M.*, 255 A.3d 801, 820 (Conn. 2020) (Ecker, J., concurring).

281. 971 F.2d 1076 (4th Cir. 1992).

282. *Id.* at 1082.

283. *Id.* at 1079.

284. *Id.* at 1081-1082.

285. *Id.* at 1083 (citing *Corbitt v. New Jersey*, 439 U.S. 212, 218-20 (1978)).

286. *Id.* at 1082-83 (citing *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967), and *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973)).

287. *United States v. Clemons*, 999 F.2d 154, 161 (6th Cir. 1993) (using *Frazier’s* reasoning and holding that conditioning acceptance of responsibility on a defendant’s waiver of his right against self-incrimination does not violate the Fifth Amendment).

Shumpert v. South Carolina Department of Highways and Public Transportation,²⁸⁸ the Supreme Court of South Carolina declared unconstitutional a portion of a state statute that imposed differential penalties on people convicted after trial and those convicted by guilty plea for the same offense. The statute authorized a ninety-day license suspension for people convicted at trial of DUI but required cancellation of this penalty for anyone who pled guilty or nolo contendere to the charge.²⁸⁹ While the state claimed that the differential penalty was a reasonable exercise of its power to regulate drivers' licenses, the court held that it "needlessly chill[ed] the basic exercise of constitutional rights."²⁹⁰ For this reason, it fell outside of the state's regulatory capacity. The court buttressed its holding by citing DUI cases in Vermont and Arizona,²⁹¹ and quoting the United States Supreme Court: "The evil in such a statute 'is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.'"²⁹²

In sum, the Supreme Court has shied away from engaging the unconstitutional conditions doctrine in the context of criminal adjudication. In contrast, some lower federal courts and some state courts have shown a willingness to apply the doctrine to limit the scope of plea bargaining.

IV. THE ORIGINS OF CRIMINAL PROCEDURE EXCEPTIONALISM IN UNCONSTITUTIONAL CONDITIONS ANALYSIS

Despite these frameworks emerging in the lower courts, the Supreme Court has refused to apply the unconstitutional conditions doctrine to its criminal procedure docket. What accounts for the Justices' persistent unwillingness to "ask the question" about whether "an unconstitutional condition [is] happening in that circumstance?"²⁹³ While our primary focus in this Article is on the *effect* of the Court's failure to apply the doctrine in the sphere of constitutional criminal procedure, we pause here to reflect, albeit briefly, on the question of *why* the Court has not heretofore applied the doctrine in this context.

288. 409 S.E.2d 771, 772 (S.C. 1991).

289. *Id.* at 773.

290. *Id.*

291. *Id.* at 774 (citing *Veilleux v. Springer*, 300 A.2d 620 (Vt. 1973); *Voyles v. Thorneycroft*, 398 F. Supp. 706 (D. Ariz. 1975)).

292. *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 583 (1968)).

293. Transcript of Oral Argument at 61, *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023) (No. 21-1168) (addressing the constitutionality of states requiring consent to general personal jurisdiction as a condition of conducting business in the state).

We begin in Section IV.A by raising several possibilities based on internal legal system dynamics. In Section IV.B we consider features of the social and political landscape outside the courthouse that offer greater explanatory power.

A. Can the Vacuum Be Explained by Internal Legal System Dynamics?

Institutional features of the legal system might explain the absence of the unconstitutional conditions doctrine from the Supreme Court's criminal procedure cases. For example, the parties' arguments during briefing, concerns that use of the doctrine might lead to system-wide collapse, textual differences between amendments, originalism, the criminal defendant's "unique" position vis-à-vis the government, or the assistance of counsel might have influenced the Court's decision-making in this area. As we discuss in more detail below, none of these features of the legal system strikes us as the root cause of the pattern we observe here.

First, it might be the case that the Court's lack of engagement with the doctrine reflects the parties' lack of engagement—if the parties have not argued the unconstitutional conditions doctrine, perhaps the Court should not be blamed for not ruling on this basis. This explanation does not fit the facts. As we mentioned above, the unconstitutional conditions doctrine has been raised by the parties a number of times in the fairly recent past across a range of criminal procedure issues.²⁹⁴ It has also been the basis of lower-court decisions in some circumstances.²⁹⁵ The Court has simply chosen to ignore the doctrine even when it has been foregrounded.

A second possibility is the fear of system collapse. Might the Court be concerned that the criminal legal system would implode if criminal courts were to carefully scrutinize the forms of coercion exerted by the government in a criminal case? Too much scrutiny might seriously damage the government's interest in law enforcement and public safety, the argument goes. That concern far outpaces how the unconstitutional condition doctrine works. While the Court might be concerned about the extent to which the criminal legal system depends on plea

294. For discussions of the unconstitutional conditions doctrine in the Fourth Amendment realm, see, for example, Brief for Petitioner at 29, *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (No. 14-1468) and Brief for Petitioner at 36, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18-6210). In the self-incrimination realm, see, for example, Brief for Respondent at 37, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (No. 96-1769).

295. See, e.g., *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1547-48 (6th Cir. 1988) (holding that the city cannot, as an employment condition, require employees to consent to an unreasonable search); *United States v. Whitten*, 610 F.3d 168, 194-95 (2d Cir. 2010) (holding that a prosecutor cannot argue to a jury in the punishment phase of a capital trial that the defendant asserted his innocence during the trial phase; such comments, intended to show lack of remorse, unconstitutionally "trench[ed]" on the defendant's Sixth Amendment right to a jury trial).

bargaining,²⁹⁶ we do not believe using the unconstitutional conditions doctrine would foretell the end of plea bargaining. It would, however, require the Supreme Court to more carefully assess conditions that bear no relationship to the essential bargain – such as requiring a defendant to waive her right to appeal or to give a DNA sample along with her guilty plea. It would also require close attention to terms that estop a defendant from challenging the legitimacy of government action, such as a waiver of the right to file a habeas corpus petition in the future.²⁹⁷ The Court’s use of the unconstitutional conditions doctrine would thus restrain the government’s ability to impose terms without having to make a comparable concession, or even explain the need for the term, in the particular defendant’s case. With respect to probation and parole conditions, the unconstitutional conditions doctrine would likewise require courts to assess germaneness and proportionality rather than reflexively approving of terms that go well beyond what is necessary to monitor the criminal tendencies of the person under supervision. And a concern about potential system collapse does not speak at all to implied consent statutes, pervasively regulated industry searches, or post-conviction penalties for silence.

Third, differential treatment might be justified by the text of the particular amendments (and the scaffolding of rights built around that text) in the criminal procedure realm. For instance, perhaps the requirement of “reasonableness” in the Fourth Amendment allows the Court to engage in the sort of analysis that the unconstitutional conditions doctrine requires, so using the doctrine would be superfluous. Philip Hamburger has argued, by way of example, that the Fourth Amendment’s prohibition on unreasonable searches “leaves much room for consensual searches – as long as the government does not secure the consent in ways that make the searches unreasonable.”²⁹⁸ He thus seems to assert that tradeoff schemes involving Fourth Amendment rights merit distinct treatment under unconstitutional conditions principles. We disagree. How the government secures consent is precisely the province of the unconstitutional conditions doctrine in First Amendment, Takings Clause, and Spending Clause cases, and it ought to be so in the Fourth Amendment cases as well.

296. Justice Kennedy famously remarked that plea bargaining is “not some adjunct to the criminal justice system; it *is* the criminal justice system.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)). We express no opinion on whether deeper scrutiny of plea deals would in fact cause the system to collapse, but merely that such a claim – even if true – would not explain the Court’s unwillingness to scrutinize rights-for-benefits schemes in other criminal procedure settings.

297. HAMBURGER, *supra* note 15, at 164–65.

298. *Id.* at 160. In his book, Hamburger incorrectly refers to this right as located in the Fifth Amendment rather than in the Fourth Amendment.

Moreover, all of the amendments discussed in this Article contain words that are malleable and subject to normative judgments. What constitutes a “taking,” for example, is guided by jurisprudential debate rather than by a dictionary; in that debate, normative judgments dictate and reflect the boundaries of appropriate government behavior vis-à-vis property owners. Likewise, the word “abridge” in the First Amendment is capacious enough to permit some burdens on speech while prohibiting others, as not every restriction inflicts a significant enough harm on the right to speak freely so as to cause constitutional concern.²⁹⁹ In short, the textual features of these amendments allow the Court to assess whether the government action is acceptable, in light of larger interests and the importance of the rights at stake, and yet the Court still sees value in using the unconstitutional conditions doctrine to supplement its analysis.

Our fourth possibility is tied to originalism and history: does the Court’s neglect of the unconstitutional conditions doctrine in criminal procedure find support on originalist grounds? In the Founding Era, as is the case today, individuals could consent to governmental conduct that otherwise would violate their constitutional rights.³⁰⁰ The question then, as now, was what inducements would constitute duress or coercion that would invalidate the consent.³⁰¹ During the Founding Era, the core legal conception of duress required threat of physical harm, such as severe bodily injury.³⁰² It is exactly the criminal procedure provisions of the Constitution that safeguard the individual’s body from governmental threats. Threats to one’s livelihood or property rights did not emerge as significant forms of coercion until the late eighteenth century.³⁰³ Analyzing what kinds of government behavior constitute impermissible coercion plays a central role in the modern unconstitutional conditions doctrine.³⁰⁴ Areas such as government employment, taxing and spending, and taking of private property simply do not present the concerns that animated discussions of coercion at the founding. In none of these areas does the government threaten bodily restraint or physical violence. The criminal procedure realm is different. This domain does entail government threats to the individual’s body, just the focus of coercion in the Founding Era. In short, the historical record provides no basis for

299. See HAMBURGER, *supra* note 15, at 160.

300. See Ryan Williams, *Unconstitutional Conditions and the Constitutional Text*, 172 U. PA. L. REV. (forthcoming 2024) (manuscript at 18-22), <https://ssrn.com/abstract=4414130> [<https://perma.cc/3MJ9-ZL8F>].

301. See *id.* at 22-25.

302. See Williams, *supra* note 300 (manuscript at 23); see also *Mitchell v. United States*, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting) (emphasizing the significance of “the rack” for “our hardy forebears” who were concerned about compulsion).

303. See Williams, *supra* note 302 (manuscript at 23).

304. See *supra* text accompanying notes 42-44.

minimizing our concerns about government conduct that induces people to submit to physical harms and liberty deprivations associated with criminal charges. Indeed, as noted by Ryan Williams, the Supreme Court has made an especially dramatic departure in its recent invocation of the unconstitutional conditions doctrine to protect states from potential coercion by the federal government.³⁰⁵

Fifth, one might argue that criminal defendants do not need access to the unconstitutional conditions doctrine because they already enjoy many constitutional protections and are therefore unlikely to suffer government coercion. But existing beneficiaries of the unconstitutional conditions doctrine also enjoy many constitutional protections when litigating against the government. Property owners can raise claims under the Due Process Clause and the Equal Protection Clause, in addition to the Takings Clause, when challenging zoning board decisions, for instance.³⁰⁶ Government employees enjoy due process and First Amendment protections when their employers attempt to impose burdensome conditions on their work or speech.³⁰⁷ In all of these instances, the unconstitutional conditions doctrine adds an extra shield to the base layer of rights. Being suspected of or charged with a crime does not diminish a rightsholder's need for an extra level of protection; it actually reinforces that need, because the suspect is presumed innocent of all wrongdoing despite government allegations to the contrary. To say that unproven allegations can justify exposing the suspect to government coercion is to fundamentally misapprehend what rights are for, and to devalue the presumption of innocence in a free and democratic society. In short, a person suspected or charged with a crime needs and deserves the same — if not more — protection from government coercion as the property owner or the government employee.

Finally, the assistance of counsel afforded to the criminally accused by the Sixth Amendment might distinguish them from all other litigants. To be sure, unlike other individuals who can raise unconstitutional conditions doctrine arguments, many criminal defendants have a constitutional right to legal representation.³⁰⁸ But many individual litigants in the First and Fifth Amendment takings cases we discussed above also had access to counsel; they were not

305. See Williams, *supra* note 300 (manuscript at 74).

306. See, e.g., *Andrews v. City of Mentor*, 11 F.4th 462, 467 (6th Cir. 2021).

307. See, e.g., *Fenico v. City of Philadelphia*, 70 F.4th 151, 161 (3d Cir. 2023).

308. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”). *Gideon v. Wainwright* made this right applicable to people charged in state court with felonies. 372 U.S. 335, 344-45 (1963) (guaranteeing a right to counsel, even for those who cannot afford to pay, for anyone charged with a felony in state courts). This case built upon the foundation laid three decades earlier in *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938), which guaranteed a right to counsel for indigent defendants in federal courts).

proceeding pro se. And states that invoke the doctrine against the federal government are most definitely represented by sophisticated lawyers.

Furthermore, the Sixth Amendment's right to counsel provision for the criminally accused falls short as a measure of true protection, for several reasons. Despite the guarantees of *Gideon v. Wainwright*,³⁰⁹ a substantial number of those charged with crimes represent themselves, either by choice³¹⁰ or by the limitations of the doctrine.³¹¹ For those who are represented, some receive services from attorneys who are stretched too thin by overwhelming caseloads to provide robust representation.³¹² Even attorneys who are not stretched too thin often lack sufficient leverage to maximize the benefit of the surrender of their clients' constitutional rights, due to overzealous prosecutorial charging policies and plea bargain strategies.³¹³ It might be said that the criminal legal system presents defendants with "choices" that outside the criminal context might be described as contracts of adhesion³¹⁴ or contracts entered into under conditions of duress.³¹⁵

309. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

310. See *Faretta v. California*, 422 U.S. 806, 806 (1975) (guaranteeing the right to represent oneself during a criminal trial).

311. See *Scott v. Illinois*, 440 U.S. 367, 367 (1979) (holding that when charged with a misdemeanor, a person is only entitled to counsel if the judge imposes a sentence of actual incarceration following conviction).

312. See, e.g., Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 207 (2003).

313. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 93 (2002) ("Sophisticated clients also understand that the defense attorney often can do little for them."); *id.* at 94 ("[A] lawyer may be perfectly representing her client when she advises him to plead guilty even in the face of assertions of innocence."). Charging and plea strategies are related, because prosecutors sometimes overcharge in order to induce guilty pleas quickly, or pleas to charges that are less than the top charge but greater than what might otherwise be warranted by the defendant's behavior. David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 483-84 (2016). And defense attorneys may "believe that they must convince most of their clients—even innocent defendants—to accept lesser punishments to avoid a substantial risk of much greater punishment." Wright & Miller, *supra*, at 33. The Supreme Court has approved of these plea strategies as part of the give-and-take of negotiation, as we discuss in Part III.B.2.

314. See Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 42-43 (discussing *Berryhill v. United States*, No. 15-cv-815, 2016 WL 2610258 (N.D. Ohio May 6, 2016), in which the defendant argued that his plea agreement was a contract of adhesion).

315. See Wright & Miller, *supra* note 313, at 94 ("Some defendants plead guilty even though they have committed no crime, or have committed some crime less serious or substantially different from the one charged."); HAMBURGER, *supra* note 15, at 223 (calling prosecutorial behavior during bargaining a form of extortion). Defendants have little leverage when negotiating for probation terms too; most people will accept almost any term in order to avoid going to prison. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L. J. 291, 344 (2016) (comparing forms stipulating the conditions of probation to "contracts of adhesion" from which "the probationer cannot opt out of . . .").

In short, the bargaining process that characterizes our criminal court system³¹⁶ may be anything but free and generate results that are anything but fair – despite the formal protections embedded in the Sixth Amendment.

B. Accounting for the Influence of Social and Political Factors on the Supreme Court's Decision-Making

If we widen the lens beyond internal system factors, we can identify other patterns in the Supreme Court's history (and in the Justices' histories) that, in our view, better explain the Court's unwillingness to use the unconstitutional conditions doctrine in criminal procedure cases. Those explanations derive from social class, education, perceptions of institutional legitimacy, and the chasm that exists between constitutional law and constitutional criminal procedure in the courts and in the legal academy.

First, as Cass Sunstein has observed, the unconstitutional conditions doctrine can be seen to arise out of a *Lochnerian* tradition.³¹⁷ During the heyday of *Lochner*, the Court provided strong protections to economic rights and comparatively little protection to noneconomic rights.³¹⁸ In this light, it is not surprising to see the doctrine invoked to protect property rights through the Takings Clause and to restrict limitations imposed through government spending (though free speech protections are perhaps harder to understand), but not invoked to protect the constitutional rights of persons suspected or convicted of crimes. To be sure, even the Court's more recent unconstitutional conditions cases have focused on traditional transactions. While those accused of crimes may face decisions as to whether to enter into agreements with the government (as the moniker "plea bargain" clearly connotes),³¹⁹ these decisions still may not strike the Justices as transactional in the traditional sense.³²⁰

Second, the Justices may be more fiercely protective of the constitutional rights of people who resemble them in terms of social status and class

316. See *Fenico v. City of Philadelphia*, 70 F.4th 151, 161 (3d Cir. 2023).

317. See 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, 596-604 (1990) ("From its inception, . . . the unconstitutional conditions doctrine grew out of a system that sought to protect common law interests and market ordering from the novel threats created by the regulatory state.").

318. See *id.* at 596.

319. See, e.g., Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1144 (2005).

320. See Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 35-49 (2018) (discussing the extent to which courts consider plea bargains as real contracts).

membership.³²¹ Scholars have observed that even during the *Lochner* era, the Justices were comfortable endorsing zoning regulations that preserved class and social boundaries.³²² The protagonists in the speech and free exercise cases are typically middle-class citizens, people who hold regular jobs, conform to conventional family forms, and the like;³²³ they appear to be “good citizens” who thoughtfully consider when to assert rights and when to waive them for the greater good.³²⁴ Those accused of committing crimes, by contrast, appear to have transgressed legal rules and/or social norms – which likely makes them distasteful and unsympathetic in the eyes of the Justices (who presumably think of themselves as legally compliant citizens). This view of criminal-court litigants did not emerge from thin air; respected legal texts have long provided its foundation. A prominent mid-twentieth-century casebook about criminal law, for example, did not question the nature of those accused of crimes as “essential[ly] grim[y].”³²⁵ Henry Hart, Jr., in one of the most cited law review articles of the

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321. As we have noted, some state and lower federal courts have recognized the applicability of the unconstitutional conditions doctrine to criminal procedure issues. One might question whether these judges do not share the potential social and class biases of Justices on the United States Supreme Court. With respect to federal courts, it appears that the judges believed that they were properly performing their judicial role by applying existing Supreme Court precedent to analogous areas of law. Indeed, we argue that that is exactly what these courts were doing. With respect to state courts, it might be relevant to note that state courts vary in many ways from federal courts. See, e.g., Geoffrey C. Hazard, Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 647 (1985) (listing institutional differences between state and federal courts and suggesting that such differences are “synergistically, systematically, and ubiquitously ‘outcome determinative[.]’”). With respect to the potential relevance of the personal perspectives of the Justices, it is notable that the U.S. Supreme Court Justice who has emphasized the Court’s anomalous refusal to consider the unconstitutional conditions doctrine in criminal procedure is Justice Ketanji Brown Jackson, the first Black woman and the first public defender to sit on the Court. See Transcript of Oral Argument at 61, *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023) (No. 21-1168) (questioning why the Court does not ask whether something “is an unconstitutional condition happening in [the criminal procedure context]”).
322. See, e.g., Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RESV. L. REV. 597, 614 (2001).
323. See, e.g., *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (protecting the right of federal employees to receive honoraria for speeches or writings); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (protecting the right of textile workers to observe the sabbath).
324. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 111 COLUM. L. REV. 653, 655 (2018).
325. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1976 (2019) (citing JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES* 24 (1940)). The image of dirt and grime associated with people charged with and convicted of crime remains prevalent today. See MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS: THE*

late twentieth century, emphasized that moral condemnation was the primary purpose of the criminal legal system, thus underscoring the importance of treating criminals as outsiders.³²⁶ The Court's reluctance to provide strong criminal procedure protections perhaps derives from and surely reinforces this view of the criminal underclass.³²⁷

A third possibility concerns the Justices' perceptions of the legal actors who are imposing the challenged conditions. Court opinions establishing absolute immunity for judges and prosecutors signal that the Justices perceive criminal court judges and prosecutors as consummate professionals, deeply committed to their jobs and to doing the right thing under stressful working conditions.³²⁸ The Court has specifically deferred to prosecutors as professionals who ought to be trusted absent clear evidence of misbehavior.³²⁹ In contrast, when applying the unconstitutional conditions doctrine to takings, the Justices might perceive

UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 119-185 (1996) (providing an extensive discussion in Part Three of the book *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*).

326. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 2 L. & CONTEMP. PROBS. 401, 405 (1958) (as referenced by and discussed in Ristroph, *supra* note 325, at 1982). Some philosophers have offered a contrasting perspective, suggesting that punishment honors the dignity of the criminal. For example, Thomas E. Hill, Jr. draws on Kantian justifications for punishment to argue that “[t]reating persons as rational agents calls for respecting them (in all normal circumstances) as free and responsible for their choices” Thomas E. Hill, Jr., *Treating Criminals as Ends in Themselves*, 11 ANN. REV. L. & ETHICS 17, 29 (2003); see Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 5 (2012) (arguing that from a retributivist perspective, “punishment by the state serves a function of communicating to the offender our liberal democracy’s commitments to three important values: (1) moral accountability for unlawful actions; (2) equal liberty under law; and (3) democratic self-defense”).
327. Perhaps what explains Justice Jackson’s original perspective on the issue is her background as a federal public defender. See Fabiola Cineas, *Why Ketanji Brown Jackson’s Time as a Public Defender Matters*, VOX (Mar. 21, 2022, 10:10 AM EDT), <https://www.vox.com/22979925/ketanji-brown-jackson-public-defender> [<https://perma.cc/H57U-EDJM>] (“[Jackson] represented some of the country’s most vulnerable people, which has given her a perspective that would be unique on the current Supreme Court.”).
328. On prosecutorial immunity, see *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976), which describes “the vigorous and fearless performance of prosecutor’s duty that is essential to the proper functioning of the criminal justice system”; and *id.* at 425, which describes the “honest prosecutor” who requires more protection than qualified immunity provides. On judicial immunity, see *Pierson v. Ray*, 386 U.S. 547, 554 (1967), which describes judges who are “principled and fearless” in their decision-making.
329. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 86 (1963); *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Even Justice Stevens’ dissenting opinion in *Armstrong* begins by acknowledging that “[f]ederal prosecutors are respected members of a respected profession. Despite the occasional misstep, the excellence of their work abundantly justifies the presumption that ‘they have properly discharged their official duties.’” *Id.* at 476 (Stevens, J., dissenting) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926)).

zoning board authorities as inclined to overreach whenever the opportunity presents itself, and perhaps even as self-serving and petty.³³⁰ Zoning board authorities also tend not to be democratically elected, in contrast to state court judges and prosecutors; they are thus not subject to the same accountability controls and may need more oversight by the federal judiciary.³³¹ Those perceptions might explain why the Court seems far more committed to scrutinizing the dictates of local zoning officials than to imposing oversight on criminal legal system actors.

Our final consideration concerns the landscape of constitutional law more generally. As legal academics we cannot help but observe that criminal procedure law is treated—by the Court, and by the legal community in general—as entirely distinct from constitutional law, despite the fact that criminal procedure implicates numerous constitutional rights.³³² In his recent book, Erwin Chemerinsky traces the Supreme Court’s interest in the Fourth, Fifth, and Sixth Amendments as starting mostly with the Warren Court, particularly if one focuses on the

330. See Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447, 471-72 (2004) (reporting that “[i]n larger cities in Iowa, members of white-collar occupations are significantly overrepresented on zoning boards” and that “many occupations with either a direct or indirect bias in favor of development are overrepresented,” making for “a significant potential for any one zoning board to be overpopulated with pro-development interests”); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 382 (2002) (“[M]ost zoning boards remain unconstrained by the due process safeguards that apply to judicial decisions.”); Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 167 (1989) (“[D]elayed and flexible decisionmaking also provides municipalities with significant leverage over potential development in order to obtain developer concessions.”). As the Oregon Supreme Court explained in *1000 Friends of Oregon v. Wasco County Court*, 742 P.2d 39, 43 (Or. 1987) (en banc):

The combination [of legislative, executive and judicial power on zoning boards] leaves little room to demand that an elected board member who actively pursues a particular view of the community’s interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure.

331. Many thanks to Michael Mannheimer for bringing this point to our attention.

332. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 150-54 (1997) (suggesting that, contrary to current practice, legal analysis of constitutional criminal procedure should more closely mirror general constitutional legal analysis). See generally Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407 (2013) (arguing that in constitutional criminal procedure, as opposed to constitutional law writ large, the Court is inclined to overdelegate to enforcement authorities); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (critiquing the dominant view of criminal procedure that views the interests of the public as in conflict with the interests of the person charged).

application of these principles to state prosecutions.³³³ This was almost two centuries after the Bill of Rights was adopted and almost a century after the Reconstruction Amendments, including the Fourteenth Amendment's Due Process Clause that guided the incorporation doctrine.³³⁴ It was also many decades after the Supreme Court took an active interest in sketching the contours of other provisions of the Bill of Rights, such as the Takings Clause,³³⁵ freedom of speech,³³⁶ and free exercise of religion.³³⁷ And, as many readers know, at the conclusion of the Warren Court era the Justices began a steady retreat from many of the doctrines that they (or their predecessors) had created to protect suspects from government abuses,³³⁸ while other constitutional rights have remained steadfast³³⁹ or grown larger during the same period.³⁴⁰ From where we sit today, we appear to be enmeshed in criminal procedure doctrines that "overvalue[] security in relation to other . . . interests" – including protecting privacy,

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333. See generally ERWIN CHERMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* (2021) (arguing that the Supreme Court has consistently favored the interests of law enforcement over the rights of criminal defendants, with the Warren Court representing a brief historical exception).
334. Fred O. Smith, Jr., Book Review, *Policing Mass Incarceration*, 135 HARV. L. REV. 1853, 1855 (2022) (reviewing CHERMERINSKY, *supra* note 333).
335. See *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233-41 (1897).
336. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
337. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).
338. CHERMERINSKY, *supra* note 333 at 184-90 (describing the Court's creation of various limitations on the exclusionary rule). *Miranda's* protections likewise have significantly waned in the twenty-first century. See, e.g., *Maryland v. Shatzer*, 559 U.S. 98, 109 (2010) (imposing an expiration date on the right to counsel invocation); *United States v. Patane*, 542 U.S. 630, 637-44 (2004) (permitting physical fruits of *Miranda* violations to be introduced as evidence); *Berghuis v. Thompkins*, 560 U.S. 370, 382-87 (2010) (expanding the concept of implied waiver). In its most recent *Miranda* decision, the Court denied a person the ability to file a civil rights lawsuit for use of an un-Mirandized statement in a criminal trial. *Vega v. Tekoh*, 597 U.S. 134, 152 (2022). Regarding the Sixth Amendment, in *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009), the Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), and stripped defendants of an important protective shell following the attachment of the right to counsel after they were charged.
339. See, e.g., *Kennedy v. Bremerton School District*, 597 U.S. 507, 514 (2022) (holding that a public high school football coach's midfield prayer was protected by the Free Speech and Free Exercise Clauses of the First Amendment).
340. The Second Amendment in particular has experienced spectacular growth in the last fifteen years, due to a trifecta of cases implicating the right of citizens to carry weapons in public. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70-71 (2022).

respecting bodily integrity, reducing police violence, and improving the reliability of procedures.³⁴¹

This tendency to view criminal law and procedure as exceptional—removed and distinct from other areas of constitutional law—has been a subject of recent interest among criminal law scholars.³⁴² Alice Ristroph, for example, has observed that this split was present not only in the courts but also in the legal academy in the early to mid-twentieth century; preeminent thinkers (such as Roscoe Pound, John Henry Wigmore, and James Barr Ames) regarded criminal law as an “intellectual backwater,” not worthy of their time or attention.³⁴³ Criminal law was the “only important branch of American law which [was] not . . . affected for the better by some textbook written by a great teacher of law,”³⁴⁴ and the field had been “all but left . . . to charlatans” while other fields, like contracts and property, were subject to sustained intellectual development.³⁴⁵ This was not simply “separation” in legal academia; it was “subordination,” as Ristroph concludes.³⁴⁶

Viewing these patterns as a part of a whole, perhaps we should not be surprised by the limited diffusion of the unconstitutional conditions doctrine into

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341. Smith, *supra* note 334, at 1869 (citing CHEMERINSKY, *supra* note 333). William Stuntz has also famously argued that the Warren Court revolution inspired a legislative backlash, as the states took it upon themselves to increase the range and complexity of substantive criminal laws and punishments to counter the effect of increased rights for those suspected and charged with crimes. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216–43 (2011) (discussing the Warren Court’s decisions and the ramifications of those decisions).
342. See, e.g., Ristroph, *supra* note 325, at 1953; Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1384–85 (2022); Weisburd, *supra* note 184, at 1309; Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 448 (2020). One of the earliest works to identify and question this trend is by Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006) (arguing that such trend begins with the “text and structure of the Constitution itself”). Constitutional law scholars have also noticed this trend. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (“The Fourth Amendment is a part of the Constitution yet is rarely taught as part of Constitutional Law. Rather, it unfolds as a course unto itself, or is crammed into Criminal Procedure.”).
343. Ristroph, *supra* note 325, at 1973 (quoting GERHARD O.W. MUELLER, *CRIME, LAW AND THE SCHOLARS* 69 (1969)); see also Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO STATE J. CRIM. L. 217, 227 (2009) (observing that before Herbert Wechsler arrived at Columbia Law School, the field of criminal law had been “virtually ignored” by the faculty because it was, in Wechsler’s words, “generally thought to have no money in it” and therefore was “not interesting.”).
344. Ristroph, *supra* note 325, at 1974 n.99 (quoting Roscoe Pound, *What Can Law Schools Do for Criminal Justice?*, 6 AM. L. SCH. REV. 127, 129 (1927)).
345. *Id.* at 1974 (quoting Roscoe Pound, *What Can Law Schools Do for Criminal Justice?*, AM. L. SCH. REV. 127, 132 (1927)).
346. *Id.*

the criminal procedure space. Walls have not just divided criminal procedure law from the rest of constitutional law as a matter of intellectual curiosity; they have segregated persons accused of crimes from other rights-bearing citizens as a matter of worthiness, and they have isolated criminal procedure rights from economic rights as a matter of constitutional importance. These overlapping divisions—separating criminal procedure from constitutional law, criminal defendants from other citizens, and criminal procedure rights from economic rights—mutually constitute and reinforce the hierarchy in which criminal procedure rights take last place among the protections afforded by the Bill of Rights.

V. THE IMPACT OF CRIMINAL PROCEDURE EXCEPTIONALISM IN UNCONSTITUTIONAL CONDITIONS ANALYSIS

In its own case law over the past century, the Supreme Court has asserted and admired the unconstitutional conditions doctrine's breadth as a shield for constitutional rights. In *Koontz*, for example, the Court stated:

We have said in a variety of contexts that “the government may not deny a benefit to a person because he exercises a constitutional right.” . . . Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.³⁴⁷

This Article has demonstrated the emptiness of such language, as the Court has not applied this principle in an “overarching” fashion. Instead, the Court has consistently ignored the principles underlying the unconstitutional conditions doctrine when deciding challenges raised under the Fourth, Fifth, and Sixth Amendments by those suspected of or charged with crimes. The doctrine is a selective shield, not the broad protector of constitutional rights that the Court purports to embrace. What is more, offering the doctrine's protection on this selective basis cannot be justified by pointing to the features of the legal system in which it operates. Features of the social and political landscape in which the Justices hear cases are more likely to blame for the pattern we have identified.

In this final substantive part of the Article, we turn our attention to the detrimental impacts caused by the Court's decision to withhold the doctrine's protections from people accused of crime. We begin by considering the doctrinal impact, exploring in more detail how a thorough unconstitutional conditions analysis can shape the outcome of a criminal procedure case. While we gestured

347. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 545 (1983)).

to that effect in Part III, in Section V.A we dive deeply into two cases from the lower federal courts, *Lebron v. Secretary, Florida Department of Children & Families*³⁴⁸ and *United States v. Scott*,³⁴⁹ to show how thoughtful judges have assessed criminal procedure inquiries using the doctrine. We then turn in Section V.B to the impact on the populations who have been deprived of access to the unconstitutional conditions doctrine. We consider the divisions the Court has created between rights and rightsholders in the United States – without good reason – and the impact of these divides on the polity.

A. *The Doctrinal Impact: Swapping Exceptionalism for Inclusion in the Criminal Procedure Docket*

What would an unconstitutional conditions analysis look like in the criminal procedure space? The Supreme Court would not have to look far to find some excellent examples from the lower courts. The Eleventh Circuit opinion in *Lebron v. Secretary, Florida Department of Children & Families* scrutinizes mandatory, suspicionless drug testing of people on welfare using the unconstitutional conditions doctrine.³⁵⁰ The Ninth Circuit's opinion in *United States v. Scott* offers a similarly robust and critical assessment of the legality of drug testing as a pretrial release condition.

At issue in *Lebron* was the authority of the State of Florida to require TANF applicants to submit to suspicionless drug testing as a condition of receiving welfare benefits.³⁵¹ First the court considered whether mandatory, suspicionless drug testing of this population was a constitutionally reasonable search under the Fourth Amendment's special needs exception.³⁵² If so, the Florida program did not infringe on any right, thus precluding the argument that the tradeoff of rights for benefits was an impermissible, unconstitutional condition. But after careful review of the Supreme Court's drug testing precedents, the Eleventh Circuit concluded that Florida's program was not a constitutionally reasonable search,³⁵³ thus triggering a deeper look into the coercive nature of the tradeoff imposed by the Florida statute.

348. 710 F.3d 1202 (11th Cir. 2013).

349. 450 F.3d 863 (9th Cir. 2005).

350. 710 F.3d at 1205, 1217–18.

351. *Id.* at 1206.

352. *Id.*

353. *Id.* at 1211 (finding no abuse of discretion in trial court's determination that State did not establish a substantial special need warranting suspension of Fourth Amendment protections). Paying close attention to the Supreme Court precedents permitting suspicionless drug

The State asserted that it could exact consent from the TANF population by statutorily conditioning the receipt of welfare benefits on submission to search.³⁵⁴ The Eleventh Circuit firmly rejected that claim. It concluded that any such argument was “belied by Supreme Court precedent, which has invalidated searches premised on consent where it has been shown that consent ‘was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.’”³⁵⁵ According to the Eleventh Circuit, Florida’s statutory requirement amounted to a demand, rather than a request, for consent, because, by this statute, “the State conveys a message that it has the unfettered lawful authority to require such drug testing—period. But it does not”³⁵⁶ In other words, a statute cannot impose a scheme of implied consent that subverts, or circumvents, constitutional analysis of coercion.³⁵⁷

After holding that there was no operative consent imposed by the statute, the *Lebron* court compared the burden on the TANF recipients’ Fourth Amendment rights to that experienced by plaintiffs alleging First Amendment violations caused by other rights-for-benefits schemes. Reviewing these precedents, the Eleventh Circuit observed that a state “could not place the burden on taxpayers to attest that they did not advocate the overthrow of the government in order to receive . . . a tax exemption” nor “force an individual to choose between ‘following the precepts of her religion and forfeiting [unemployment compensation] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.’”³⁵⁸ The court distinguished *Wyman v. James* on the basis of the state action complained about; that case involved a

testing for certain populations, the Eleventh Circuit held that there was no basis on which to extend such testing to the TANF population “when there is no immediate or direct threat to public safety, when those being searched are not directly in the frontlines of drug interdiction . . . or when there are no dire consequences or grave risk of physical harm as a result of waiting to obtain a warrant” *Id.* Moreover, the court concluded that the evidence in the record did not support the State’s assertion that “TANF recipients engage[] in illegal drug use or that they misappropriate government funds for drugs.” *Id.*

354. *Id.* at 1214.

355. *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 13 (1948)). In support of the premise that consent extracted by statute was merely submission to a show of authority (rather than real, operative consent), the *Lebron* court cited a series of Supreme Court cases in which officers had forced entry under color of authority, including *Johnson v. United States*, 333 U.S. 10, 13 (1948); *Amos v. United States*, 255 U.S. 313, 317 (1921); and *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). *Lebron*, 710 F.3d at 1215.

356. *Lebron*, 710 F.3d at 1215.

357. This understanding of statutorily imposed implied consent arguments calls into question the implied consent schemes that operate in the DUI arena to require blood alcohol testing—but it has not yet succeeded in undermining those schemes.

358. *Lebron*, 710 F.3d at 1217 (citing *Speiser v. Randall*, 357 U.S. 513, 526, 528–29 (1958), then quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (first alteration in original)).

physical home search of a welfare recipient but did not concern drug testing, which the court noted is governed by a different body of “well-established precedent” requiring a court “to balance the competing government and individual privacy interests.”³⁵⁹ Drawing insight about the limits to state-imposed coercion from these case outcomes in other doctrinal areas, the *Lebron* court concluded that Florida’s statute “unconstitutionally burden[s] a TANF applicant’s Fourth Amendment right to be free from unreasonable searches.”³⁶⁰

A second example of unconstitutional conditions analysis in the suspicionless drug testing context comes to us from the Ninth Circuit. In its 2005 opinion in *United States v. Scott*,³⁶¹ the court considered the constitutionality of a state court condition that required a pretrial detainee to submit to suspicionless drug testing as a condition of his release.³⁶² The court asserted that “[t]he right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions—such as chopping off a finger or giving up one’s first born.”³⁶³ The only conditions the government can impose as a condition of release are constitutional conditions, the court declared.³⁶⁴

359. *Id.* at 1216 n.10. The court further distinguished *Wyman* for the jurisprudential basis of its holding. *Wyman* belongs in the Court’s “special needs” jurisprudence, which was inapplicable in *Lebron*. *Id.*

360. *Id.* at 1218.

361. 450 F.3d 863, 865 (9th Cir. 2005). Other courts considering the appropriateness of drug screens as a pretrial release condition have also considered the closeness of fit between the condition and the government interest it is meant to address. *See, e.g., Berry v. Dist. of Columbia*, 833 F.2d 1031, 1035 (D.C. Cir. 1987) (holding that testing cannot be constitutionally reasonable unless the government proves a “positive correlation between drug use and pretrial criminality or non-appearance”). The D.C. Circuit also instructed the lower court to consider on remand certain aspects of the testing program, including “the scope of the [testing mechanism], the manner in which [the test] is conducted . . . and the place in which it is conducted.” *Id.* at 1036 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). These factors suggest a kind of proportionality review.

362. *Scott* concerned a federal defendant who was accused of committing a new crime while out on bail from a pending state case in Nevada. 450 F.3d at 865. The Nevada trial court imposed random, suspicionless drug testing as a pretrial release condition on him. *Id.* When officers came to Raymond Lee Scott’s home to perform the drug test, he failed it. *Id.* The officers arrested Mr. Scott, searched his home, and observed evidence of a federal crime, which led to the federal prosecution. *Id.* The government conceded there was no probable cause to test Mr. Scott for drugs or to justify the search of the home until Mr. Scott failed the drug test. *Id.* at 874.

363. *Id.* at 866 n.5.

364. *Id.*

The government first argued constitutionality based on consent,³⁶⁵ premised on the tradeoff of rights for benefits that is at the core of unconstitutional conditions analysis. But the court rejected the government's claim that Raymond Lee Scott had "willingly consent[ed]" to the drug testing in return for the right to "sleep in [his] own bed[] while awaiting trial."³⁶⁶ Consent derived from a pre-trial release condition of this type, without more, was insufficient in the court's view. "Pervasively imposing an intrusive search regime as the price of pretrial release, just like imposing such a regime outright, can contribute to a downward ratchet of privacy expectations[,] "³⁶⁷ the court warned.

The *Scott* majority then compared the pretrial release condition to conditions imposed in other kinds of bargains with the state, observing that contractors doing business with the government can be required to sign a limiting clause,³⁶⁸ and that welfare recipients can be required to submit to search-like home visits as a condition of receiving benefits.³⁶⁹ But the fact that these conditions were found to be constitutional was not dispositive of the issue here. The majority noted that, in prior Supreme Court jurisprudence,³⁷⁰ an employee's assent to a previously imposed drug-testing term as a condition of employment was "merely a relevant factor"³⁷¹ in determining the strength of his or her privacy interest at the time of the drug test; assent alone did not cause the privacy interest to evaporate. Only assent to a condition that is reasonable can have that effect.³⁷² Hence, any drug-testing condition in the pretrial release context must survive a reasonableness analysis.

To assess the reasonableness of the condition imposed on Mr. Scott, the Ninth Circuit focused on the germaneness of the condition, considered in light of the problem it was meant to address. While it did not use the term germaneness, it found the connection between the condition and the asserted government interest to be flimsy, rather than substantial:

365. *Id.* at 865-66. The government also attempted to justify the search using "special needs" and "totality of the circumstances" language, but the court was not convinced by either of those arguments. *Id.* at 874.

366. *Id.* at 865-66.

367. *Id.* at 867.

368. *Id.* at 867-68 (citing *Zap v. United States*, 328 U.S. 624, 628 (1946) and *Yin v. California*, 95 F.3d 864, 872 (9th Cir. 1996)).

369. *Id.* at 868 (citing *Wyman v. James*, 400 U.S. 309, 317-18 (1971)); *Wyman*, 400 U.S. 309, 317 (1971) (describing investigative nature of home visits).

370. 450 F.3d at 868 (citing and discussing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989), which addressed the constitutionality of subjecting Customs Agents to drug testing).

371. *Id.*

372. *Id.*

[T]he connection between the object of the test (drug use) and the harm to be avoided (non-appearance in court) is tenuous. One might imagine that a defendant who uses drugs while on pretrial release could be so overcome by the experience that he misses his court date. Or, having made it to court, he may be too mentally impaired to participate meaningfully in the proceedings. These are conceivable justifications, but the government has produced nothing to suggest these problems are common enough to justify intruding on the privacy rights of every single defendant out on pretrial release. And it has produced nothing to suggest that Nevada found Scott to be particularly likely to engage in future drug use that would decrease his likelihood of appearing at trial.³⁷³

The court acknowledged that a pretrial release condition might be justified in a particular defendant's case based on specific concerns about flight; it might also be justified more generally by a legislative finding.³⁷⁴ But the state made no showing on either ground. It thus failed to convince the court that the search of Mr. Scott pursuant to the condition was reasonable.

These examples demonstrate that unconstitutional conditions analysis is possible in the criminal procedure docket and often leads to more carefully reasoned analysis than reflexive reliance on warrant exceptions or privacy categories. If the Supreme Court were to adopt this approach, it would bring its criminal procedure jurisprudence into conversation with constitutional jurisprudence in First Amendment, Takings, and Spending Clause contexts, leading to more victories for at least some people facing accusations of criminal conduct. Even where victory at the individual case level did not result, future defendants would have a deeper well of arguments on which to draw for future litigation and the Supreme Court would be forced to confront its disparate treatment of different rightsholders.

B. The Symbolic Impact: Swapping Exceptionalism for Inclusion in the Population of Rightsholders

The Supreme Court's inconsistent application of the unconstitutional conditions doctrine has a profound and disparate impact on various rightsholders. *Koontz* emphasized that the doctrine is intended to provide a buffer for citizens from undue coercion by local, state, and federal institutions of government.³⁷⁵

373. *Id.* at 870.

374. *Id.* at 872 n.12.

375. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

The Court's cases, though, extend this protective shell only to certain classes of rightsholders, while leaving others exposed and vulnerable.

As exemplified by its rigorous use of the unconstitutional conditions doctrine in the takings context to protect landowners from regulations, the Court has steadfastly used the doctrine to safeguard property and other forms of wealth. Other unconstitutional conditions cases focus on the ability of the government to leverage its influence through grants of money,³⁷⁶ but the primary recipients of this form of government largess are states and organizations. When monetary benefits instead flow to indigent individuals, the Court has resisted using the unconstitutional conditions doctrine to address concerns about the regulatory burden imposed by government programs. While lower courts have invoked the unconstitutional conditions doctrine to protect vulnerable citizens from forced waiver of their Fourth, Fifth, and Sixth Amendment rights, the Supreme Court has not “ask[ed] the [unconstitutional conditions doctrine] question”³⁷⁷ even when explicitly invited to do so.

Even in the employment context—in which the Court *has* applied the doctrine—it offered protection for the right to earn income rather than for nonmonetary rights, such as the ability to engage in political activity. Thus, federal officials seeking to garner honoraria for speaking engagements won protection from restrictive rules,³⁷⁸ while mint worker George Poole, who wished to engage in political organizing on his own time, lost.³⁷⁹

As we noted in Part III, the Court's application of the unconstitutional conditions doctrine to areas of criminal procedure would not necessarily translate into easy victories for people charged with or convicted of crimes. Elastic standards already baked into criminal procedure doctrines,³⁸⁰ such as reasonableness, may drive the same ultimate result for a particular litigant as analysis grounded in the unconstitutional conditions doctrine. But sometimes a litigant will win using the unconstitutional conditions doctrine, as the *Lebron* and *Scott* decisions discussed herein have shown. In particular, for defendants concerned about the coercive nature of plea bargains offered by the government, careful use of the unconstitutional conditions doctrine should lead courts to question terms that

376. See *supra* Section II.A.

377. Transcript of Oral Argument, *supra* note 2, at 61 (statement of Jackson, J.).

378. See *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 457 (1995).

379. See *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100-104 (1947).

380. Yale Kamisar memorably characterized the Fourth Amendment's language as “majestic” yet “vague.” Kamisar, *supra* note 137, at 31.

insulate the prosecution from judicial review,³⁸¹ create significant disparities in sentences between those who plead guilty and those who go to trial for the same offense,³⁸² or appear peripheral to the core bargain. And for those who do not prevail on their unconstitutional conditions claim, the basis of the loss still matters. The Court's repeated tendency to handle criminal procedure questions as an isolated subset of cases, rather than in the context of analytical frameworks of unconstitutional conditions, may have drained the well from which future litigants can draw when looking for arguments to raise in new cases.

For example, returning to *United States v. Knights*, recall that the United States argued to the Ninth Circuit and to the Supreme Court that the challenged probation condition—submission to suspicionless searches—related closely to the main purpose of probation (keeping a close eye on probationers to readily identify signs of illegal behavior). In the language of the unconstitutional conditions doctrine, this condition would survive the test for germaneness, said the United States, contrasting it to a condition that limited the free speech or free exercise rights of this population.³⁸³ But rather than upholding the condition on this narrow ground, the Court declared that probationers as a class have a lesser expectation of privacy in their persons and belongings, and thus that Mark James Knights had no basis to complain about what happened to him.³⁸⁴ This holding is far more expansive than an unconstitutional conditions-based holding would have been, and it has significant implications for probationers subject to searches in other contexts or to other sorts of probation conditions.

Consider *Riley v. California*, for instance—the 2014 case in which the Court declared that privacy interests in digital containers (cell phones and laptops) remain robust even following arrest, and thus require officers to obtain a warrant

381. See Turner, *supra* note 16, at 87–88 (describing the range of “waivers [that] insulate plea bargains from judicial review, thus allowing prosecutorial overreaching and other procedural failures and factual inaccuracies to remain unchecked”); *United States v. Raynor*, 989 F. Supp. 43, 48 (D.D.C. 1997) (critiquing terms of plea deals that “undermine the important role of the courts of appeals to correct errors in sentencing”).

382. Such disparities have been shown empirically to drive false guilty pleas. *Innocents Who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS 1 (Nov. 24, 2015), <https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [<https://perma.cc/X2GM-F3C8>] (finding that innocent defendants plead guilty to “get lighter sentences than those who are convicted at trial”). This trend is particularly concerning in death penalty cases. Recent research from the state of Georgia found “strong evidence that the threat of the death penalty [had] a robust causal effect on the likelihood of a plea agreement.” Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 475 (2013).

383. Petition for Writ of Certiorari, *supra* note 180, at 14–15; see also Brief for the United States, *supra* note 180, at 27 (emphasizing that the search authorized by the challenged parole conditions “serve[d] an important probation purpose”).

384. *United States v. Knights*, 534 U.S. 112, 121–22 (2001).

if they want to conduct a search.³⁸⁵ If probationers have a lesser expectation of privacy than everyone else, can their cell phones be searched incident to arrest, without a warrant? Likewise, does the curtilage of the home of a probationer receive less protection than the curtilage of non-probationers, whose homes are protected from warrantless searches by the *Florida v. Jardines*³⁸⁶ trespass doctrine? With respect to the second kind of expansion, courts have routinely validated a range of probation conditions—like requiring permission to marry³⁸⁷—that would surely raise questions about germaneness in the unconstitutional conditions context if *Knights* had followed that line of analysis. In short, the unnecessary breadth of the Court’s holding in *Knights* could be, and mostly likely has been, used as a gateway to justify further dilution of rights for the probation population even in areas where the Court has embraced a bolder conception of privacy in recent years.

What is more, an unconstitutional conditions analysis in criminal procedure cases would require the Court to confront critical questions when assessing the tradeoff of rights for benefits in certain contexts. When applying the unconstitutional conditions doctrine in the context of takings, for example, the Court has expressed concern about the coercive effects of government demands; it has emphasized the importance of germaneness and proportionality in regulatory requirements. The Court has also cautioned that because of the broad government discretion involved, individuals and businesses applying for land-use permits are “especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.”³⁸⁸ If the Court were to apply the unconstitutional conditions doctrine to plea bargaining or other areas of criminal procedure, it would have to ask whether, when presented with a plea deal or probation option, a person

385. 573 U.S. 373, 386 (2014).

386. 569 U.S. 1, 5-6 (2013).

387. Courts have already validated a long list of probation conditions, premised on the conclusion that probationers have a lesser expectation of privacy. Weisburd, *supra* note 184, at 1323-34. Probationers also do not enjoy a categorical right to counsel at probation revocation hearings. See Gagnon v. Scarpelli, 411 U.S. 778, 789-90 (1973) (declining to categorically require counsel at parole revocation hearings, but holding that the right to counsel may attach on a case-by-case basis); Burns v. United States, 287 U.S. 216, 220 (1932) (“Probation is thus conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract.”). State courts have also limited the procedural rights of probationers and parolees by characterizing their release as a privilege, rather than a right. See, e.g., Wray v. State, 472 So. 2d 1119, 1121 (Ala. 1985); People v. Ickler, 877 P.2d 863, 866 (Colo. 1994); Haiflich v. State, 285 So. 2d 57, 58 (Fla. Dist. Ct. App. 1973); State v. Edelblute, 424 P.2d 739, 745 (Idaho 1967); Johnson v. State, 659 N.E.2d 194, 198-99 (Ind. Ct. App. 1995); State v. Billings, 39 P.3d 682, 685 (Kan. Ct. App. 2002); State v. Malone, 403 So. 2d 1234, 1238 (La. 1981); Wink v. State, 563 A.2d 414, 420 (Md. 1989); Smith v. State, 580 So. 2d 1221, 1225-26 (Miss. 1991); State v. Brantley, 353 S.W.2d 793, 796 (Mo. 1962); State v. Mendoza, 579 P.2d 1255, 1257 (N.M. 1978).

388. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013).

accused of a crime might experience government coercion akin to that facing a person seeking a zoning variance. It would have to examine the germaneness and the proportionality of the requirement the government wants to impose. It would have to consider whether the demands of the prosecutor's office or criminal court judge are comparably "extortionate" to the demands of the zoning board.³⁸⁹ Maybe the Court would ultimately conclude that the level of coercion is smaller in the criminal court context than in the land use context, but its comparison would have to be explicit – perhaps even explained. All cards would have to be on the table. And reversion to important policy goals served by the criminal legal system would not be sufficient. Invoking a memorable phrase from the Sixth Circuit, "The guaranties of protection afforded by the Constitution are most vital where the temptations to abandon them in favor of attractive policy goals are most seductive."³⁹⁰

Coercion is far from a uniform or monolithic concept; behavior that counts as coercive in one setting might not amount to coercion in another.³⁹¹ As observed by Philip Hamburger, "[O]ne needs to recognize a complex spectrum of economic, personal, and other pressures to accept conditions, and an equally complex range of personal circumstances and psychology in which different persons feel the same pressures differently."³⁹² The point here is that the Court's willingness to engage in a detailed examination of coercion in the speech, exactions, or conditional federal spending contexts but steadfast refusal to do so in the criminal procedure context is both indefensible and ironic, in light of the longstanding refrain that criminal law (and procedure) systems require exceptional attention to the government-rightsholder relationship.³⁹³ This claim is premised on the idea that, due to the distinctive nature of criminal punishments, more – not less – should be required of the government when using this branch

389. *Id.* at 607.

390. *Lovvern v. City of Chattanooga*, 846 F.2d 1539, 1549 (6th Cir. 1988).

391. See *Bowers*, *supra* note 256, at 1090 ("The point is not that the Court needs to be consistent across constitutional contexts – only that the Court sometimes considers itself competent to *know coercion when it sees it.*").

392. HAMBURGER, *supra* note 15, at 192.

393. Alice Ristroph has divided this "exceptionalism" claim into three parts that are conceptually linked: burdens exceptionalism (criminal punishments are categorically distinct from civil consequences), subject-matter exceptionalism (behavior that is the subject of criminal regulation is categorically distinct from behaviors than run afoul of other regulatory schemes), and operational exceptionalism (criminal courts must and do engage in statutory interpretation with greater precision, and they take seriously their obligation to place limits on enforcement discretion). Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, 2021 CRIM. L. & PHIL. 5, 5-6 (2021).

of the legal system to regulate behavior.³⁹⁴ The incorporation cases make the argument even more forcefully: these rights are fundamental prerequisites to an ordered system of justice.³⁹⁵ Surely “the legal question as to when a condition comes with *constitutionally meaningful pressure*”³⁹⁶ is just as important, if not more so, in the criminal procedure realm as in these other contexts. To quote Guy-Uriel Charles, “whether there are any constitutional limits to the extent of the renegotiations” of constitutional promises that are embedded in the Fourth, Fifth, and Sixth Amendments is a question the Court must answer, rather than dodge.³⁹⁷ And yet in criminal cases, the Court seems instead to cling to sentiments such as the following, drawn from Justice Scalia’s dissenting opinion in *Mitchell v. United States*: “Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure.”³⁹⁸ Given this sentiment, one feels compelled to ask how our hardy forebears would have regarded permit conditions on beach house construction projects.³⁹⁹

Lastly, the unconstitutional conditions framework requires courts to assess candidly the weight of the individual’s interest in his or her constitutional rights.⁴⁰⁰ As we discussed in the prior section of this Article, the individual seeking protection from criminal sanction would seem to have an extraordinarily

394. See Levin, *supra* note 342, at 1392. Levin warns that this claim has been used to justify fairly thin or shoddy procedures in the civil regulatory system, despite the significant harms that such a system can inflict. See *id.* at 1433.

395. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).

396. HAMBURGER, *supra* note 15, at 192 (emphasis added) (referencing Mitchell Berman, who argues that it is nonsensical to create a “sterile” binary between freedom and compulsion when it comes to assessing the relationship between the government and the governed).

397. Charles, *supra* note 189, at 492. The Court has acknowledged the limits of permissible coercion in the criminal context just once in recent memory, when assessing the ability of the state to impose criminal penalties for a refusal to submit to a blood draw following a DUI arrest. *Birchfield v. North Dakota*, 579 U.S. 438, 477 (2016). But even the declaration that “[t]here must be a limit,” was not buttressed by sustained analysis. *Birchfield*, 579 U.S. at 441.

398. *Mitchell v. United States*, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting) (addressing the validity of a sentencing judge drawing an adverse inference from the defendant’s silence during the sentencing hearing).

399. See Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENV’T L.J. 247, 257 (2015) (“The most plausible original meaning of ‘taking’ was the narrow category of direct physical appropriation of property by the government.”); see also Nicole Stelle Garnett, *Justice Scalia’s Rule of Law and Law of Takings*, 41 VT. L. REV. 717, 728 (2017) (noting “dominant,” though not unchallenged, “academic view” that the Takings Clause was originally understood to apply only to physical appropriation or invasions of private property, not regulation of property).

400. See Levine, Nash & Schapiro, *supra* note 32, at 282–83.

strong interest in retaining the citadel of privileges and rights that the Constitution provides. These are, to borrow from Justice Jackson, “really significant things.”⁴⁰¹ Unlike privileges or rights granted in the property or employment context, the Constitution’s offerings to a person accused of crime lack easy quantification, but that is because they are priceless. One might even surmise that for generally indigent groups, such as criminal court litigants or welfare recipients, a constitutional right often means the most—because it is all they have.⁴⁰² In rejecting a challenge on unconstitutional conditions grounds, the Supreme Court would have to address, explicitly, why the rights of the accused are worth less to them than the rights of property owners are to them, or why the burden imposed on equally important rights is more justified in the criminal procedure context than in the employment context.⁴⁰³ The Court’s existing criminal procedure opinions evade this question entirely, and thus fail to meet the burden of explaining criminal procedure exceptionalism in this area.

We believe that those accused of or charged with crimes are at least as deserving of the doctrine’s protections, if not more so, as the civil plaintiffs who currently hold favored status. Consider that most actors who enjoy protections from the unconstitutional conditions doctrine are transactionally sophisticated—state governments, White House employees, and many property owners surely fit this description—or are at least familiar with the transaction that leads to the invocation of the doctrine. For example, a government employee likely understands that she enters into some agreement about the terms and conditions of her employment when she joins the government’s payroll; the property owner who applies for a permit to build a beach house understands that the zoning board has authority to raise concerns about the size and impact on surrounding properties. In contrast, at least some people in the criminal legal system are likely to be less sophisticated, and almost surely less sophisticated about the kinds of transactions they are likely to confront in that system,⁴⁰⁴ and this deficit is not

401. Transcript of Oral Argument, *supra* note 2, at 61 (statement of Jackson, J.).

402. See Sullivan, *supra* note 22, at 1498 (“[T]he poor may have nothing to trade but their liberties.”).

403. In applying the unconstitutional conditions doctrine, the Court does draw on precedents utilizing the doctrine in a variety of substantive areas. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606–07 (2013) (analyzing the application of the unconstitutional conditions doctrine in a takings case by relying on unconstitutional conditions precedents across a wide range of doctrinal areas). This kind of cross-doctrinal comparison might well support the unconstitutional conditions claims of a criminal defendant if the Court would apply the unconstitutional conditions doctrine in the criminal procedure context.

404. We say “some” rather than “all” because certain people have been known to develop a familiarity with the criminal legal system over time, after being subject to multiple prosecutions. Murat C. Mungan, *Repeat Offenders: If They Learn, We Punish Them More Severely*, 30 INT’L

cured by the Sixth Amendment’s promise of representation, for the reasons discussed in Section IV.A.

In previous work,⁴⁰⁵ we have urged state courts to adopt their own state constitutional doctrines of unconstitutional conditions. Even if the U.S. Supreme Court refuses to acknowledge the application of the doctrine in the area of criminal procedure, we hope state courts will develop their own robust doctrines of unconstitutional conditions and apply them to criminal procedure issues. Here, as elsewhere, state courts might take the lead in demonstrating the feasibility and importance of this approach. Given the primary role of state courts in adjudicating criminal cases, widespread invocation of state unconstitutional conditions doctrines in state criminal cases would go a long way toward offering appropriate protection to criminal defendants in the United States, thus vindicating the rights of those most vulnerable – even if the U.S. Supreme Court continues to ignore their plight.

CONCLUSION

By applying the shield of the unconstitutional conditions doctrine to protect property rights and other forms of wealth but denying it to those facing criminal charges, the Supreme Court has abdicated its responsibility to protect both large portions of the Constitution and large portions of the population from the coercive exercise of governmental power. If it is the responsibility of the courts “to breathe the breath of life into constitutional rights . . . in the very face of contravening legislation,”⁴⁰⁶ the Court has failed in this regard when it comes to some of our nation’s most vulnerable residents. In refusing even to acknowledge the unconstitutional conditions issues presented in the criminal procedure context, the Court has ducked the profoundly important question of why certain segments of society deserve protection from government coercion through tradeoffs and others do not. Not “ask[ing] the [unconstitutional conditions] question”⁴⁰⁷ in its criminal procedure cases has led the Court to render the

REV. L. & ECON. 173, 173 (2010) (observing that, by going through the legal system multiple times, “repeat offenders may very well learn about the mechanisms employed by the law enforcers in detecting offenders”).

405. See Levine, Nash & Schapiro, *supra* note 32, at 286-87.

406. *People v. Younger*, 42 N.W.2d 120, 125 (Mich. 1950); see also *Koontz*, 570 U.S. at 604 (describing the Supreme Court’s duty to vindicate constitutional rights).

407. Transcript of Oral Argument, *supra* note 2, at 61 (statement of Jackson, J.).

Fourth, Fifth and Sixth Amendment rights considerably more porous, and thus weaker, than the rights protected by other amendments.⁴⁰⁸

This is far from a settled question, as Justice Jackson's comment reveals. The availability of the unconstitutional conditions doctrine could have an impact on the development of doctrine in other areas where government largess is selectively distributed. Consider, for example, warrantless government searches of passengers riding mass transit. For decades, travelers have grown quite accustomed to searches of their person and baggage before boarding airplanes. But in recent years governments have extended this practice to people using local transit options such as buses and subways. If riding public transit is regarded as a privilege rather than a right, and if searches of one's body and backpack are predicated only on implied passenger consent⁴⁰⁹—implied simply from the decision to ride rather than walk—the unconstitutional conditions doctrine could play a role in determining the validity of such searches.⁴¹⁰

We should also take a hard look at recent programs that require people accused of crime to provide a DNA sample to receive a dismissal of charges or a favorable plea deal. The most notorious of these programs, currently run by the District Attorney of Orange County, California, has been dubbed “spit and

408. In her concurrence in *Mallory*, Justice Jackson emphasized the similarity between criminal procedure doctrine and other doctrinal areas in which the Court does invoke the unconstitutional conditions doctrine:

In other areas of the law, we permit States to ask defendants to waive individual rights and safeguards. See, e.g., *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (allowing plea bargains to waive a defendant's trial rights and the right against self-incrimination); *Barker v. Wingo*, 407 U.S. 514, 529, 536, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (waiver of speedy trial rights). Moreover, when defendants do so, we respect that waiver decision and hold them to that choice, even though the government could not have otherwise bypassed the rules and procedures those rights protect.

Mallory v. Norfolk S. Ry., 600 U.S. 122, 149 (2023) (Jackson, J., concurring).

409. In 2006, the Second Circuit upheld a New York City Police Department program to search bags carried by passengers on the subway system. *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006). The court treated consent only as playing a role in establishing the reasonableness of the police policy. *Id.* at 269, 273. Later that year, the same court upheld warrantless searches of cars boarding a ferry. *Cassidy v. Chertoff*, 471 F.3d 67, 70 (2d Cir. 2006). This time, the court indicated that the plaintiffs' consent to search directly weighed in favor of the constitutionality of the searches at issue, but the opinion “does not address the constitutionality of any repercussions that might be visited upon a person who withholds consent.” 471 F.3d at 77 n.3.

410. Courts have hedged on whether it is consent or some other Fourth Amendment exception that justifies the search. See, e.g., *United States v. Davis*, 482 F.2d 893, 910-12 (9th Cir. 1973) (upholding an airport screening search as reasonable because it is limited in scope and duration and because those who choose not to fly are exempted). The court also said that a person who chooses to fly is “granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment.” *Id.* at 913.

acquit.”⁴¹¹ DNA tradeoff programs extend the coercive bargains that we have long seen in the plea bargaining context, as they require a person who wants a deal to yield not just Fifth and Sixth Amendment rights but Fourth Amendment privacy rights as well. Is this not a form of “dragooning,” leaving people with “no real option but to acquiesce”?⁴¹² What is more, at least in Orange County this tradeoff is being required of people who are charged with very minor crimes, not of those charged with serious offenses. Some interview subjects even assert that the Orange County District Attorney is filing these cases just to obtain DNA samples.⁴¹³ Surely our Fourth Amendment deserves better.

In between searches and pleas we can observe thorny pretrial issues too. Over the past two years, for example, certain trial courts have required people being detained pretrial to accept a COVID vaccine to be released on bail or on their own recognizance pending trial.⁴¹⁴ We have considered the intersection of COVID prevention practices with the unconstitutional conditions doctrine in another article.⁴¹⁵ Here, we mention this practice for its particular relevance in the world of criminal procedure. The Fourth Amendment insists that pretrial release conditions must be designed to help achieve one of two goals: to assure the person’s continued appearance at court hearings or to protect the community from further crime. Pretrial release contracts conventionally include terms like “stay away from the victim” or “check in with this administrator once a week.” The COVID vaccine is certainly connected to community safety, but to a different sort of community safety than the criminal courts typically safeguard. Requiring a person who has been charged with a crime to submit to a medical injection as a condition of being released back into the community, when all other concerns about flight and future criminality have already been addressed (and when other types of citizens can get exemptions for religious or health reasons), could be a deeply problematic move by the government. Forced vaccination arguably amounts to a violation of privacy and bodily integrity—perhaps even greater than that required for a blood draw.⁴¹⁶ And justifying this heavy-handed practice under the guise of “consent” does not solve the problem. Consent in

411. Andrea Roth, *Spit and Acquit: Prosecutors as Surveillance Engineers*, 107 CALIF. L. REV. 405, 408 (2019).

412. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 582 (2012).

413. Roth, *supra* note 411, at 442-43, 442-43 nn.214-18.

414. See, e.g., Madison Alder, *N.Y. Federal Judge Orders Defendant Vaccinated as Bail Condition*, BLOOMBERG L. (Aug. 18, 2021, 6:24 PM EDT), <https://news.bloomberglaw.com/us-law-week/n-y-federal-judge-orders-defendant-vaccinated-as-bail-condition> [<https://perma.cc/T5L4-3UET>].

415. Levine, Nash & Schapiro, *supra* note 32, at 267-69.

416. See, e.g., *Birchfield v. North Dakota*, 579 U.S. 438, 476-477 (2016); *Missouri v. McNeely*, 569 U.S. 141, 165 (2013).

these circumstances is no less problematic—no less coercive—than the sort of consent that has been used to justify probation and parole terms for decades, premised on the idea that these populations are cloaked in a lesser expectation of privacy than adults whose freedom is fully intact.⁴¹⁷

Whether the Court will address these questions remains to be seen. Strong headwinds generated by decades of jurisprudential friction and the Court's seemingly unshakeable commitment to criminal procedure and criminal defendant exceptionalism caution us to be realists. But we urge the Court to embrace the unconstitutional conditions doctrine as a valuable tool of constitutional analysis in its criminal procedure docket. If it were to do so, the Court would begin the process of restoring the Fourth, Fifth, and Sixth Amendments to their rightful place in the Constitution and would honor its stated commitment to equal justice under law.

417. Weisburd, *supra* note 184, at 1354 (“[T]he influence of coercion . . . makes consent an insufficient safeguard against the deprivation of rights.”).