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## New Problems for Subsidized Speech

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## NEW PROBLEMS FOR SUBSIDIZED SPEECH

JOSEPH BLOCHER\*

### ABSTRACT

*The constitutionality of conditional offers from the government is a transsubstantive issue with broad and growing practical implications, but it has always been a particular problem for free speech. Recent developments suggest at least three new approaches to the problem, but no easy solutions to it. The first approach would permit conditions that define the limits of the government spending program, while forbidding conditions that leverage funding so as to regulate speech outside the contours of the program. This is an appealing distinction, but runs into some of the same challenges as public forum analysis. The second approach would treat conditional offers to purchase speech like other proposed economic transactions, invalidating them when they are coercive. This principle helps explain many recent cases, including the healthcare decision. And yet the Court's willingness to find coercion in cases involving conditional offers from the government is hard to square with its approach to campaign finance law and its apparent faith in markets more generally. The third and final approach would treat limits on conditional offers not as individual rights, but as structural limitations on the scope of government. This approach, too, points in the direction of possible solutions—and also further problems—for analyzing the constitutionality of subsidized speech.*

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\* Professor, Duke Law School. Many thanks to Chris Griffin, John Inazu, Greg Magarian, Jeff Powell, Rocky Rhodes, and Neil Richards for valuable criticism; to Neal Devins and Tim Zick for inviting me to participate in this Symposium; and to the editors of the *William & Mary Law Review* for their hard work in preparing the Article for publication.

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## INTRODUCTION

One of the most intractable problems in constitutional law is defining what kinds of conditional offers the government can make to individuals, organizations, and states.<sup>1</sup> This is a transsubstantive issue,<sup>2</sup> arising in cases involving affirmative government powers under the Spending Clause,<sup>3</sup> individual rights guaranteed by the Free Exercise Clause,<sup>4</sup> and state actions like granting corporate charters,<sup>5</sup> but it has always been a particular challenge for free speech.<sup>6</sup> As the realm of government-subsidized activity expands, resolution of the conditional offer problem (also known by other aliases, including the “doctrine” of unconstitutional conditions<sup>7</sup>) increasingly appears to be one of the most important issues in

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1. *Rust v. Sullivan*, 500 U.S. 173, 205 (1991) (Blackmun, J., dissenting) (describing state-supported speech as an “intractable problem”); *see also* Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1197 (explaining that “[a]s with many First Amendment issues, the conflict between these two positions”—that funding decisions are either exempt from constitutional scrutiny or subject to the same tests as other restrictions—“appears to be irresolvable, making it impossible for the Court to develop a coherent body of doctrine”); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 544 (1995) (“Determining the constitutionality of government subsidization of expression is one of the most frustrating tasks facing scholars of the First Amendment.”).

2. Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10-11 (1988) (describing the doctrine of unconstitutional conditions as “roam[ing] about constitutional law like Banquo’s ghost, invoked in some cases, but not in others”).

3. *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987).

4. *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding that a state could not deny unemployment benefits to a person who refused, for religious reasons, to work on Saturday).

5. *Doyle v. Cont’l Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) (“Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.”).

6. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 491-92 (2012) (“Although [unconstitutional conditions] have long been treated as merely a peripheral danger, they have become of central importance, for they have become a means of evading much of the Constitution, including the Bill of Rights.... The most sobering examples of the evasion are speech conditions.”); Heyman, *supra* note 1, at 1121 (“[S]tate-supported speech poses a distinctive problem—a problem that is generated by the modern affirmative state, and must be understood in its own terms.”).

7. Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013) (suggesting that the “conditional offer problem” or “conditional offer puzzle” is a better label than “unconstitutional conditions doctrine”).

constitutional law, as well as one of the most difficult.<sup>8</sup> And despite diligent efforts, a satisfactory answer to the problem has proven elusive.<sup>9</sup> Some wise and battle-weary voices describe it as simply “too hard.”<sup>10</sup>

This short Article offers no solution. Rather, it uses one seemingly narrow<sup>11</sup> and somewhat underappreciated<sup>12</sup> First Amendment case to suggest three new(ish) ways to think about the conditional offer problem. In *Agency for International Development v. Alliance for Open Society International, Inc. (AOSI)*, the Supreme Court struck down a federal law that required private organizations receiving government money for the fight against HIV and AIDS to explicitly adopt a position against prostitution.<sup>13</sup> On one level, this is a surprising result. As Chief Justice Roberts noted in the majority opinion: “As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This

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8. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 346 n.1, 350 (2008) (predicting that to the degree “the Roberts Court has a conservative agenda,” it will pursue that agenda “through doctrines that skew the interpretation and limit the enforceability of conditional spending statutes”); Berman, *supra* note 7, at 1284 (arguing that, of the holdings in *National Federation of Independent Business v. Sebelius*, the holding regarding conditional spending “is apt to have the most far-reaching consequences beyond health care”).

This Article does not address in detail the related problems that arise when the government leverages its relationships with private actors—those “that control the infrastructure of free expression”—in order to regulate the expression of third parties. See, e.g., Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297 (2014).

9. See, e.g., Bagenstos, *supra* note 8, at 373-74.

10. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995) (calling the problem “irredeemably intractable”).

11. *The Supreme Court, 2012 Term—Leading Cases*, 127 HARV. L. REV. 218, 227 (2013) [hereinafter *Leading Cases*] (concluding that the Court in *Agency for International Development v. Alliance for Open Society International, Inc.* “hewed closely to the facts” and took a “minimalist approach”).

12. This is not to say unnoticed. See, e.g., Charles W. “Rocky” Rhodes, *Speech, Subsidies, and Traditions: AID v. AOSI and the First Amendment*, 2013 CATO SUP. CT. REV. 363, 364 (“applaud[ing] the Court’s holding, but noting that “its inside/outside program distinction, though appropriate in the presented context, can’t govern every funding condition”); Alexander P. Wentworth-Ping, Note, *Funding Conditions and Free Speech for HIV/AIDS NGOs: He Who Pays the Piper Cannot Always Call the Tune*, 81 FORDHAM L. REV. 1097 (2012) (analyzing the Second Circuit opinion and advocating an approach similar to that taken by the dissent); *Leading Cases*, *supra* note 11, at 218; Recent Case, 125 HARV. L. REV. 1506, 1509-11 (2012) (analyzing and criticizing the Second Circuit’s opinion).

13. 133 S. Ct. 2321 (2013).

remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights."<sup>14</sup> And yet the Court concluded that this general principle was inapplicable, that the condition impermissibly compelled the organizations to speak, and therefore the condition was unconstitutional.<sup>15</sup>

The opinions in *AOSI* suggest at least three approaches to the conditional offer problem. The first focuses on the distinction at the unstable core of the opinion: the line between "conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."<sup>16</sup> The former are permissible; the latter are suspect.<sup>17</sup> This is an appealing distinction, for it seems to permit the government to "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee,"<sup>18</sup> without "result[ing] in an unconstitutional burden on First Amendment rights."<sup>19</sup> Some have lauded *AOSI* on somewhat similar grounds.<sup>20</sup>

But defining the scope of the program is not a straightforward matter of statutory interpretation, in part because there is no vantage point from which to evaluate whether a particular speech condition is "inside" or "outside" of a government program.<sup>21</sup> Indeed, it is not clear how the line can be drawn, nor even why it should matter. Perhaps this is why the majority explicitly ducked the line-

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14. *Id.* at 2328.

15. *Id.* at 2332.

16. *Id.* at 2328.

17. *Id.* at 2328-29 (comparing *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), which upheld a requirement that nonprofit organizations not engage in lobbying as a condition for tax-exempt status, with *FCC v. League of Women Voters*, 468 U.S. 364 (1984), which invalidated a statute conditioning all federal funding for noncommercial broadcast television on a prohibition of all editorializing, even if the funding for editorializing came from private sources).

18. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Without more, the "legitimate steps" language is circular.

19. *AOSI*, 133 S. Ct. at 2328. So stated, this is either a tautology or another trip around the circle.

20. Rhodes, *supra* note 12, at 363 ("May the federal government, as a condition for a private entity to receive funds to implement a government program, require the recipient to pledge ideological support for government policies? As the Court held, of course not.").

21. *AOSI*, 133 S. Ct. at 2333 (Scalia, J., dissenting).

drawing task in *AOSI*,<sup>22</sup> just as it has in other conceptually similar cases.<sup>23</sup> Like the “relatedness” test in Spending Clause cases,<sup>24</sup> the program-definition principle essentially requires courts to establish the boundaries of appropriate constitutional governance. In that respect, it bears a striking resemblance to public forum doctrine,<sup>25</sup> and requires courts and scholars to distinguish between what Robert Post calls domains of “management” and “governance.”<sup>26</sup>

A second possibility is that *AOSI* is best understood as a case about the permissibility of a market transaction: the government’s conditional offer to purchase speech.<sup>27</sup> After all, the case does not involve a traditional speech regulation, but an economic relationship.<sup>28</sup> As such, the decision may hold important clues not simply about particular doctrinal categories, but also about the Court’s level of faith in markets and bargained-for exchanges. Considering the Roberts Court’s apparent libertarian bona fides,<sup>29</sup> one might expect the Justices to let the sophisticated and well-informed parties negotiate amongst themselves. But in *AOSI* and a few other related

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22. *Id.* at 2328, 2330 (majority opinion) (noting that “[t]he line is hardly clear,” but that wherever it might be drawn, “we are confident that that the Policy Requirement falls on the unconstitutional side of it”); *id.* at 2330 (concluding that the line is “not always self-evident”).

23. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2602 (2013) (“We need not decide at precisely what point a land-use permitting charge denominated by the government as a ‘tax’ becomes ‘so arbitrary ... that it was not the exertion of taxation but a confiscation of property.’” (quoting *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1910))); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (“[W]herever [the coercion] line may be, this statute is surely beyond it.”).

24. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (holding, inter alia, that conditions must be sufficiently related to the purpose of the federal grant).

25. *See infra* Part II.A.

26. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1717 (1987).

27. *AOSI*, 133 S. Ct. at 2331-32.

28. *Id.*

29. *See, e.g.*, Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY, Winter 2012, at 46, 47, available at <http://perma.cc/Y7B9-QJ3U> (“What’s missing from the criticism is a picture of what these cases add up to: an identity for the Roberts Court as the judicial voice of the idea that nearly everything works best on market logic, that economic models of behavior capture most of what matters, and political, civic, and moral distinctions mostly amount to obscurantism and special pleading.”); Ilya Shapiro, *The Supreme Court’s Libertarian Moment?*, HUFFINGTON POST (July 2, 2013, 5:20 PM), [http://www.huffingtonpost.com/ilya-shapiro/the-supreme-courts-libert\\_b\\_3536534.html](http://www.huffingtonpost.com/ilya-shapiro/the-supreme-courts-libert_b_3536534.html) [<http://perma.cc/H394-MS6F>] (“Not in every case, not always with one voice, and not without fits and starts, but as a whole the justices are moving in a libertarian direction.”).

cases—most notably, *National Federation of Independent Business (NFIB) v. Sebelius*—the Court has used the Constitution itself to regulate such exchanges.<sup>30</sup>

Why has the Court constitutionally prohibited offers and exchanges in these cases, while constitutionally protecting other forms of exchange against government regulation? The answer apparently lies in the Justices' views on coercion, choice, and the realities of economic relationships. These are issues that cut across traditional doctrinal categories, forcing reconsideration of many existing constitutional rules. To take just one example: if the government's offer to AOSI was "coercive," then the same can surely be said of the (implicitly conditional) offers that major donors make to political candidates. And that, in turn, suggests a much broader scope for the corruption principle given short shrift in the Court's recent campaign finance decisions.<sup>31</sup>

One particularly interesting wrinkle in this regard is the Court's suggestion that coerced speech is worse than coerced silence. This might sound backwards, since the First Amendment is often thought primarily to target "negative" obstacles such as prior restraints.<sup>32</sup> But *AOSI* was decided on compelled speech grounds, distinguishing it from cases like *Rust v. Sullivan* in which a funding condition simply required the would-be private speaker to remain silent.<sup>33</sup> This suggests that the Court might be particularly interested in the unique constitutional harms imposed by compulsion, as opposed to constraint.<sup>34</sup> Much of the opposition to the Affordable Care Act's "affirmative" mandate seemed to reflect this view.<sup>35</sup>

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30. 132 S. Ct. 2566 (2012).

31. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (holding that campaign finance regulation may only target quid pro quo corruption, meaning "a direct exchange of an official act for money"); *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.").

32. *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (concluding that prevention of prior restraints was a primary purpose of the First Amendment).

33. 500 U.S. 173, 178 (1991) (quoting and upholding 42 U.S.C. § 300a-6 (2012), which provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning") (alteration in original).

34. See Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 775-80 (2012).

35. As a doctrinal matter, the challenge to the individual mandate manifested itself in the Commerce Clause. *NFIB*, 132 S. Ct. at 2591 (Roberts, C.J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained



The third and final puzzle this Article explores is what *AOSI* says about the scope and power of government. On the one hand, the decision strikes down part of a federal law, and in that respect appears to be government limiting.<sup>36</sup> And yet, in the course of reaching its compelled speech holding, the Court implicitly endorses the proposition that recipients have some constitutionally salient entitlement to government funds.<sup>37</sup> This, after all, is the fulcrum that the government used for its inappropriate “leverage.”<sup>38</sup> The Court, therefore, essentially entrenches the size of public spending programs, while taking away one effective method of controlling them.

### I. *AOSI*'S DECEPTIVELY COMPLICATED HOLDING

On first reading, *AOSI* appears to be a relatively straightforward decision. It does not purport to create any new First Amendment rules. It invokes well-known precedents like *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,<sup>39</sup> *Rust v. Sullivan*,<sup>40</sup> and *Legal Services Corp. v. Velazquez*,<sup>41</sup> and does not overrule or even seem to limit any of their holdings. And yet a closer look reveals that the decision is not only complicated on its own terms, but is also usefully representative of deep, pressing, and difficult problems throughout constitutional law.

Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act) as the centerpiece of its strategy to fight the global spread of HIV and AIDS.<sup>42</sup> Recognizing that a comprehensive strategy could make good use of nongovernmental allies, Congress authorized the appropriation of billions of dollars for that purpose.<sup>43</sup> Such funding, however, had two

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under a clause authorizing Congress to ‘regulate Commerce.’”). But, for many people, the real root of opposition seemed to resonate in intuitions about individual rights and autonomy. See, e.g., George F. Will, *Unlawful Health Reform?*, WASH. POST, Nov. 19, 2009, at A27.

36. *AOSI*, 133 S. Ct. 2321, 2332 (2013).

37. *Id.* at 2328.

38. *Id.*

39. 547 U.S. 47 (2006).

40. 500 U.S. 173 (1991).

41. 531 U.S. 533 (2001).

42. Pub. L. No. 108-25, 117 Stat. 711 (codified as amended in scattered sections of 22 U.S.C.).

43. *AOSI*, 133 S. Ct. at 2324.

related conditions: no funds “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking,”<sup>44</sup> and funds cannot be given to an organization “that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>45</sup> The latter condition, known as the Policy Requirement, was the target of the constitutional challenge in *AOSI*.<sup>46</sup>

Alliance for Open Society International, Inc. and the other recipient organizations feared that compliance with the Policy Requirement would jeopardize their relationships with host governments and also make it more difficult to work with prostitutes—an important audience and potential ally, many believe, in the fight against HIV and AIDS.<sup>47</sup> The organizations argued that the Requirement was an unconstitutional condition and that it violated their First Amendment rights by compelling them to speak.<sup>48</sup> After years of battling in the lower courts, and the formation of a circuit split,<sup>49</sup> the case wound its way to the Supreme Court.

Writing for the majority, Chief Justice Roberts recognized that “[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds.”<sup>50</sup> Nonetheless, “[i]n some cases, a funding condition can result in an

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44. *Id.* (quoting 22 U.S.C. § 7631(e) (2012)).

45. *Id.* (quoting 22 U.S.C. § 7631(f)). A later regulatory guideline clarified that funding recipients could work *with* organizations “engage[d] in activities inconsistent with the recipient’s opposition to the practices of prostitution and sex trafficking” so long as the recipients themselves maintained “objective integrity and independence from any affiliated organization.” *Id.* at 2326 (quoting 45 C.F.R. § 89.3 (2012)).

46. *Id.* at 2326.

47. See, e.g., Claire Provost, *Anti-Prostitution Pledge in US Aids Funding “Damaging” HIV Response*, GUARDIAN (July 24, 2012, 10:32 AM), <http://www.theguardian.com/global-development/2012/jul/24/prostitution-us-aids-funding-sex> [<http://perma.cc/495T-UYJE>].

48. Brief for Respondents at 20-26, *AOSI*, 133 S. Ct. 2321 (No. 12-10), 2013 WL 1247770.

49. The D.C. Circuit upheld the Policy Requirement, *DKT Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 477 F.3d 758 (D.C. Cir. 2007), while a divided panel of the Second Circuit struck it down. *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011), *reh’g en banc denied*, 678 F.3d 127 (2d Cir. 2012), *aff’d sub nom.*, *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l Inc.*, 133 S. Ct. 2321 (2013).

50. *AOSI*, 133 S. Ct. at 2328. The Chief Justice made the same point in *NFIB*, and similarly concluded that it, too, did not involve a general matter or a typical case: “In the typical case we look to the States to defend their prerogatives by adopting ‘the simple expedient of not yielding’ to federal blandishments when they do not want to embrace the federal policies as their own.” *NFIB*, 132 S. Ct. 2566, 2603 (2012) (Roberts, C.J.) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

unconstitutional burden on First Amendment rights.”<sup>51</sup> The Policy Requirement created just such an unconstitutional burden, the Court found, because it “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.”<sup>52</sup> On the majority’s reading, the government’s ability to impose funding conditions is coincident with the scope of the program itself: “The relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”<sup>53</sup> The majority conceded that “[t]he line is hardly clear,”<sup>54</sup> but concluded that wherever it might be drawn, “we are confident that the Policy Requirement falls on the unconstitutional side of the line.”<sup>55</sup>

Justice Scalia, joined by Justice Thomas, vigorously dissented, arguing that the scope-of-the-program principle was out of place: “I am at a loss to explain what this central pillar of the Court’s opinion ... has to do with the First Amendment.”<sup>56</sup> He argued that the case could not possibly involve compelled speech because no one was being compelled to do anything—the organizations could simply decline the funds if they did not want to comply with the Policy Requirement.<sup>57</sup> Meanwhile, the government had a perfectly valid interest in attaching conditions to its own funds in order to ensure that they were used only for purposes that the government itself supports.<sup>58</sup> All of this was consistent with Justice Scalia’s longstanding skepticism of unconstitutional conditions claims in subsidized speech cases.<sup>59</sup> But in other ways, the result and the Justices’ positions raise complex and novel questions.

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51. *AOSI*, 133 S. Ct. at 2328.

52. *Id.* at 2332.

53. *Id.* at 2328.

54. *Id.*

55. *Id.* at 2330.

56. *Id.* at 2333 (Scalia, J., dissenting).

57. *Id.* at 2335 (“[T]he Government is not forcing *anyone* to say *anything*.”).

58. *Id.* at 2333.

59. See *infra* note 124 and accompanying text.

## II. WHAT IS A “PROGRAM” AND WHY DOES IT MATTER?

The Court’s decision turned on a posited distinction between speech conditions defining a government spending program and conditions regulating speech “outside” of it.<sup>60</sup> This program definition principle is the “central pillar of the Court’s opinion,”<sup>61</sup> but the Justices explicitly declined to construct it,<sup>62</sup> and barely even gestured at its outlines. One is left wondering whether the pillar really bears any weight. At least two basic questions must be answered. Why does the boundary of the program matter? And how can it be drawn?

### A. *Why Do Programs Matter? The Public Forum Analogy*

The primary issue that divided the Justices in *AOSI* was whether the boundaries of the Leadership Act program are constitutionally salient for First Amendment purposes.<sup>63</sup> The majority said yes because conditions falling outside the program impermissibly seek to “leverage” funding to regulate speech.<sup>64</sup> Justice Scalia was “at a loss” to see why this should be so.<sup>65</sup> Both positions are problematic.

The idea that the constitutionality of a condition depends on whether it applies to activities outside of the relevant program is not unfamiliar to the First Amendment, nor to constitutional law in general.<sup>66</sup> In *Rust v. Sullivan*, for example, the Supreme Court upheld the challenged funding restrictions because they did not “prohibit[] the recipient from engaging in the protected conduct

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60. See *AOSI*, 133 S. Ct. at 2333 (Scalia, J., dissenting).

61. *Id.*

62. See *id.* at 2328 (describing the line as “hardly clear”).

63. For background on the concept of constitutional salience, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) (defining constitutional salience as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not” and discussing its application in the First Amendment context).

64. See *AOSI*, 133 S. Ct. at 2328.

65. *Id.* at 2333 (Scalia, J., dissenting).

66. Cf. Schauer, *supra* note 10, at 994 & n.22 (noting that for some unconstitutional conditions cases, “the slippery but useful idea of relevance was a satisfactory resolution”).

outside the scope of the federally funded program.”<sup>67</sup> And in *Regan v. Taxation with Representation of Washington*, a nonprofit organization argued that federal law unconstitutionally conditioned the organization’s ability to receive tax-deductible contributions on its agreement not to engage in lobbying activities.<sup>68</sup> The Court rejected the claim in part because there was no evidence that the IRS imposed “stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying.”<sup>69</sup>

A similar principle appears in Spending Clause doctrine, which shares deep structural similarities with subsidized speech jurisprudence. In *South Dakota v. Dole*, the Court held that “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”<sup>70</sup> And in *NFIB*, the Chief Justice concluded that when conditional offers “take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”<sup>71</sup>

The obvious question is why the distinction matters. In cases such as *Dole* and *NFIB* involving challenges to the authority of the federal government, some answers are apparent. Congress may only act pursuant to its enumerated powers, and thus the Court must conduct something like a Necessary and Proper Clause analysis to determine whether a given action is sufficiently related to one of those powers.<sup>72</sup> Moreover, federalism doctrine protects the states

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67. 500 U.S. 173, 197 (1991). Martin Redish and Daryl Kessler describe a similar approach when they argue that “[t]he choice of one speaker over another is constitutional if the government bases its decision on criteria ‘substantially related’ to the predescribed viewpoint-neutral purpose of the subsidy.” Redish & Kessler, *supra* note 1, at 547.

68. 461 U.S. 540 (1983). Likewise, in *National Endowment for the Arts v. Finley*, the Court upheld a funding restriction, though Justice O’Connor noted in doing so that it would be a “different case” if “the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints.” 524 U.S. 569, 587 (1998).

69. *Regan*, 461 U.S. at 544 n.6.

70. 483 U.S. 203, 207-08 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); *see also* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (forbidding the government from demanding surrender of an easement in return for building permit because the condition was “unrelated” to the state’s legitimate interest).

71. *NFIB*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.).

72. *Cf. McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

from federal coercion, which may be implicated (though not necessarily proven)<sup>73</sup> by threats to terminate an unrelated funding program. Neither of those background principles can quite explain *AOSI*, however. The Court decided it as a First Amendment case, which is precisely why Justice Scalia was baffled.<sup>74</sup>

Another possibility is that the inside-outside principle is simply a specific instantiation of the general principle—familiar from the tiers of scrutiny—that government should not regulate more speech than is necessary to achieve its interest.<sup>75</sup> There is much to like about this explanation, but it does not resolve the central question dividing the majority and dissent, which is whether any speech has been regulated at all. From Justice Scalia’s perspective, questions of overbreadth and means-end scrutiny are irrelevant.

Perhaps the Justices simply went down the wrong doctrinal path. Though unconstitutional conditions and compelled speech might both be relevant to *AOSI*, the program-definition principle actually bears a striking resemblance—somewhat for better and largely for worse—to standard public forum analysis. This is both a weakness and a strength, for it offers a normative justification for the program-definition principle, while raising a whole new set of similarly intractable problems.

Though things are quite a bit more complicated in practice, the simplified hornbook version of public forum analysis is that public forums are “those places which ‘by long tradition or by government fiat have been devoted to assembly and debate.’”<sup>76</sup> They can include

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plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”)

73. Sam Bagenstos argues persuasively that a threat to terminate an independent program “is the *trigger* for conducting a coercion analysis, not the *conclusion* of that analysis.” Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 869 (2013).

74. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc. (AOSI)*, 133 S. Ct. 2321, 2333 (2013) (Scalia, J., dissenting).

75. I am very grateful to Greg Magarian for pushing me on this point.

76. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (“[T]raditional public fora are open for expressive activity regardless of the government’s intent.”); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)); see also *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (“We have held that ‘[t]he government does not create a public forum by ... *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse.’”).

both physical spaces, like parks, and government activities, like the distribution of mail. Within them, most restrictions on speech are subject to strict scrutiny,<sup>77</sup> whereas in a limited public forum, the government has broad power to regulate “in light of the purpose served by the forum,” even if that means drawing lines on the basis of subject matter and speaker identity.<sup>78</sup> Beyond this lies government speech—a relative latecomer on the First Amendment scene, which is not integrated into the public forum analysis framework but operates as a kind of government-empowering absolutist alternative.<sup>79</sup> The stripped-down version of the government speech doctrine suggests that when the government speaks, it can say what it wants,<sup>80</sup> even if that means discriminating on the basis of viewpoint.<sup>81</sup>

This description suggests a deep symmetry with the program-definition principle. The basic goal in either case is to find a boundary between public discourse and speech subject to government control for instrumental purposes.<sup>82</sup> If a speech requirement reaches speech “outside” of a program, it is treated like a regulation in a public forum and is accordingly subject—as the Policy Requirement was—to the usual rules of First Amendment analysis.<sup>83</sup> This

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77. *Widmar v. Vincent*, 454 U.S. 263, 269-70, 276 (1981) (holding that, in public forums, the only acceptable restrictions are those on time, place, and manner, or content-based restrictions that are narrowly drawn to serve a compelling state interest).

78. *Cornelius*, 473 U.S. at 806 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (citing *Perry*, 460 U.S. at 49)); see also Post, *supra* note 26, at 1762 (“The Court has never precisely defined what it means by this ‘reasonableness’ standard, but at a minimum it is clear that it is designed to provide the government the utmost flexibility in managing the nonpublic forum.”).

79. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (upholding the government’s power to deny display of a monument in a public park, on the basis that doing so was government speech rather than regulation of a public forum).

80. The Establishment Clause is generally thought to be the only limit on government speech, though Nelson Tebbe has persuasively suggested others. Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013).

81. See generally Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011).

82. Post, *supra* note 26, at 1798 (“Public forum doctrine rests on the distinction between a public realm, in which social values and ends are constituted, and organizational domains, in which these values are taken as premises and implemented.”).

83. Judge Straub pursued this line of reasoning in his dissent from the Second Circuit panel opinion, albeit reaching the conclusion that no public forum existed. *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 263 (2d Cir. 2011) (Straub, J.,

was the majority's approach. By contrast, if a condition merely defines the boundaries of the program or reaches only speech inside it, then the case will be analyzed as if it involves a limited public forum or government speech, giving the government broad discretion to impose conditions. This was Justice Scalia's approach.

The symmetry between these doctrines is aesthetically pleasing, but not analytically reassuring, for it suggests that the program-definition principle might well face the same struggles and dead ends as public forum analysis. Some of these false starts seem especially likely to infect thinking about conditions on speech "inside" government programs. Consider, for example, *Davis v. Massachusetts*, an ancestor of public forum doctrine, in which the Court compared the government to "the owner of a private house" and concluded that it could therefore freely limit speech occurring on its property.<sup>84</sup> The ghost of *Davis* haunts the subsidized speech cases, appearing for example in *Rust*'s conclusion that the government can "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program" because "[i]n so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."<sup>85</sup> As in *Davis*, the conceptualization here is easy enough to understand: the government can do what it wants with its own property.

And yet despite its appealing clarity, the ownership approach is unsatisfactory. It simply assumes its essential premise, which is that the government can impose whatever conditions it wants so long as its own resources are being used. And indeed in the post-*Davis* line of public forum cases, the Court has rejected the simple version of this property-ownership approach, layering it with a flavor of public trust doctrine<sup>86</sup> and clarifying that the government's

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dissenting) ("Congress did not authorize Leadership Act funds 'in order to create a public forum for [private organizations] to express themselves.'" (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003))), *aff'd*, 133 S. Ct. 2321 (2013).

84. 167 U.S. 43, 46-47 (1897).

85. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

86. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").



ownership of a resource does not include unlimited power to regulate speech occurring within it.<sup>87</sup>

The question, then, is whether a normative justification can be found for the program-definition principle that does not simply rely on the government's ownership of the relevant funds. One possibility lies in the distinction between what Robert Post calls "governance" and "managerial" domains.<sup>88</sup> The difference between the government's power in these domains is stark and fundamental:

In situations of governance the state is bound by the ordinary principles of first amendment jurisprudence, but when exercising managerial authority ordinary first amendment rights are subordinated to the instrumental logic characteristic of organizations, and the state can in large measure control speech on the basis of an organization's need to achieve its institutional ends.<sup>89</sup>

Post connects this framework to the division of resources "within" and "outside" of government organizations,<sup>90</sup> just as the Court does in *AOSI*.<sup>91</sup> But rather than focusing on "the character of the government property at issue,"<sup>92</sup> as the Court did in the discredited *Davis* line,<sup>93</sup> Post advocates a focus on "the nature of the government authority in question."<sup>94</sup>

This provides not only a conceptual approach to the problem—a redefinition of terms—but also a normative foundation for doctrine. The government should, indeed must, have authority to control speech in contexts where government property (whether physical, financial, or otherwise) is properly dedicated to instrumental purposes.<sup>95</sup> But outside those domains, speech conditions may have

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87. See generally Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413 (2011).

88. See generally Post, *supra* note 26.

89. *Id.* at 1775.

90. *Id.* at 1785.

91. *AOSI*, 133 S. Ct. 2321, 2328, 2330 (2013).

92. Post, *supra* note 26, at 1717.

93. *Davis v. Massachusetts*, 167 U.S. 43, 46-47 (1897).

94. Post, *supra* note 26, at 1717.

95. See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001) ("Democratic governments must speak, for democracy is a two-way affair.... Speech is but one means that government must have at its disposal to conduct its affairs and to accomplish its ends.").

the effect of regulating public discourse, and thus are appropriately subject to the usual First Amendment rules, including—as in *AOSI*—the prohibition on compelled speech.

### *B. How Can Programs Be Defined?*

The previous Section argued that the best way to understand and justify *AOSI*'s program-definition principle is as a search for the difference between governance and management—the same basic inquiry that animates public forum doctrine. But this is a very slippery concept on which to rest a constitutional rule,<sup>96</sup> and it is somewhat troubling that the Court explicitly avoids identifying the line. Perfect clarity and precision are undoubtedly impossible, but in order to be a desirable or even functional legal standard, the difference between these domains must be both conceptually comprehensible and practically identifiable.

One initial question is how it is even possible for a government-imposed condition to be “outside” a government-created program. In *AOSI*, the Court concluded that “[b]y requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.”<sup>97</sup> But this again assumes an essential premise—that professing such a belief is not part of the program. Sometimes an explicit statement of belief is an essential part of the program; indeed, that is precisely what the government argued in *AOSI*.<sup>98</sup> And as the Justices recognized in *Rosenberger*, “we have permitted the government to regulate the content of what is or is not expressed when it is the speaker

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96. Bagenstos, *supra* note 73, at 905 (“[T]he very idea of a separate, independent program, which serves as the analytic fulcrum of Chief Justice Roberts’s opinion [in *NFIB*], is itself extremely problematic.... [H]is opinion provides no reason why pre-ACA Medicaid should *not* be understood as having tied together separate programs.”); Rhodes, *supra* note 12, at 363 (noting as a “valid concern” the “malleability of, and the constitutional source for, the Court’s articulated distinction between conditions ‘inside’ and ‘outside’ the program”); Schauer, *supra* note 10, at 995 (“This approach ... allows the state to evade, more easily than would be preferred, the premises underlying the unconstitutional conditions doctrine simply by redefining the nature of the activity.”).

97. *AOSI*, 133 S. Ct. 2321, 2330.

98. *Id.* at 2333 (Scalia, J., dissenting) (“Elimination of prostitution is an objective of the HIV/AIDS program, and *any* promotion of prostitution—whether made inside or outside the program—*does* harm the program.”).

or when it enlists private entities to convey its own message.”<sup>99</sup> Can a court simply decide that a speech condition is not part of a larger program?

On one level, the answer to the question is a clear—or at least well-entrenched—yes. After all, nearly any act of statutory interpretation involves determining, for example, the boundaries of government action. Why should determining whether the Leadership Act includes the Policy Requirement be any harder than determining whether the honest services fraud statute includes undisclosed self-dealing?<sup>100</sup> But to say that courts can or must draw those lines does not reveal anything about *how* they should go about doing so. Statutory interpretation, after all, applies different canons in different contexts—the honest-services fraud statute was read in light of the rule of lenity,<sup>101</sup> which in turn is justified in terms of fair notice, the restriction of law enforcement discretion, and other values.<sup>102</sup> What are the tools and normative justifications that courts should use when defining the boundaries of a government speech program?

One possibility would be to give deference to the government’s own definition, just as the Court seems to do in cases involving the Spending Clause.<sup>103</sup> After all, the political branches might know better than any court whether a particular condition is inside a government program. Judicial efforts to define the program might interfere significantly with its administration. As the Court put it in a related context, “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”<sup>104</sup> And indeed the Court has occasionally deferred to governmental institutions like schools,

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99. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

100. *Skilling v. United States*, 130 S. Ct. 2896, 2931-33 (2010) (finding that 18 U.S.C. § 1346 covers only bribery and kickback schemes).

101. *Id.* at 2932-34.

102. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345-46.

103. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (requiring only a minimal relationship between an expenditure and the government interest involved); *United States v. Butler*, 297 U.S. 1, 65 (1936) (deferring to congressional judgment as to whether the spending power is being exercised in pursuit of “the general welfare”).

104. *Connick v. Myers*, 461 U.S. 138, 146 (1983) (rejecting First Amendment claims of a government employee fired after distributing a questionnaire to fellow employees).

prisons, or the military when evaluating the constitutionality of speech restrictions.<sup>105</sup>

Despite the conceptual appeal of this approach, it suffers major consequential defects. Primary among these is that it would give the government enormous power to define its own power, particularly given that the scope of the program is likely to be defined broadly, and retroactively, for the purposes of litigation. As the Court recognized in *Legal Services Corp. v. Velazquez*, “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”<sup>106</sup>

If not by deference to the political branches, how should courts go about identifying the boundaries of a spending program? Post is straightforward about the difficulty in public forum cases: “There is no magic talisman to distinguish public from nonpublic forums. As a society, however, we recognize managerial domains by the presence of an instrumental orientation embodied in the exclusion of roles and statuses inconsistent with the attainment of organizational ends.”<sup>107</sup> Focusing on those roles and statuses may at least help orient the analysis, even if it does not provide clear answers. If, as was arguably true in *AOSI*, the fund recipients are oriented to a common goal, much like members of a private organization, then they lie within the program. By contrast, “if a resource is used by individuals occupying widely different roles and statuses, with correspondingly divergent values and expectations, the resource lies in the public realm, and the state’s authority over it is a matter of governance. The resource is a public forum,”<sup>108</sup> and the usual First Amendment rules apply.

Similarly, evaluating a program against a background of tradition and entrenched practice may help identify the program’s boundaries,<sup>109</sup> in much the same fashion as the Court has identified

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105. See Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007); see also Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008) (arguing for deference to certain speech institutions’ internal rules).

106. 531 U.S. 533, 547 (2001).

107. Post, *supra* note 26, at 1834.

108. *Id.* at 1793.

109. See Rhodes, *supra* note 12, at 364 (lauding *AOSI*’s result in part because “no tradition allows the government ... to manipulate a program’s scope to assert control over a traditional

traditional public forums.<sup>110</sup> In *Velazquez*, to take just one example, the Court struck down a condition that prohibited federally funded lawyers representing indigent clients from challenging existing welfare laws.<sup>111</sup> In doing so, the Court concluded that this condition distorted the “usual functioning” of the legal system and interfered with attorneys’ “traditional” representation of their clients.<sup>112</sup>

Of course, none of these approaches offer a clear-cut way to answer the question of whether a particular speech restriction falls within a subsidized speech program. Indeed, there is no vantage point from which to get a clear view of what is inside or outside the program. In drawing that line, the Court is shaping the very boundaries of public discourse.

### III. WHEN DID THE COURT LOSE FAITH IN MARKETS?

Another way to understand *AOSI* is as a case about market transactions and permissible consent to economic offers. This framing makes it easier to evaluate another broad trend in the Court’s current jurisprudence. It is often said that the Roberts Court has advanced a basically libertarian agenda in which bargained-for exchange is freed from legal restrictions.<sup>113</sup> Some of the Court’s most prominent decisions have used the First Amendment as a deregulatory tool,<sup>114</sup> striking down regulations of various kinds—on campaign contributions<sup>115</sup> and the sale of prescription drug information,<sup>116</sup> for example.

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sphere of expression”); *id.* at 386 (advocating a tradition-based approach that “would preclude the government from attempting to use viewpoint-based funding conditions in subsidized venues that have long been open to a variety of viewpoints”).

110. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

111. *Velazquez*, 531 U.S. at 536-37.

112. *Id.* at 543-44.

113. *See supra* note 29.

114. Purdy, *supra* note 29, at 49 (noting that the First Amendment has recently “become a linchpin in the Supreme Court’s anti-regulatory cases”).

115. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014); *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

116. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011).

But in another set of cases—all of them involving situations in which the government itself is a party to the bargain—the Court has forbidden or unwound exchanges. The most prominent example of this is *NFIB*, in which a seven-Justice majority found that the federal government’s conditional offer of Medicaid funding was unconstitutionally coercive.<sup>117</sup> The result has been to impose, through the Constitution, the kind of limits on exchange that the Court has elsewhere used the Constitution to strike down. What accounts for this apparent oddity?

*A. Entitlements and the Persistent Problem of “Coercion”*

In both *AOSI* and *NFIB*, the most straightforward solution to the fund recipients’ complaint seems to be for them to decline the funds and thereby avoid the objectionable condition. Addressing the matter in *NFIB*, Chief Justice Roberts wrote: “The States are separate and independent sovereigns. Sometimes they have to act like it.”<sup>118</sup> Writing for a majority in *AOSI*, the Chief Justice acknowledged that “[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds.”<sup>119</sup> Why does neither case fall within the reach of that seemingly expansive “sometimes” or “general matter”?

The ingredient that apparently makes the difference is coercion. As Kathleen Sullivan observed more than twenty-five years ago, “Directly and through metaphors of duress or penalty, the Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect.”<sup>120</sup> Despite the frequency of its invocation, though, the concept of coercion remains somewhat ephemeral. As Justice Scalia’s dissenting opinion alleged, the majority in *AOSI*

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117. *NFIB*, 132 S. Ct. 2566, 2607 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 2666-67 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

118. *See id.* at 2603 (Roberts, C.J., joined by Breyer and Kagan, JJ.)

119. *AOSI*, 133 S. Ct. 2321, 2328 (2013); *see also NFIB*, 132 S. Ct. at 2630 (“States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress’ terms.”).

120. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428 (1989); *see* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 154 (1996) (“When the state supports speech, it establishes a relationship between itself and private speakers that can sometimes compromise the independence of the latter.”); *see also* *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937) (considering whether a conditional subsidy went beyond “the point at which pressure turns into compulsion”).

“pussyfoots around the lack of coercion,” which he attributed to the fact that “[t]he majority cannot credibly say that this speech condition is coercive, so it does not.”<sup>121</sup> The latter is consistent with his long-held view that as far as the First Amendment is concerned, the government “may allocate ... funding *ad libitum*.”<sup>122</sup>

And yet Justice Scalia agreed with the Court in *NFIB*, which Justice Ginsburg noted was the “*first time ever*” the Court found that a spending condition unconstitutionally coerced the states.<sup>123</sup> As the dissenting Justices put it:

As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States’ choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power.<sup>124</sup>

The Court was not unanimous on this point, however, nor is it even clear what the Justices meant by it.<sup>125</sup> Justice Ginsburg, who would later see coercion in *AOSI*, saw only an irresistibly good deal in *NFIB*: “all that matters, it appears, is whether States can resist the temptation of a given federal grant.”<sup>126</sup>

This Article cannot possibly offer a satisfactory definition of coercion—that task has bedeviled scholars for decades. *AOSI* does, however, suggest new ways to think about it. Specifically, the Court seems to equate coercion with its conclusion that the condition reached speech outside the program. There are at least two possible ways to justify that connection.

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121. *AOSI*, 133 S. Ct. at 2334-35 (Scalia, J., dissenting).

122. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., concurring); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting).

123. *NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part).

124. *Id.* at 2661 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

125. Berman, *supra* note 7, at 1285-86.

126. *NFIB*, 132 S. Ct. at 2640 n.24 (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part) (criticizing the dissent’s position); *see also* *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (holding that a conditional spending program is not coercive “simply by reason of its success in achieving the congressional objective”).

One possibility, the implications of which are explored in somewhat more detail below,<sup>127</sup> is that fund recipients, whether they be states or private organizations, have some entitlement to funds “within” the program, and that it was the threat to take these away that made the offer coercive. This explains why the Court pointed to a USAID document suggesting that organizations that failed to adhere to the Policy Requirement could lose existing awards.<sup>128</sup> Indeed, the Court has long recognized that spending programs create obligations “in the nature of a contractual relationship.”<sup>129</sup> On this reading, the Court’s efforts to prevent coercion are really just efforts to prevent the government from retroactively adding conditions to its existing obligations, just as the *NFIB* Court invoked the rule against “surprising participating States with post-acceptance or ‘retroactive’ conditions.”<sup>130</sup>

As a descriptive matter, the source of these obligations is less clear. The government has no duty to fund such programs, and characterizing them as entitlements—which *AOSI* and *NFIB* implicitly do<sup>131</sup>—requires an account of baselines set by statute, history, prediction, or some other method.<sup>132</sup> Whatever the source of these entitlements, it is unclear why their denial should give rise to First Amendment claims.<sup>133</sup> If the government has entered into a contract—whether with a state, an individual, or an organization like *AOSI*—and then violates the terms of that deal, the legal harm is to the party’s bargained-for expectations, not necessarily (though

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127. See *infra* notes 174-80 and accompanying text.

128. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc. (AOSI)*, 133 S. Ct. 2321, 2330 (2013).

129. *NFIB*, 132 S. Ct. at 2659-60 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting); see also *id.* at 2602 (Roberts, C.J., joined by Breyer and Kagan, JJ.) (employing contract analogy); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”).

130. *NFIB*, 132 S. Ct. at 2606 (Roberts, C.J., joined by Breyer and Kagan, JJ.) (quoting *Pennhurst*, 451 U.S. at 25).

131. See *infra* notes 177-80 and accompanying text.

132. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1351-74 (1984); *id.* at 1353 (defining coercion as “an alteration of the position one would have enjoyed in the normal course of events”).

133. Epstein, *supra* note 2, at 14 (“There are no shortcuts to this form of analysis. In order to understand unconstitutional conditions, it is first necessary to understand the function and limitations of consent, and the bargaining processes by which it comes about.”).



not exclusive of) their individual constitutional rights.<sup>134</sup> Such constitutional claims would seem to have a more natural home in the Due Process Clause than in the First Amendment.

The second reason why the program's boundaries might matter in a subsidized speech case is because when the government places conditions on speech acts outside of a program, it has effectively gone from calling the tune—which is perfectly appropriate—to calling the piper, which is not. The piper has freely consented to play a particular tune, and therefore cannot complain when its speech is “compelled” to that extent. But when the government reaches beyond the boundaries of that agreement, it manages grantees rather than grants.<sup>135</sup> This it cannot do. When the government subsidizes messages, it properly purchases speech, but not speakers.

For this to make sense, though, there must be some reason why the fund recipient is or appears to be coerced into doing things beyond the program's boundaries. One possible explanation is that the size of the program, whether or not it is something to which the recipient is entitled, creates coercion. In their joint dissent in *NFIB*, Justices Scalia, Kennedy, Thomas, and Alito emphasized the amount of money that the states stood to lose (or, at least, not to gain) if they declined the federal government's offer.<sup>136</sup> The Chief Justice seemed to have in mind something similar when he wrote that “[t]he threatened loss of over 10 percent of a State's overall budget ... is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”<sup>137</sup>

A similar rationale could help explain the result in *AOSI*. Like the states in *NFIB*, the organizations subject to the Policy Require-

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134. *Cf. id.* at 11 (“[I]f common law duress were present in these cases, the recipient of the grant would be able to attack the offending condition without resorting to any special doctrine of unconstitutional conditions.”).

135. The Court made the same point inversely in *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (“The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.” (emphasis added)).

136. *NFIB*, 132 S. Ct. 2566, 2662-63 (2012); see also Bagenstos, *supra* note 73, at 867 (“[T]he joint dissent focuses its analysis primarily on the large amount of money at stake, though some of its language also adverts to the entrenched nature of the existing grant program.”); Rhodes, *supra* note 12, at 378 (“The Leadership Act thus cherry-picked the application of a preferred political ideological pledge as the basis to award billions of dollars of funding, funding essential to many of the recipient organizations.”).

137. *NFIB*, 132 S. Ct. at 2605.

ment simply could not afford to say no to the government's offer. Indeed, by some measures they had even less choice. Though states stood to lose 10 percent of their overall budgets if they declined the Medicaid expansion, many organizations involved in the *AOSI* litigation depended on the government for up to two-thirds of their funding.<sup>138</sup>

Whether this makes the offer coercive or overwhelmingly generous is a question beyond the scope of this Article. The focus here is on the implications for freedom, choice, and markets, and those implications are surprisingly broad. Consider, for example, the campaign finance context, in which competition plays a role analogous to coercion. Though the conditions are usually implicit,<sup>139</sup> campaign contributions are, in form, quite similar to the conditional offer in *AOSI*. If the mere size of a spending program is enough to raise concerns that a recipient is beholden to the government, then will voters have the same concerns when a major corporate donor is the contributor and a politician is the recipient? If so, the Court has perhaps been too restrictive in the degree to which it permits the government to regulate campaign speech for the purpose of avoiding the appearance of corruption.<sup>140</sup> The practical and doctrinal stakes are different in *AOSI* and *Citizens United v. FEC*, but the question of the piper's freedom to play its own tune is basically the same.

### *B. Is Coerced Speech Worse than Coerced Silence?*

There is one more wrinkle in the Court's First Amendment analysis that is worth particular attention: the apparent suggestion that coerced speech is somehow worse than coerced silence. This is

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138. Rhodes, *supra* note 12, at 378 (noting that the billions of dollars paid out under the Act were "essential to many of the recipient organizations"). *AOSI* itself is not fully dependent on the government. See Wentworth-Ping, *supra* note 12, at 1131 n.261 (noting that *AOSI* received a grant of nearly \$2.2 million from the Open Society Institute, which is financed by George Soros).

139. An explicit conditional offer might shade into outright quid pro quo corruption, though the lines are hardly clear. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121 (2010) ("Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics, the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster.").

140. See *supra* note 31 and accompanying text.

something of a novel proposition, both because the question is rarely asked and because the answer is surprising.

Most unconstitutional conditions cases involve requirements that a party refrain from speaking. In fact, the Policy Requirement challenged in *AOSI* was apparently the first time Congress had ever imposed an ideological pledge as a condition for funding.<sup>141</sup> The Second Circuit majority found this to be significant, and emphasized as much in its opinion striking down the Policy Requirement.<sup>142</sup> The distinction drew dissents<sup>143</sup> and criticism<sup>144</sup> but reappeared in the Supreme Court's own analysis.

The majority repeatedly described the Policy Requirement as one that "compels" speech,<sup>145</sup> and Justice Scalia's dissent agreed that "[t]he constitutional prohibition at issue here is ... the First Amendment's prohibition against the coercing of speech."<sup>146</sup> The constitutional foundation for this prohibition is long-standing, if somewhat slippery. The Court has repeatedly held that the Amendment "guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."<sup>147</sup> As a normative matter, the prohibition on compelled speech can be justified on

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141. Rhodes, *supra* note 12, at 390; *Leading Cases*, *supra* note 11, at 218 ("In its unconstitutional conditions cases, the Supreme Court has often examined the constitutionality of speech restrictions imposed as a condition of government funding. The Court has had less occasion to consider affirmative speech requirements.").

142. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011), *aff'd sub nom.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013).

143. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 678 F.3d 127, 129-30 (2d Cir. 2012) (Cabranes, J., dissenting from denial of rehearing en banc).

144. *See* Recent Case, *supra* note 12, at 1509-10 (criticizing Second Circuit opinion for relying on this distinction).

145. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. (AOSI)*, 133 S. Ct. 2321, 2332 (2013).

146. *Id.* at 2333 (Scalia, J., dissenting).

147. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) (emphasis added); *see also* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943))).

many different grounds, for example, protecting the autonomy of the coerced speaker,<sup>148</sup> or preserving the integrity of public discourse.<sup>149</sup>

No matter which normative underpinnings of the doctrine are most compelling (so to speak), *AOSI* raises the separate question of whether and why compelled speech is *different*—and, apparently, worse—than coerced silence. The right to speak and the right not to speak are generally treated as “complementary components,”<sup>150</sup> neither one more important than the other. If anything, restraints on speech are probably thought to be a more central First Amendment concern than efforts to require it—hence the special suspicion reserved for prior restraints.<sup>151</sup>

But in *AOSI*, the Court seemed to suggest that the affirmative nature of the speech rule was outcome determinative. The best evidence of this lies in the Court’s focus on whether *AOSI* had adequate alternative outlets for its speech.<sup>152</sup> The attention given to this issue demands explanation, for it is not immediately clear why it should be relevant to a compelled speech analysis. For example, the schoolchildren in *Barnette* prevailed on their First Amendment claim notwithstanding whatever other opportunities they had to not salute the flag.<sup>153</sup>

As in other unconstitutional conditions cases, the government argued in *AOSI* that the recipient organizations were free to express their own viewpoints—even to distance themselves from the viewpoint set out in the Policy Requirement—by working with or through affiliate organizations.<sup>154</sup> But the Court found that setting up

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148. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995) (concluding that compelled speech “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”).

149. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 979 (2009) (“Compelled speech also distorts the marketplace of ideas and democratic decision-making by misrepresenting the views of speakers forced to propound a viewpoint that is not their own.”).

150. *Wooley*, 430 U.S. at 714.

151. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (identifying prior restraints as “the most serious and the least tolerable infringement on First Amendment rights”).

152. *AOSI*, 133 S. Ct. 2321, 2330-31 (2013).

153. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compelling children in public schools to salute the flag and pledge allegiance violates the First Amendment).

154. Brief for Petitioner at 44-49, *AOSI*, 133 S. Ct. 2321 (No. 12-10), 2013 WL 701226. This argument only really became tenable after a later guideline clarified that fund recipients could work *with* organizations “engage[d] in activities inconsistent with the recipient’s

affiliate organizations not bound by the Policy Requirement was no remedy, precisely because fund recipients were obligated to adopt the government's message "as their own."<sup>155</sup> As a result, they had no effective way to distance themselves from the government's message: "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy."<sup>156</sup> It follows that one of the determinative flaws in the Leadership Act was that AOSI could not pursue independent goals "on its own time and dime"<sup>157</sup>—it had to comply with the Policy Requirement at all times, and even when using funds not received from the government.<sup>158</sup>

The lack of adequate alternatives could just as easily have been conceptualized as a *restraint* on speech.<sup>159</sup> Indeed, as a matter of framing, the same thing can be said of nearly any compelled speech case. In *Wooley v. Maynard*, for example, the district court found that the First Amendment was infringed because the parties were prohibited from covering up the words "Live Free or Die" on their license plates,<sup>160</sup> whereas the Supreme Court found a First Amendment violation in the fact that the "statute in effect requires that appellees use their private property as a 'mobile billboard' for the

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opposition to the practices of prostitution and sex trafficking" so long as the recipients themselves maintained "objective integrity and independence from any affiliated organization." *AOSI*, 133 S. Ct. at 2326-27 (quoting 45 C.F.R. § 89.3 (2012)); *see also* *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 n.6 (1983) (upholding restriction in part because organization could still act through affiliated organizations).

155. *AOSI*, 133 S. Ct. at 2330.

156. *Id.* at 2331.

157. *Id.* at 2330.

158. The district court focused on this argument. *See* *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 261-62 (S.D.N.Y. 2006) (finding that the Policy Requirement did not permit "alternate channels" outside the scope of the program), *aff'd*, 651 F.3d 218 (2d. Cir. 2011), *aff'd sub nom.* *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013).

159. I have argued elsewhere that one way to reconcile the apparently contradictory principles that the government can say what it wants, but that it must not discriminate on the basis of viewpoint, is by permitting adequate alternatives for private speakers. Blocher, *supra* note 81, at 755-59.

160. *See* 406 F. Supp. 1381, 1386 (D.N.H. 1976) ("Since we accept plaintiffs' contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated."), *aff'd*, 430 U.S. 705 (1977).

State's ideological message—or suffer a penalty.”<sup>161</sup> These are two sides of the same coin.

Recognizing this symmetry also suggests one way in which compelled speech—at least where adequate alternatives are not available—might indeed be as bad as the *bête noire* of speech regulation: the prior restraint.<sup>162</sup> In both scenarios, when a party is forced to speak or when it has no opportunity to disclaim an imputed message, the harm to both the speaker and the marketplace of ideas is irremediable. Perhaps that is why in *West Virginia State Board of Education v. Barnette*, the foundational case in compelled speech jurisprudence, the Court concluded that “[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”<sup>163</sup> One might equally see *AOSI* as involving compelled speech because disclaimers were unavailable, or as involving restrained speech because disclaimers were forbidden.

The Court floated another possibility, which is that the government's offer would have been permissible if made to organizations that already agreed with the Policy Requirement. The majority suggested as much when it said that the requirement was not designed “to enlist the assistance of those with whom [the government] already agrees,” but rather to oblige “a grant recipient to adopt a particular belief as a condition of funding.”<sup>164</sup> On this view, the government can purchase “existing” speech with which it agrees, but may not pay for its creation. Government funds can therefore be used to reward, but not to incentivize, private speech.

This principle is attractive in some ways, as it would effectively eliminate the possibility of coercion. It would in fact remove recipient choice from the equation entirely, because the government's “offer” would not be made in exchange for any kind of performance. But it is insufficient as a general principle for resolving subsidized speech cases. Permitting only rewards, not offers, would be hard to square with *Rust v. Sullivan*'s (obviously correct) holding that “[t]he

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161. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

162. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (identifying prior restraints as “the most serious and the least tolerable infringement on First Amendment rights”).

163. 319 U.S. 624, 633 (1943).

164. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. (AOSI)*, 133 S. Ct. 2326, 2330 (2013).

Government can, without violating the Constitution, selectively fund a program to *encourage* certain activities it believes to be in the public interest.”<sup>165</sup> Moreover, it would essentially mean treating the world of private discourse as conceptually separate from, and prior to, the government’s involvement. And this is simply not the way the world works. Private organizations, let alone states, shape and organize themselves in response to government funding priorities as well as their own goals.<sup>166</sup> Government spending programs do not simply order from a preexisting menu; they shape and create it.

None of this is meant to minimize the potentially important difference between government efforts to incentivize or compel activity and government efforts to restrain or forbid it. Rights to and not to engage in particular constitutionally salient activities involve distinct philosophical and doctrinal complications.<sup>167</sup> These are likely to become increasingly important as government spending programs and intuitions about freedoms “not to” grow stronger. Just as the individual mandate was thought by many to be problematic on the basis that it compelled individual activity, the Leadership Act’s Policy Requirement was apparently the first time Congress had ever imposed such an ideological pledge as a condition for funding.<sup>168</sup>

#### IV. LIMITING THE GOVERNMENT’S POWER, WHILE PRESERVING ITS REACH

Finally, one might understand *AOSI* as a case about government power full stop. On this view, what is troubling is not the harm to *AOSI*, but rather the aggregate effect of so many conditional offers. Each offer alone may be noncoercive and yet still add up to a problem if the government buys up too much of the public domain.

A power-limiting principle, rather than one operating from the viewpoint of fund recipients, is consistent with approaches to unconstitutional conditions that are keyed to structural concerns

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165. 500 U.S. 173, 193 (1991) (emphasis added).

166. See generally Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) (emphasizing the degree to which law shapes social background).

167. See Blocher, *supra* note 34, at 792-93; Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012).

168. Rhodes, *supra* note 12, at 390.

about the power of government. Though not the current orthodoxy, this is the kind of coercion principle that Philip Hamburger advocates when he argues that an offeree's "consent is irrelevant for conditions that go beyond the government's power."<sup>169</sup> The reason for this is, in part, that "constitutional rights are also structurally the people's legal limits on the government's powers."<sup>170</sup> Richard Epstein has described a similar approach that would focus unconstitutional conditions analysis not on conventional recipient-specific grounds like duress and undue influence, but rather on problems of government monopoly and collective action.<sup>171</sup>

The practical motivation for the power-limiting approach is not hard to see. Twenty years ago, Seth Kreimer's pathbreaking article on allocational sanctions argued that governmental control over benefits was a more powerful form of coercion than traditional "negative" controls,<sup>172</sup> and the decades since have reinforced the point. Consider federal grants to state and local governments. One recent study found that federal grants constituted less than 1 percent of state and local revenues in 1902; by 1952, 10 percent; and by 2006, 30 percent.<sup>173</sup> Unsurprisingly, then, "fiscal and political realities make it difficult for states and local governments to turn down any offers of federal aid."<sup>174</sup>

The same is true, perhaps even more so, for individuals and private organizations. Rocky Rhodes notes that "government agencies have an estimated 200,000 grant agreements and other contracts with approximately 33,000 human-service nonprofit organizations, with government funding providing almost two-thirds of all revenue for these organizations."<sup>175</sup> Rhodes concludes that "[t]he threat to liberty if the government can leverage all of these

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169. Hamburger, *supra* note 6, at 480.

170. *Id.* at 484.

171. Epstein, *supra* note 2, at 8, 14-15.

172. Kreimer, *supra* note 132, at 1295-96.

173. Douglas A. Wick, Note, *Rethinking Conditional Federal Grants and the Independent Constitutional Bar Test*, 83 S. CAL. L. REV. 1359, 1363-64 (2010) (citing JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 258-59 (2d ed. 2007)); *id.* at 1364 ("In just ten years, total federal grant expenditures went from \$285 billion in fiscal year 2000, to \$653 billion in fiscal year 2010." (citing OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES FISCAL YEAR 2011, tbl.12.1. (2010))).

174. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1140 (1997).

175. Rhodes, *supra* note 12, at 376.



subsidies and grants to require entities to pledge allegiance to government policies wouldn't be speculative, but a real abridgement on free expressive rights."<sup>176</sup> The threat, in other words, is not to any one fund recipient, but to public discourse as a whole.

What is fascinating about this reading is that unconstitutional conditions cases point in two directions at once: they limit the government's *power*, but constitutionally entrench its *size*. The latter of these may be surprising. But when upholding an unconstitutional conditions-style claim in a case like *AOSI*, the Court suggests that the recipient of what might seem to be government largesse actually has some kind of constitutional entitlement to those funds. Were it otherwise, the case could be decided on the basis of the Chief Justice's observation that "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds."<sup>177</sup> There would, after all, be no unfair "leverage"<sup>178</sup> if the rest of the policy did not exist—one cannot use a lever without a fulcrum. The Court thus gives a kind of oblique endorsement to the "New Property"<sup>179</sup> approach and turns away from the "bitter with the sweet" approach advocated by the previous Chief Justice.<sup>180</sup>

Even while it affirms, and in some sense constitutionally freezes, the government's reach, the Court's decision also limits the government's authority to control those domains. The government can create a sprawling range of endowments and spending if it wishes. But conditional offer cases like *AOSI* limit the government's ability to control that spending. Indeed, the antileveraging principle the Court describes is a subtle but potentially powerful tool for controlling government power. If the parties' reliance or past relationship with the government effectively limits the government's ability to make new offers, then the Court is effectively using the government's size against it, a kind of constitutional jiu jitsu.

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176. *Id.*

177. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. (AOSI)*, 133 S. Ct. 2321, 2328 (2013).

178. *Id.*

179. See Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 778-79 (1964) (arguing that government largesse should be treated as a form of personal property).

180. *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986) (holding that Puerto Rico's greater power to ban gambling altogether included the lesser power to ban gambling advertising); *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974) (Rehnquist, J., concurring).

The practical implications of this depend not only on doctrine, but also on political realities. The Court gives the government increased incentive to rein itself in by limiting the government's power over its programs.<sup>181</sup> In this way, the true practical impact of a seemingly limited holding—excising the Policy Requirement from the Leadership Act, for example—may be to topple the entire program. The choice the government faces (which, ironically, seems somewhat coercive) is whether to continue the program without the ability to control it as designed. As a practical and political matter, this is the equivalent of removing a gear from the machine. It is stealthy judicial review.

Putting these untenable political choices back into the government's hands suggests another way of characterizing the government-limiting approach to constitutional conditions, which is as an effort to control the government's *political* power. As scholars have long recognized, one danger of government-subsidized speech is that it can dominate public discourse, perhaps even drowning out competing voices.<sup>182</sup> Moreover, some danger exists that by acting through other speakers, the government can distort or even avoid the political process while hiding its influence. By forbidding or changing the terms of conditional offers, the Court can theoretically correct these supposed political failures.

Many areas of constitutional doctrine—including some that seem to be of particular interest to the Roberts Court—are designed to avoid this kind of ventriloquism. One animating rationale behind the Court's anticommandeering jurisprudence, for example, is that it ensures proper political accountability by saving state officials from taking the blame for federal mandates.<sup>183</sup> This rationale emerged in *NFIB*, especially in the Chief Justice's conclusion:

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181. Epstein, *supra* note 2, at 28 (“When the government is told that it cannot bargain with individuals, the empirical question arises whether government will deny them a useful benefit altogether, or grant them the benefit without the obnoxious condition.”).

182. See, e.g., David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 682 (1992) (“[G]overnment-funded speech both creates possibilities for a more democratic and inclusive public debate and threatens to dominate the market and overwhelm individual autonomy with its vast resources.”); Rhodes, *supra* note 12, at 382 (“[G]overnment’s unique access to and control over speech avenues—and its trillions of dollars of financial resources—risk unduly influencing public discourse and distorting the marketplace of ideas.”).

183. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1631-34 (2006) (describing, but not endorsing, this rationale).

“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds.... But when the State has no choice, the Federal Government can achieve its objectives without accountability.<sup>184</sup>

Though the empirical supposition is debatable,<sup>185</sup> the principle is clear enough: voters must be able to identify who is playing the tune. In other areas of First Amendment law, the Court has recognized these as legitimate state interests sufficient to justify some kinds of speech regulation. For example, even while striking down corporate contribution limits in *Citizens United*, the Court upheld the provision of the Bipartisan Campaign Reform Act requiring disclosure of campaign contributions.<sup>186</sup>

Interestingly enough, one place the Court has been reluctant to require transparency is in its government speech doctrine, discussion of which was surprisingly absent from the opinions in *AOSI*.<sup>187</sup> Because that doctrine essentially holds that the government can say what it wants,<sup>188</sup> it is a potentially expansive tool of government power. And much to the consternation of many First Amendment

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184. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) (citation omitted) (quoting *New York v. United States*, 505 U.S. 144, 169 (1992)); see also Bagenstos, *supra* note 73, at 904 (“[B]oth Chief Justice Roberts and the joint dissenters urged that the point of prohibiting federal coercion was to promote the accountability of state officials to their residents.”).

185. Berman, *supra* note 7, at 1306 (“This passage is hard to read with a straight face. The Court was, after all, deliberating over the fate of a law universally known as ‘Obamacare.’”).

186. *Citizens United*, 130 S. Ct. 876, 916 (2010) (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”); see also *Doe v. Reed*, 130 S. Ct. 2811, 2815 (2010) (upholding a Washington law requiring disclosure of referendum petitions).

187. *AOSI*, 133 S. Ct. 2321, 2330 (2013); *Leading Cases*, *supra* note 11, at 224 n.61 (“This point was sufficiently obvious that the Court devoted a mere three words to it. At first glance, it is curious that the dissent did not press the idea that the policy requirement was government speech—many of Justice Scalia’s policy arguments evoke the government speech cases.” (citation omitted)).

188. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech ... is exempt from First Amendment scrutiny.”).

scholars,<sup>189</sup> and to the disappointment of lawyers in government speech cases,<sup>190</sup> the Court has thus far declined to require that the government explicitly adopt a message as its own in order to qualify as government speech.

A government-limiting principle imposes constraints on the government's ability to make conditional offers that, even if accepted by the offeree,<sup>191</sup> would expand the government's power too far. Of course, establishing what counts as "too far" raises its own conceptual and practical difficulties. The goal here is simply to describe the principle, rather than to show how far it extends.

### CONCLUSION

In his thoughtful investigation of the First Amendment rules applicable to subsidized speech, Robert Post concluded that "[t]he doctrines have become formalistic labels for conclusions, rather than useful tools for understanding."<sup>192</sup> *AOSI* confirms that Post's observation remains accurate nearly twenty years later. Though the outcome of the case turns on various First Amendment rules, the doctrinal levers are pulled by the Court's conclusions regarding the definition of the program at issue, the permissibility of certain economic transactions, and the reach of the government's power. And understanding these underlying inquiries demands a more

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189. See, e.g., Bezanson & Buss, *supra* note 95, at 1384 (2001) ("[G]overnment speech should be limited to purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government's message."); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1005 (2005) (arguing for a transparency requirement as a prerequisite for government speech).

190. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009) (noting but rejecting respondent's argument that government must "go through a formal process of adopting a resolution publicly embracing 'the message' that the monument conveys").

191. In this sense, constitutional rights would be protected not just by "property rules"—which prohibit loss except with consent—but also by "inalienability rules," which prohibit transfer altogether. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093, 1105-06 (1972).

192. Post, *supra* note 120, at 152 (noting that the Court has "chosen to address cases of subsidized speech primarily by relying upon two doctrines, which respectively prohibit unconstitutional conditions and viewpoint discrimination," rather than by engaging in "complex and contextual normative judgments about the boundaries of distinct constitutional domains in social space").

thorough study of the normative visions of the First Amendment that are threatened when the government subsidizes private speech.

Interest in, and the content of, the law surrounding conditional offers has always ebbed and flowed with background developments in the relationship between the government and the recipients of government funds. It appears that the doctrine and the concerns animating it are back at the center of the Court's agenda. This is understandable enough: never before has the federal government been so involved in subsidizing constitutionally protected activity, whether by individuals or by states.<sup>193</sup> *AOSI* is exemplary of both the need to establish the constitutional boundaries of that activity, and also the difficulties the Court will continue to face in doing so.<sup>194</sup>

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193. Hamburger, *supra* note 6, at 567 (“Ultimately, conditions are part of an ongoing shift in the organization of society—in particular, a shift in modes of dependence.”).

194. See Heyman, *supra* note 1, at 1198 (“[T]he problem [of denials of support] is best understood as one of distributive justice in the modern liberal state.”); Schauer, *supra* note 10, at 990 (examining the problem of unconstitutional conditions among those constitutional problems that “are irredeemably intractable, and are so precisely because they replicate the deepest, hardest, and therefore least solvable problems of constitutional government”).