

EMTALA: Medicare's Unconstitutional Condition on Hospitals

by E. H. MORREIM*

Introduction

A remarkable, but remarkably under-discussed, feature of U.S. healthcare is that for nearly three decades the federal government has required hospitals to hand out billions of dollars of free care every year. Medicare, enacted in 1965, insured healthcare for elderly and certain disabled people.¹ Twenty years later, the Emergency Medical Treatment and Active Labor Act of 1986 (“EMTALA”),² was added. It requires every Medicare-contracting hospital with an emergency department (“ED”) to screen and stabilize anyone who arrives with a potential emergency condition, regardless of whether the patient can pay.³ Additionally, hospitals may not transfer an unstable patient to another provider, absent very specific conditions.⁴ Furthermore, hospitals with specialty services, such as burn units or Newborn Intensive Care Units (“NICUs”), must accept transfers of patients who need them, even if that hospital has no ED.⁵ When patients

* Professor, College of Medicine, University of Tennessee; J.D., University of Memphis School of Law; Ph.D., University of Virginia. The author acknowledges with sincere gratitude the very helpful comments provided on earlier drafts of this paper by Peter D. Jacobson, J.D., M.PH; Philip Hamburger, J.D.; Thomas Mayo, J.D.; Charles Key, J.D.; Alena Allen, J.D.; Amy T. Campbell, J.D.; and Lance Stell, Ph.D.

1. Title XVIII appears in the U.S. Code as §§ 1395–1395 ccc, Subchapter XVIII, Chapter 7, Title 42.

2. 42 U.S.C.A. § 1395dd (West 2015).

3. *Id.*

4. *Id.*

5. See 42 C.F.R. § 489.24(f) (2015) (“A participating hospital that has specialized capabilities or facilities [including, but not limited to, facilities such as burn units, shock-trauma units, neonatal intensive care units, or, with respect to rural areas, regional referral centers (which, for purposes of this subpart, mean hospitals meeting the requirements of referral centers found at Sec. 412.96 of this chapter)] may not refuse to accept from a referring hospital within the boundaries of the United States an appropriate transfer of an

cannot or will not pay, the hospital must simply shrug and absorb the loss. Thus, EMTALA vastly expanded Medicare's initial scope of beneficiaries and provider obligations and imposed enormous financial liabilities. Surprisingly, neither the Supreme Court nor any of the Circuit Courts have addressed EMTALA's constitutionality.

EMTALA is constitutionally flawed on two levels. The first level—in which EMTALA imposes takings with no provision for just compensation—has been described elsewhere⁶ and need only be briefly reviewed here. On this view, government forces one party—the hospital—to transfer personal property, such as costly pharmaceuticals, to another party—the patient—and to permit patients to invade its spaces, such as ER cubicles, OR suites, and ICU beds. Fundamentally, it would be no different if the government forced every Ritz Carlton and Marriott hotel to open their rooms to the homeless on cold nights, with no compensation whatsoever for the invasion of space or for the consumption of staff time and supplies. On this first level, the Fifth Amendment's Takings Clause is violated every time such EMTALA-mandated care lacks just compensation. Constitutional violations at this level are episodic, depending on whether the hospital has been adequately paid. Takings are permissible.⁷ Failure to compensate them justly is not.⁸

The second level, discussed in this Article, proposes that EMTALA as a whole is unconstitutional, or more specifically, an “unconstitutional condition” imposed on hospitals' participation in Medicare. When creating a benefit program, such as Medicare, the government may rightly attach “strings” to ensure that public funds are spent as Congress intended.⁹ Hence, it might be supposed that even if EMTALA imposes takings, there is no problem. Medicare participation is voluntary, hence so are EMTALA's burdens. These burdens are simply a condition tied to federal money. If hospitals want to be free of it, they can stop contracting with Medicare or close their EDs and specialty units.

This argument fails. The doctrine of unconstitutional conditions holds that the government cannot with impunity require persons to waive fundamental constitutional rights as a condition for receiving a

individual who requires such specialized capabilities or facilities if the receiving hospital has the capacity to treat the individual.”).

6. See E.H. Morreim, *Dumping the 'Anti-Dumping' Law: Why EMTALA Is (Largely) Unconstitutional and Why It Matters*, 15 MINN. J.L. SCI. & TECH. (2014).

7. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

8. *Id.*

9. See Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

government benefit. Although the jurisprudence in this area is not a model of clarity, this Article will show that by forcing hospitals to abdicate their Fifth Amendment right against uncompensated takings, the EMTALA oversteps the Supreme Court's boundaries limiting permissible federal spending.

This is not to suggest that patients should be left crushed and bleeding while hospital staffs search the wreckage for an insurance card. The mandate that hospitals care for emergency patients should stay, and patients who can pay are of course legally obligated to do so. *Quantum meruit*. But, for those who cannot or will not, the government is obligated to make good.¹⁰ The government that mandates the transfers of property must ensure just compensation. Realistically, EMTALA, as a longstanding statute, may not be reconfigured any time soon. Still, it is important to consider the constitutional legitimacy of legislation carrying such an enormous and growing impact.

Part I begins with a brief overview of how EMTALA imposes takings, followed in Part II by an overview of "unconstitutional conditions" jurisprudence.

Part III extracts four particularly salient elements from that jurisprudence. The first element is a threshold triggering closer scrutiny: when the government indirectly attempts to extract a concession that it cannot directly demand under the constitution, a closer look is imperative. For instance, if the government cannot directly impose restraint on free speech, then we must look very closely when a government grant carries speech restraints.

The second element is relevance ("germaneness"). The condition the government places, e.g., on participating in a benefit program or regulating land use, must be relevant to the purpose of the program or regulation. For example, a government regulation that reduces flood risk by limiting how much land a shop owner can pave for a bigger parking lot is quite different than a government regulation that forces a shop owner to donate green space for public recreation.

The third element is proportionality. If the state can legitimately extract a concession in exchange for a benefit or regulatory approval, that concession must not be seriously disproportionate to the magnitude of the benefit. Thus, even if the government can rightly

10. See Morreim, *supra* note 6, at 257–59. Where the government takes property from one private party and gives it to another, the government becomes a guarantor where the party whose property was taken will be justly compensated.

demand that the shop owner dedicate a reasonable bit of land to flood control, it could not require her to buy a huge parcel of land elsewhere in the county to improve the county's overall flood control—thereby extracting an unduly large concession simply because the shop owner really needs the extra parking space.

The fourth element is coercion, which plays a significant role throughout the analysis. As Justice Scalia put it, some conditions attached to government benefits actually become “an out-and-out plan of extortion.”¹¹

On the basis of these considerations, Part IV argues that EMTALA is an unconstitutional condition tacked onto Medicare.

I. EMTALA and Fifth Amendment Takings

The Fifth Amendment provides, “nor shall private property be taken for public use, without just compensation.”¹² Hence, the elements of a Fifth Amendment taking are property, a taking, and public use. Once these are satisfied, the government must pay just compensation.¹³

A. Property

The most familiar kind of taking concerns real property. For example, if the state needs to build a road through Farmer Brown's land, it takes title, pays Brown, and builds the road. Personal property, however, is equally susceptible to government taking. This includes money, intellectual property, such as trade secrets, and ordinary everyday objects.¹⁴

The Supreme Court recently reaffirmed this point in *Horne v. USDA*, which concerned a New Deal-era law requiring raisin growers to hand over a substantial portion of their crop every year as part of a program to stabilize market prices.¹⁵ The plaintiffs, raisin growers,

11. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

12. U.S. CONST. amend. V.

13. See Morreim, *supra* note 6, at 211–86 for considerably greater detail and case law explaining how EMTALA imposes takings.

14. See Morreim, *supra* note 6, at 222–31.

15. *Horne v. USDA*, 135 S. Ct. 2419, 2424 (2015). As part of a 1937 government program to stabilize the market price of raisins, growers were required to turn over a specified percentage of their crop every year, after which the government might donate them, sell them in a noncompetitive market, or otherwise dispose of them. Net proceeds, if any after deducting the government's expenses, would be rebated to the growers. In 2002-03, growers were required to set aside forty-seven percent of their crop, and thirty percent in 2003-04. This resulted in a complex history of litigation, in which the federal government maintained that its program did not impose takings at all.

refused and dubbed the requirement a taking. The Court agreed, emphasizing that personal property and real property are equally subject to the Takings Clause. It held that “[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”¹⁶

Here, EMTALA requires hospitals to provide ED patients with personal and real property, ranging from costly pharmaceuticals and medical devices, to paid employee time and the rental value of various spaces, such as an ED cubicle, OR suite, or ICU bed.¹⁷ Although technically a hospital’s EMTALA obligation ends when someone is admitted as an inpatient,¹⁸ EMTALA-generated costs often include ongoing inpatient expenses. After all, hospitals can no longer transfer an unstable, indigent patient to a charity hospital as they could before 1986.¹⁹ And as noted, EMTALA also requires hospitals with specialty facilities (burn units, NICUs, etc.) to accept transfers from hospitals lacking such facilities—whether or not the patient can pay.²⁰ Thus, EMTALA costs can substantially exceed those generated in the ED.²¹

16. *Id.* at 2426. The Court’s phrasing closely parallels this author’s phrasing from 2013: “If the state commandeers my car, how does it help that I am still free to use my garage for something other than sheltering a car? They still took my car.” *See* Morreim, *supra* note 6, at 276.

17. *See* Morreim, *supra* note 6, at 226. (“Importantly, the hospital itself is not the ‘property’ in question. Rather, the hospital is the (corporate) ‘person’ whose property is taken.”).

18. 42 C.F.R. § 489.24(d)(2)(i) (“If a hospital has screened an individual under paragraph (a) of this section and found the individual to have an emergency medical condition, and admits that individual as an inpatient in good faith in order to stabilize the emergency medical condition, the hospital has satisfied its special responsibilities under this section with respect to that individual.”). *See also* Lopez v. Contra Costa Reg’l Med. Ctr., 903 F. Supp. 2d 835 (N.D. Cal. 2012).

19. This is precisely what was mandated by Arizona in the pre-EMTALA events of *St. Joseph’s Hosp. & Med. Ctr. v. Maricopa Cty.*, 786 P.2d 983 (Ariz. 1989).

20. 42 C.F.R. § 489.24(f) (“A participating hospital that has specialized capabilities or facilities (including, but not limited to, facilities such as burn units, shock-trauma units, neonatal intensive care units, or, with respect to rural areas, regional referral centers (which, for purposes of this subpart, mean hospitals meeting the requirements of referral centers found at § 412.96 of this chapter)) may not refuse to accept from a referring hospital within the boundaries of the United States an appropriate transfer of an individual who requires such specialized capabilities or facilities if the receiving hospital has the capacity to treat the individual.”).

21. For further discussion, *see* Morreim, *supra* note 6, at 228–29.

B. Public Use

EMTALA takes hospitals' property for the public purpose of ensuring access to emergency care, regardless of an individual's ability to pay. Surely we can endorse this requirement, since any of us could be emergently ill or injured with no insurance card on hand. As an affluent society, we may cross the wrong moral line if we throw a dying person out onto the streets, solely because he cannot prove his solvency.

Admittedly, these takings are not the usual citizen-to-government, Farmer Brown-type transfers. Rather, they are government-mandated property transfers from one private party (the hospital) to another (the patient). However, in 2005, the Supreme Court affirmed this kind of taking in *Kelo v. City of New London*.²² In *Kelo*, the city of New London attempted to revitalize the city's faltering economy by requiring homeowners to sell their land—including waterfront homes that had been owned by the same family for generations—to private developers as part of a community revitalization plan.²³ Homeowners protested that a forced sale to a private party could not qualify as "public use" under the Takings Clause, and therefore violated the Takings Clause.²⁴ The Court held that such government-mandated private-to-private transfers can indeed qualify as takings for "public use," and thus, can permissibly be mandated as long as there is payment of just compensation.²⁵ By implication, EMTALA's required private-to-private (hospital-to-patient) transfers can equally qualify as takings for public use.

C. Takings

There are two basic types of taking: "*per se* takings" and "regulatory takings." *Per se* takings are the oldest and most familiar, as with Farmer Brown's land. The government ousts the original owner and becomes the new owner.²⁶

Regulatory takings are a later construction.²⁷ Originally emerging from land-use regulations, they attempt to strike a balance between compensating the public and allowing the government to serve the common good without being forced to pay.²⁸ On the one

22. *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

23. *Id.*

24. *Id.*

25. *Id.*

26. See Morreim, *supra* note 6.

27. *Id.*

28. *Id.*

hand, the government has considerable authority to limit what people do with their property, as in zoning regulations that, while promoting the common good, can adversely affect the value of a property.²⁹ Perhaps I would like to transform my home into a geriatric strip club for aging Baby Boomers. Alas, if my house sits next door to an elementary school, the zoning board will likely disapprove. Although the home's value would be greatly enhanced by octogenarian pole-dancers, I must absorb the loss with grace.

On the other hand, sometimes government regulation is so intrusive that it essentially amounts to an ouster requiring compensation.³⁰ The property does not actually change hands, but its value is so diminished that the government action is a regulatory taking requiring just compensation. For example, in *United States v. Causby*, low-altitude flights from a military airfield so upset the flocks at Lee Causby's chicken farm, the Supreme Court found Causby's poultry business had become nonviable and required the government to pay the farmer for its taking even though Causby still owned the property.³¹ By 1978, the Court provided several criteria to help courts determine whether a particular regulation was simply the price of living in a community, or whether it had such adverse effects on a property's value that it amounted to a regulatory taking requiring compensation.³²

Subsequently, the Court refined its schema to identify two types of *per se* takings, expressly distinguishing them from the regulatory takings discussed just above: (a) complete destruction of the property's value and (b) physical invasion or occupation. The first type—complete destruction of value—emerged in 1992 in *Lucas v. South Carolina Coastal Commission*.³³ In *Lucas*, plaintiff David Lucas bought oceanfront land to build a housing development, subsequent zoning restrictions rendered the land unusable for that purpose.³⁴ Because all economically beneficial uses of Lucas's

29. *Id.*

30. *Id.*

31. *United States v. Causby*, 328 U.S. 256 (1946).

32. In *Pennsylvania Central v. City of New York*, 438 U.S. 104, 124 (1978), the Court identified three criteria to assess whether a regulation amounted to a taking: (1) the regulation's economic impact on the claimant; (2) the extent to which it has interfered with investment-backed expectations; and (3) the character of the government action—e.g., whether it features a physical invasion.

33. *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003 (1992).

34. *Id.*

property had been precluded, the Court found a *per se* taking.³⁵ This was not a mere regulatory diminution of Lucas's land value; it was equivalent to a complete ouster, even though he technically still owned the property. Thus, compensation was required, and no regulatory impact analysis was necessary.³⁶

The other type of *per se* taking—physical invasion or occupation—was articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*³⁷ As the cable-television industry emerged during the 1960s and '70s, New York State authorized cable companies to install their equipment on sides and tops of buildings, including Jean Loretto's apartment building.³⁸ Although only small portions of Loretto's building were occupied by the cables and boxes, the Supreme Court found that these installations constituted a physical invasion and therefore a *per se* taking, requiring compensation.³⁹

Arkansas Game & Fish Commission v. Teleprompter Manhattan CATV Corp. is also apt.⁴⁰ In that case, the Corps of Engineers' dam-control activities caused intermittent flooding on state game and fish lands, necessitating costly environmental repairs after every flood.⁴¹ The Supreme Court unanimously held that this intermittent flooding was a taking requiring compensation, even though the floods did not constitute a permanent invasion of the land.⁴²

EMTALA's takings should now be evident. They are not about land-use regulation. Rather, hospitals are the "persons" whose property is subjected to *per se* takings of both types. First, the value of personal property is completely destroyed: the costly pharmaceutical or bandage is entirely consumed, and the hour of nursing or physician time is completely spent. Second, spaces are routinely invaded—the ED cubicle, the operating room, and the ICU bed. EMTALA thus subjects hospitals to an "intermittent flood" of

35. *Id.*

36. *Id.*

37. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

38. *Id.*

39. *Id.*

40. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

41. *Id.*

42. *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2424 (2015) also drives the point home. There, a raisin program resulted in a direct appropriation of property—a "clear physical taking"—and not a regulation of property. *Id.* at 2428. Even though the raisins might remain in the grower's hands, as they did with the Hornes, title had been transferred to the government, which exercised complete control. *Id.* at 2429. As such, the program imposed *per se* takings requiring just compensation with no further analysis. The fact that government might later pay growers a bit of leftover money did not excuse them from the initial obligation to pay. *Id.*

needy patients.⁴³ Throughout, the hospital has entirely lost “the rights to possess, use and dispose of” these specific properties in any way other than to serve this particular patient.⁴⁴ When a party loses these rights, she has effectively lost the entire “bundle” of property rights and hence, suffered a *per se* taking.⁴⁵

It would be no different if the government required that on cold nights, every Ritz Carlton, Hilton, and Marriott must open their rooms to the homeless, yet provided no compensation either for the invasion of space or for the consumption of staff time, towels, and toiletries.

A predictable response would be that there is no problem because EMTALA is simply a requirement for participation in Medicare.⁴⁶ Hospitals are not forced to participate. They can withdraw from the program or can shut down the EDs and specialty facilities EMTALA covers, thereby freeing themselves from all such obligations.⁴⁷

Horne provides one very direct response:

The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market.

43. Ark. Game & Fish Comm'n, 133 U.S. at 519. See Morreim, *supra* note 6, at 226.

44. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

45. *Horne*, 135 S. Ct. at 2428 (citing *Loretto*, 458 U.S. at 435).

46. Hospitals that accept payment under Medicare (“participate” in the program) can be terminated if they fail to meet EMTALA obligations. Per 42 C.F.R. § 489.24(g) (2015), if “a hospital fails to comply with the requirements of paragraph (a) through (e) of this section, HCFA [now CMS] may terminate the provider agreement in accordance with § 489.53.” And per 42 C.F.R. § 489.53(b)(1) (2015), CMS can terminate a hospital’s provider agreement with Medicare if “[t]he hospital fails to comply with the requirements of § 489.24 (a) through (e), which require the hospital to examine, treat, or transfer emergency medical condition cases appropriately, and require that hospitals with specialized capabilities or facilities accept an appropriate transfer,” or even if a hospital fails to report another hospital for suspected EMTALA violations, as required under § 489.24(e) and under § 489.20. See 42 C.F.R. § 489.53(b)(2) (2015). Shy of complete termination from Medicare, violations of EMTALA can trigger civil monetary penalties of up to \$50,000 per violation, plus civil suits against the hospital by patients adversely affected. 42 U.S.C. §§ 1395dd(d)(1)(A), 1395dd(d)(2). Clearly, hospitals have no choice.

47. See, e.g., *Whitney v. Heckler*, 780 F.2d 963, 972 (11th Cir. 1986); *Minn. Ass’n of Health Care Facilities v. Minn. Dep’t of Pub. Welfare*, 742 F.2d. 442, 445–46 (8th Cir. 1984); *Methodist Hosp. v. Ind. Family & Soc. Servs. Admin.*, 860 F. Supp. 1309, 1335 (N.D. Ind. 1994) (citing *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993)); *Burditt v. U.S. Dep’t of Health and Human Servs.*, 934 F.2d 1362 (5th Cir. 1991); *Matter of Review of Health Care Admin. Board*, 415 A.2d 1147 (N.J. 1980), *appeal dismissed sub nom*; *Wayne Haven Nursing Home v. Finley*, 449 U.S. 944 (1980).

According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine. . . . [T]he Government is wrong as a matter of law. In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."⁴⁸

In other words, *Loretto* could not be required to give up her Fifth Amendment right against uncompensated takings, as a condition for participating in the apartment rental marketplace. Neither could the Hornes be required to give up their right against uncompensated takings as a condition of participating in the raisin market. Directly parallel, this Article argues that hospitals should not be required to give up their right against uncompensated takings, as a condition of participating in the Medicare program. As we will now see, this reasoning essentially invokes the concept of "unconstitutional conditions."⁴⁹

II. Unconstitutional Conditions: An Overview

Medicare creates a fairly ordinary insurance contract between healthcare providers (here, hospitals) and the government. Like many insurers the government seeks program integrity to ensure that beneficiaries receive the appropriate quality and quantity of goods and services, and that billing is done correctly. Such requirements, dubbed "conditions of participation" ("COP"),⁵⁰ are essentially health, safety, and financial standards.

48. *Horne*, 135 S. Ct. at 2430 (citation omitted). The court added that "[t]he Taking here cannot reasonably be characterized as part of a . . . voluntary exchange." *Id.* (citing *Loretto*, 458 U.S. at 439)).

49. The *Horne* and *Loretto* Courts do not expressly invoke the doctrine, perhaps because the "participation" in question is a commercial market rather than a government program. However, the reasoning is fundamentally similar and, as discussed below, EMTALA does concern participation in a government program and hence can fall directly under the umbrella of unconstitutional conditions.

50. See 42 C.F.R. §§ 482, 485, 410, and various related regulations specifying quality and quantity of services and providers CMS expects for Medicare beneficiaries.

EMTALA is a completely different genre of COP.⁵¹ It has nothing to do with assuring quality or quantity of care for beneficiaries, or proper billing for the payer. Rather, it takes advantage of hospitals' financial dependence on Medicare participation, to demand that they hand out goods and services completely outside of Medicare's target population—the elderly and disabled—for an entirely different purpose and population, namely, anyone who comes to the ED with a possible emergency condition or needs specialty services. In so doing, the statute arguably imposes what the Supreme Court dubs an “unconstitutional condition.”

The doctrine of unconstitutional conditions is not crystal clear, but consider the following analogy: Suppose the government said to physicians “we want to make it easier to prosecute doctors who commit Medicare fraud; hence, if a doctor wants to care for Medicare patients he must waive his Fifth Amendment right against self-incrimination.” It would be little different than telling hospitals “if you want to care for Medicare patients you must give up your Fifth Amendment right against uncompensated takings.” Something seems very wrong, but what precisely is the problem?

The applicable jurisprudence steers a course between two important principles. On one hand, just as the federal government may tax and spend for the general welfare,⁵² it may also make sure its funds are used as intended—to place *conditions* on the funds' use and, more broadly, to place conditions on other government benefits such as land-use permits.⁵³ Thus, a humanities grant that supports one type of art over another by, for example, funding classical music instead of jazz, does not censor jazz. It is simply a decision not to subsidize jazz at this time.

The Court applied this principle in *Rust v. Sullivan*, when it ruled that the government could properly forbid using federal funds to promote abortion as part of a family-planning grant.⁵⁴ After all, the Court reasoned, the recipients of those funds still had other ways to

51. EMTALA is perhaps not literally a “Condition of Participation” for hospitals, since it is not found in 42 C.F.R. § 482. However, it is still a “condition” in the sense of being a requirement, and it must be satisfied for any hospital to “participate,” i.e., to be paid under a provider agreement, in the Medicare program.

52. U.S. CONST. art. I, § 8, cl 1.

53. For a thoughtful discussion of this point, see Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 481 (2012). See also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1460 (1989).

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

advocate abortion if they wished to. They simply were restricted in their use of those particular funds.⁵⁵ Per the Court:

The Government can, without violating the Constitution, 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 which seeks to deal with the problem in another way. In 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.⁵⁶

On the other hand, there are lines the government must not cross. The Constitution provides important protections, particularly in the Bill of Rights, which must not lightly be abandoned to coerce people to behave in certain ways. “[T]he 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 . . . outside the contours of the program itself.”⁵⁷ As the Court observed in 1926, improperly imposed conditions can leave people with “a choice between the rock and the whirlpool [T]he power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights.”⁵⁸ The Court has further noted:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to

55. *Id.* at 1772.

56. *Id.* Similarly, “[p]eople who work for the CIA accept that they will have less freedom of speech than if they worked for McDonald’s, but since the condition is a reasonable one the restriction on their freedom of speech is not considered unconstitutional.” *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000).

57. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l*, 133 S. Ct. 2321, 2328 (2013).

58. *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583, 593–94 (1926). As one commentator put it, “[w]e would not think that the mugger’s implicit threat of ‘your money or your life’ is morally acceptable simply because the statement can be thought about as a deal involving risks.” Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5(1) J. LEGAL ANALYSIS 61, 18 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186423.

a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests⁵⁹

Thus, in *Agency for International Development v. Alliance for Open Society International (AID)*, a government program to combat HIV required that funding recipients espouse a general policy opposing prostitution.⁶⁰ Clearly, a straight-out government mandate that a person or organization must oppose prostitution would offend the First Amendment.⁶¹ In *AID*, the Court held that this very same mandate, imposed as a condition for receiving federal funds, ran afoul of the Constitution because it regulated speech beyond the contours of the funded program.⁶²

Unconstitutional conditions case law spans the Bill of Rights quite broadly. First Amendment cases involve a variety of free speech issues⁶³ as well as freedom of religion issues.⁶⁴ A Fourth Amendment example inquires whether mandatory drug testing as a condition for receiving welfare benefits runs afoul of search and seizure constraints.⁶⁵ Plea bargains in criminal cases can raise Sixth

59. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

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

61. *Id.* at 2327 (“It is, however, a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’ . . . Were [the AID anti-prostitution policy] enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.”).

62. Analogously, in *Sinderman*, a college professor lost his employment for speaking out about a policy issue, prompting the Court to opine: “[T]he government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient’s constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance.” 408 U.S. at 597. *See also* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984); *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47, 59 (2006); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996). *See* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) for the Court’s reaffirmation of Perry’s principle as recently as 2013.

63. *See, e.g., League of Women Voters of Cal.*, 468 U.S. at 364.

64. *See, e.g., Sullivan*, *supra* note 53, at 1426.

65. Ilan Wurman, *Note: Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153 (2013); Ilan Wurman, *Unconstitutional Conditions and*

Amendment questions about the right to trial by jury.⁶⁶ And Tenth Amendment issues can arise where conditions on federal funding may usurp states' rights. In *South Dakota v. Dole*, for instance, the federal government conditioned states' receipt of federal highway funds on their willingness to set their legal drinking age at twenty-one.⁶⁷ Although states have a constitutionally protected right to make their own decisions in such matters, the Supreme Court upheld the condition because the funds' purpose included highway safety.⁶⁸

Of particular interest here, several cases concern the Fifth Amendment's Takings Clause—the Court's most recent focus in its unconstitutional conditions jurisprudence.⁶⁹ In 1987, *Nollan v. California Coastal Commission*⁷⁰ was decided just three days after *South Dakota v. Dole*. The California Coastal Commission required that, as a condition for replacing their beachfront bungalow with a larger home, James and Marilyn Nollan grant an easement permitting the public to traverse their property from a state beach on one side to another public beach on the other side.⁷¹ The Commission's proffered reason: The Nollans' new home must not obstruct the public's view of the ocean.⁷²

Although the *Nollan* Court did not expressly invoke unconstitutional conditions, the case was effectively the first to bring the Takings Clause under the doctrine.⁷³ Per the Court, the Commission had every right to reject the Nollans' request outright, if necessary to protect the public's view of the ocean.⁷⁴ However, the required easement did not serve the Commission's purpose of protecting *visual* access.⁷⁵ Rather, the Commission was using its authority as leverage to extract something additional—a convenient

Drug Testing Welfare Recipients, JURIST (Mar. 13, 2013), <http://jurist.org/dataline/2013/03/ilan-wurman-drug-testing.php>.

66. Mitchell N. Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

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

68. Additionally, the Court observed that, since only five percent of highway funding was at stake, the condition could not be deemed coercive. For further discussion of *Dole*, see Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775 (2007) and Berman, *supra* note 66.

69. Berman, *supra* note 66, at 89.

70. *Nollan v. Cal. Coastal Commission*, 483 U.S. 825 (1987).

71. *Id.*

72. *Id.*

73. Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 866–67 (1995).

74. *Id.*

75. *Nollan*, 483 U.S. at 836.

way for the public to walk from one beach to the other via the Nollans' property.⁷⁶ As observed by Justice Scalia, writing for the majority: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."⁷⁷

Without an "essential nexus"—a clear connection between the specific purposes sought by the legislation and the constraint placed on the citizen—the Commission's condition would be, not a "valid regulation of land use but 'an out-and-out plan of extortion.'"⁷⁸ In the end, the Commission could not rightly demand an easement for the public to "tramp across the Nollans' backyard."⁷⁹ That would be a taking requiring just compensation.

Seven years later, the Court augmented its analysis in *Dolan v. City of Tigard*.⁸⁰ When Florence Dolan wanted to double the size of her plumbing and electronic supply store and pave its gravel parking lot, the city made two demands.⁸¹ First, because paving her land can exacerbate flood risks, Dolan must dedicate a portion of her property that lay within the floodplain to drainage improvements.⁸² Second, because the expansion could exacerbate traffic congestion, she must dedicate an additional fifteen feet of land, adjacent to the floodplain, for a pedestrian/bike path.⁸³ A total of ten percent of her land would thereby be devoted to city use.⁸⁴

The Court acknowledged the relevance of the city's aims of flood and traffic control—thus satisfying the requirement for an "essential nexus" between the purpose of the zoning law and its application to the case at hand.⁸⁵ The city's demands, however, were out of proportion to the actual likely impact of Dolan's construction on flooding and traffic.⁸⁶ Specifically, the city's insistence that the property be a public bike/walk path, rather than a private easement,

76. *Id.* at 837.

77. *Id.* (Justice Scalia continues: "When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury.").

78. *Id.* at 837.

79. Sullivan, *supra* note 53, at 1463.

80. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

81. *Id.*

82. *Id.* at 380.

83. *Id.*

84. *Id.*

85. *Id.* at 387.

86. *Id.* at 395.

exceeded legitimate land-use restriction.⁸⁷ As a result, Dolan would lose the right to exclude others from her property, which is an essential “stick” in her bundle of property rights.⁸⁸

The city’s imposition on Dolan, thus was deemed significantly disproportionate to her impact on the community. Per the Court, “[i]t is difficult to see why recreational visitors trampling along petitioner’s floodplain easement are sufficiently related to the city’s legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.”⁸⁹ Thus in *Dolan*, as in *Nollan*:

Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.⁹⁰

As recently as 2013, the Court reaffirmed both requirements: essential nexus (germaneness) and proportionality. In *Koontz v. St. Johns River Water Management District*, Coy Koontz sought permits to develop nearly four acres of his fifteen-acre property in Florida.⁹¹ Because the project would affect wetlands, he offered to offset environmental damage with a conservation easement on the remaining eleven acres.⁹² Rejecting this, the St. Johns River Water Management District required Koontz to either (a) reduce the size of the development to just 1 acre and grant easement for the other fourteen acres, or (b) make improvements, at his own expense, to fifty acres of District land located several miles away.⁹³

The Court disapproved: “A predicate for any unconstitutional conditions claim is that the government could not have constitutionally *ordered* the person asserting the claim to do what it

87. *Id.* at 393.

88. *Id.*

89. *Id.* See also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (likewise emphasizing the right to exclude).

90. *Dolan*, 512 U.S. at 385.

91. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591–92 (2013).

92. *Id.* at 2589.

93. *Id.* at 2593.

attempted to *pressure* that person into doing.”⁹⁴ Here, assuredly the government could not have directly ordered Koontz to pay out of pocket to improve other District lands. That would obviously have been a taking. To justify doing the same thing indirectly, via placing conditions on Koontz’s proposed land use, the District must satisfy the *Nollan/Dolan* criteria. After all, the government “may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”⁹⁵

Importantly, the Court also held that “[i]t makes no difference that no property was actually taken in this case. *Extortionate demands for property* in the land-use permitting context run afoul of the Takings Clause not because they take property but because they *impermissibly burden the right not to have property taken without just compensation.*”⁹⁶ Despite no actual taking in this case, the government still imposed an unconstitutional condition on Koontz.

Admittedly, the doctrine of unconstitutional conditions tends to present a “minefield to be traversed gingerly.”⁹⁷ A number of scholars have offered comprehensive theories; perhaps none are entirely successful, yet each enlightening.⁹⁸ Fortunately, we need not establish a unified theory of unconstitutional conditions in order to show that EMTALA represents an unconstitutional condition imposed on Medicare-contracting hospitals. *Koontz* and *AID*, both decided in 2013, attest that the doctrine is alive and well. Based on

94. *Id.* at 2598 (emphasis added).

95. *Id.* at 2595.

96. *Id.* at 2589–90 (emphasis added). “The government’s demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when its demand is for money.” *Id.* at 2590 (emphasis added).

97. Sullivan, *supra* note 53, at 1416.

98. See Sullivan, *supra* note 53 (speaking on corporate rights against state regulation, state autonomy from federal encroachment, and individual rights); *but see* Hamburger, *supra* note 53 (proposing that even if persons may sometimes legitimately agree to waive individual constitutional rights as a condition for receiving a discretionary government benefit, some rights are created by, and for the protection of, the people as a whole, and hence cannot effectively be waived by any individual. These rights set limits on government powers and can only be changed or waived by the people as a whole). See generally Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Hamburger, *supra* note 53; Merrill, *supra* note 73; Berman, *supra* note 66; Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913 (2006); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984); Lerner, *supra* note 68; Wurman, *supra* note 65.

the jurisprudence discussed above, Part III will now elucidate several elements of the unconstitutional conditions doctrine. Part IV will then show that EMTALA imposes an unconstitutional condition on Medicare-contracting hospitals “impermissibly burden[ing] the right not to have property taken without just compensation.”⁹⁹

III. Elements of an Unconstitutional Condition

A. Threshold for Scrutiny

As the Supreme Court emphasized in *Koontz*, a “predicate for any unconstitutional conditions claim is that the government could not have constitutionally *ordered* the person asserting the claim to do what it attempted to *pressure* that person into doing. . . . [I]f the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking.”¹⁰⁰ And as noted in *Dolan*: “[H]ad the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred [because] [s]uch public access would deprive petitioner of the right to exclude others.”¹⁰¹ And per *Nollan*: “Had California simply required the Nollans to make an easement across their beachfront . . . rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.”¹⁰²

The government triggers closer scrutiny when it attempts to indirectly extract a concession it cannot directly demand. Once this happens, the inquiry then focuses on whether the condition—the burden on constitutional rights—can be justified in terms of the goals of the spending program or regulatory scheme. Justifying such a burden is roughly parallel to justifying a direct invasion of rights. Ordinarily, state invasions of constitutionally fundamental rights, such as freedom of religion, (1) require a compelling government

99. *Koontz*, 133 S. Ct. at 2590 (citation omitted).

100. *Id.* at 2598–99 (emphasis added). Earlier in the decision, the Court noted: “We have said in a variety of contexts that ‘the government may not deny a benefit to a person because he exercises a constitutional right.’” *Id.* at 2594.

101. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (citations omitted). The Court does not waiver, in its recent First Amendment case: “Were it enacted as a direct regulation of speech, the Policy Requirement [to espouse a policy rejecting prostitution] would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

102. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

interest and (2) must be narrowly tailored to serve that interest.¹⁰³ Similarly, justifying a rights-burdening condition on a government benefit requires that (1) the condition be directly relevant to the purpose to be achieved by the legislation (essential nexus) and that (2) the burden imposed on the person be proportionate. These two criteria are discussed below. Following that, we will discuss the role of coercion as a pervasive theme in the jurisprudence of unconstitutional conditions.

B. Essential Nexus (“Germaneness”) to Legislative Purpose

Although government can exact conditions to ensure that programs and regulations are implemented as intended, *Nollan* showed that government cannot tie to its land-use regulations “strings” that lack connection to the purpose of the regulation.¹⁰⁴ *South Dakota v. Dole* provides further illustration. Given that the Constitution generally reserves police powers to the states (including, for example, where to set the legal drinking age),¹⁰⁵ *Dole* focused on whether the federal government could properly use federal highway funds as leverage to induce states to set their legal drinking age at twenty-one. If the federal government cannot directly require states to adopt a particular drinking age, can it tie such an age-requirement to states’ acceptance of federal highway money? It depends on Congress’s purpose for the federal highway program. If age is relevant to that purpose, then it satisfies the “germaneness” requirement and may be constitutional. If not, then the government may have overstepped constitutional boundaries.

In *Dole*, the Court defined that purpose broadly—to promote highway safety in general—and thus ruled the drinking age condition to be sufficiently germane to highway safety to withstand constitutional scrutiny. However, Justice O’Connor dissented, defining the program’s purpose more narrowly. Emphasizing that, “Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent.”¹⁰⁶ She identified the highway funds’ goal as

103. *Hamburger*, *supra* note 53, at 550–51, 554.

104. *Nollan*, 483 U.S. at 834. *See also* *South Dakota v. Dole*, 483 U.S. 203, 203 (1987).

105. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

106. *Dole*, 483 U.S. at 216. *See also* *Nollan*, 483 U.S. at 841, which states, “[O]ur cases describe the condition for abridgement of property rights through the police power as a ‘substantial advanc[ing]’ of a legitimate state interest. We are inclined to be particularly

promoting highway safety *through sound construction*. If this is the purpose, she opined, then mandating a specific drinking age is not sufficiently germane to the legislation's goal, and the federal condition should be ruled unconstitutional.¹⁰⁷

Identifying legislative purpose can, of course, be slippery. As Chief Justice Roberts observed, “[t]he line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition.”¹⁰⁸

Here, we also recall Scalia's admonition from *Nollan*: if the condition the government imposes does not serve the purpose of the underlying legislation, then the government is simply leveraging its power into an extortionate demand.¹⁰⁹ Hence, the government can rightly deny a building permit entirely if your development would cause inordinate flooding, and can rightly make you ameliorate the flooding you would cause. But it cannot use that power to make you hand over a large parcel of land for a nice public beach just because you really need the building permit. The latter would be extortionate, and unconstitutional as an uncompensated taking.

Interestingly, the same basic reasoning appeared in *National Federation of Independent Businesses v. Sebelius (NFIB)*.¹¹⁰ In this decision, which largely upheld the Affordable Care Act (ACA), the one element the Court struck down was the ACA's provision for expanding Medicaid. The law originally required states participating in Medicaid to expand eligibility to include all individuals at or below 133% of the federal poverty level, on pain of forfeiting all Medicaid

careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is *avoidance of the compensation requirement, rather than the stated police-power objective*” (emphasis added).

107. See, e.g., Lerner, *supra* note 68, at 782. (The Court essentially added a proportionality element, noting that only five percent of funding was at stake; hence, the mandate was not unduly coercive.)

108. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (Roberts continues, “We have held, however, that ‘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.’”).

109. “In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” *Nollan*, 483 U.S. at 837. See also *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2589–90 (2013) (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”).

110. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

funding if they did not.¹¹¹ Thus, broad expansion was a “string” tied to states’ continued participation in the program.

Although the Court did not expressly invoke the doctrine of unconstitutional conditions, it struck down the Medicaid provision on the same basic grounds.¹¹² The ACA’s Medicaid expansion was “a shift in kind, not merely degree. The original program was designed to cover medical services for four specific categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children.”¹¹³ Expanding the program to encompass every indigent man, woman, and child below a specified income threshold was not a mere alteration or amendment to the program; it was a dramatic transformation that exceeded Congress’s authority.¹¹⁴ “As we have explained, ‘[t]hrough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.’”¹¹⁵ In essence, the Court complained that Congress had imposed a new condition on continuing to participate in Medicaid—one that was not sufficiently germane to the program as originally conceived.

C. Proportionality

The proportionality criterion emphasizes that, even if a particular burden on a constitutional right is permissible in principle (that is, sufficiently germane to the underlying legislative purpose), that burden must not be excessive. In *Dolan*, *Koontz*, and *Dole*, the Court figured the proportionality criterion into its analysis. For example, one of the *Dole* Court’s major justifications for upholding the drinking-age condition was that a mere five percent of highway funds was implicated.¹¹⁶ The *Dole* Court reasoned, “[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into

111. *Id.* at 2575.

112. *Id.* at 2604–05.

113. *Id.* at 2605–06.

114. *Id.* at 2606–07.

115. *Id.* at 2606 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)).

116. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

compulsion.”¹¹⁷ However, the Court did distinguish “relatively mild encouragement” from coercion.¹¹⁸

The Court in *NFIB* likewise invoked proportionality.¹¹⁹ There, the disproportionate impact on states’ budgets loomed large in the Court’s decision that the Medicaid portion of the ACA was unconstitutional.¹²⁰ Given the program’s financial significance to states, with a potential loss of over ten percent of states’ overall budget, the Court held that a complete revocation of Medicaid funds would go too far.¹²¹

D. Coercion

Even though the Court has not directly identified coercion as an express criterion for unconstitutional conditions, the aforementioned cases all emphasize coercion. Indeed, the concept of coercion links the major criteria. A lack of germaneness can render a condition extortionate. Disproportionality becomes unduly coercive, as the government uses its substantial power to extract more than a legitimate concession from the person in exchange for some

117. *Id.*

118. “[T]he argument as to coercion is shown to be more rhetoric than fact. . . . Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.” *Id.* at 211–12.

119. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012).

120. It may be argued that, in the case of public hospitals, EMTALA’s unconstitutionality takes a somewhat different form than for private hospitals. As discussed in Morreim, *Dumping the ‘Anti-Dumping’ Law*, 15 MINN. J. L. SCI. & TECH. 212, 269–70 (2013), public hospitals can argue that EMTALA wrongfully *commandeers* states (or localities) to do federal business. In this sense, commandeering might be deemed the particular and somewhat distinctive *type* of unconstitutional condition imposed on public hospitals. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that the federal government cannot commandeer a states’ resources to implement the Brady Handgun Violence Prevention Act). “The Framers’ experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. . . . [T]he Framers rejected the concept of a central government that would act upon and through the States. . . .” *Id.* at 919. The great innovation of this design was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other”—“a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” *Id.* at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

121. *Id.* at 2604 (“Medicaid spending accounts for over twenty percent of the average State’s total budget, with federal funds covering fifty to eighty-three percent of those costs.”).

government benefit. Consider the following examples from *Horne*,¹²² *Koontz*,¹²³ and *NFIB*.¹²⁴

In *Horne*, the Court stated:

The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. . . . [T]he Government is wrong as a matter of law. . . . The taking here cannot reasonably be characterized as part of a similar voluntary exchange.¹²⁵

Also consider three important outcomes from *Koontz*: (1) the unconstitutional conditions doctrine vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up; (2) *Nollan* and *Dolan* represent a special application of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits; and (3) the standard set out in *Nollan* and *Dolan* reflects the danger of governmental coercion in this context while accommodating the government's legitimate need to offset the public costs of development through land use exactions.¹²⁶

Finally, *NFIB* represents an instance of obvious coercion, where the government's forcing states to expand Medicaid or lose ten percent of their entire budget was deemed a gun to the head, not "relatively mild encouragement."¹²⁷

122. *Horne v. USDA*, 135 S. Ct. 2419 (2015).

123. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

124. *NFIB*, 132 S. Ct. at 2566.

125. *Horne* 135 S. Ct. at 2430.

126. *Koontz*, 133 S. Ct. at 2588–96 (2013) ("As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."). The same reasoning emerged in the First Amendment context, for instance in *AID*. "In the present context, 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." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2328 (2013). Note that this passage emphasizes speech because *AID* focused on First Amendment issues.

127. *NFIB*, 132 S. Ct. at 2605 (citing *Dole*, 483 U.S. at 211) (internal quotation marks omitted)).

In sum, conditions placed on federal spending cross a line when they become leverage to extract concessions that reach beyond the legitimate legislative purpose of the federal program.¹²⁸ EMTALA represents just such overreaching, and therefore places an unconstitutional condition on Medicare-contracting hospitals.

IV. EMTALA as an Unconstitutional Condition of Medicare

A. Threshold to Scrutiny

As with the unconstitutional conditions cases discussed above, the threshold trigger for scrutiny is easily met: The government is attempting to extract something indirectly, which it clearly could not demand directly. EMTALA requires hospitals to hand out goods and services to people who come to their EDs, often for no compensation whatsoever. If directly mandated, this would violate the Takings Clause. Hence, we must next inquire whether, if imposed indirectly as a condition of participating in Medicare, EMTALA satisfies the requirements of germaneness and proportionality and whether it imposes undue coercion.¹²⁹

B. Germaneness

As noted, legitimate conditions arise from the program's purpose, to ensure that money is used as intended. Illegitimate

128. For broader discussions of the role of coercion in the jurisprudence of unconstitutional conditions, see Sullivan, *supra* note 53; Epstein, *supra* note 99; Hamburger, *supra* note 53; Merrill, *supra* note 73; Berman, *supra* note 66; Farber, *supra* note 98; Kreimer, *supra* note 98, at 1304; Lerner, *supra* note 68; Wurman, *supra* note 65.

129. It might be observed that the existing case law regarding the Fifth Amendment and unconstitutional conditions applies the doctrine only to cases involving land-use regulation. This does not entail that land use is the only possible or permissible Fifth Amendment application. As the Court noted in *Koontz*, "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." 133 S. Ct. at 2594. For instance, in the *Dolan* case, the economic value of granting a 15-foot easement for a bike path was not large, hence presented the city with a tempting target because the value of expanding the store and paving the parking lot would be worth far more to Florence Dolan than the financial loss of the easement. Because of that enhanced vulnerability, the Court went on to emphasize that "[e]xtortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." Additionally and also in *Koontz*, the Court observed that land is not the only sort of property that could be the focus of an unconstitutional taking. Money itself qualifies, as do other kinds of property such as liens. See *Koontz*, 133 S. Ct. at 2601.

conditions are those that would leverage the funds to regulate conduct outside the contours of the program.¹³⁰

So what are the purpose and contours of Medicare? Public Law 89–97, enacted July 30, 1965, amended the Social Security Act “[t]o provide a hospital insurance program for the aged under the Social Security Act with a supplementary medical benefits program and an expanded program of medical assistance, to increase benefits under the Old-Age, Survivors, and Disability Insurance System, to improve the Federal-State public assistance programs, and for other purposes.”¹³¹

The program’s primary purpose, then, is to provide medical insurance to people over age sixty-five, plus those with certain disabilities such as end-stage renal disease.¹³² Medicare describes extensive “conditions of participation” for hospitals, providing detailed guidance on such issues as the quality of facilities, qualifications of various types of providers, and the like.¹³³ Even a cursory look shows that these generally aim to ensure that federal funds are spent as intended: to provide an appropriate quality and quantity of care to elderly and disabled beneficiaries, with proper financial accounting for program integrity.

Twenty years later, Congress imposed EMTALA on Medicare-contracting hospitals, expressly outside the program’s contours:

Medical Screening Requirement.—In the case of a hospital that has a hospital emergency department, if any individual (*whether or not eligible for benefits under this title*) comes to the emergency department and a request is made on the individual’s behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical

130. “In the present context, 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.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013). Beyond this, program requirements can become an “out-and-out plan of extortion.” *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

131. The Social Security Act of 1965, Pub. L. No. 89–97, Medicare Part A insures access to hospital services; Part B was then created to cover physician services, outpatient services and related care; Part C offers Medicare Advantage (managed care) plans, while most recently Part D provides drug coverage.

132. The statute is codified at 42 U.S.C. § 1395c (2015) et seq.

133. 42 C.F.R. § 482 (2015).

screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.¹³⁴

Necessary Stabilizing Treatment for Emergency Medical Conditions and Labor.—

(1) In general.—If any individual (*whether or not eligible for benefits under this title*) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c).¹³⁵

Hospitals with specialized facilities, such as burn units and newborn intensive care, even absent an ED, must also accept those in need. Again, recipients of these services need not be otherwise eligible for benefits under Medicare.¹³⁶

The chasm between Medicare's statutorily defined purposes and EMTALA's demands is quite stunning. Indeed, EMTALA makes no pretense to focus on the Medicare's main statutory focus—the elderly. After all, the elderly already had insurance by the time the law was passed (Medicare), and their eligibility for services in the ED and elsewhere is usually not difficult to detect; wrinkles and gray hair give it away.

134. 42 U.S.C. § 1395dd(a) (2011) (emphasis added).

135. 42 U.S.C. § 1395dd(b) (emphasis added).

136. 42 U.S.C. § 1395dd(g). *See also* 42 C.F.R. § 489.24(f): “A participating hospital that has specialized capabilities or facilities (including, but not limited to, facilities such as burn units, shock-trauma units, NICUs, or, (with respect to rural areas), regional referral centers which, for purposes of this subpart, mean hospitals meeting the requirements of referral centers found at §412.96 of this chapter) may not refuse to accept from a referring hospital within the boundaries of the United States an appropriate transfer of an individual who requires such specialized capabilities or facilities if the receiving hospital has the capacity to treat the individual.”

We are again reminded of *NFIB*. There, the ACA's Medicaid expansion constituted, not a mere alteration or amendment to the program, but a dramatic transformation that plainly exceeded Congress's authority.¹³⁷ Surely EMTALA represents an even greater deviation from Medicare's avowed purpose, an even more dramatic transformation of the program. After all, the ACA's Medicaid expansion still focused on the poor. EMTALA, in contrast, turned away from the elderly and disabled, to a completely different population—anyone needing emergency care or specialty services. Clearly, EMTALA's remarkable expansion of responsibilities cannot plausibly be deemed “germane” to Medicare's statutory focus on the elderly and disabled.

C. Proportionality

This Article is not the setting in which to establish definitively whether EMTALA's burden on hospitals is disproportionate to the benefit they receive by being paid to care for elderly and disabled persons. We can, however, describe how the comparison might proceed.

On one side of the ledger, we list hospitals' revenues from Medicare.¹³⁸ The threat for failing to accept EMTALA, after all, is exclusion from Medicare. On the other side, we tally uncompensated EMTALA and EMTALA-generated goods and services. If the burdens of EMTALA compliance are significantly out of proportion to the benefits of participating in Medicare, then we would conclude EMTALA fails the Court's proportionality requirement.

Here are a few figures. For 2013, Medicare's total benefit payments amounted to \$583 billion, of which twenty-five percent went to hospitals for inpatient services, and another six percent for hospital outpatient services—for a total of just over \$180 billion.¹³⁹ It is not clear whether this represents generous, adequate, or inadequate compensation for hospitals' services, because we do not know hospitals' baseline costs for providing such care. One thing we do know is that, as the ACA is implemented, hospital payments are decreasing—1.1% per year starting in 2011 and diminishing further

137. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012).

138. The total Medicare side includes money paid to care for Medicare beneficiaries, plus certain extra payments Medicare makes, such as for graduate medical education. For a more detailed discussion of payment issues. See Morreim, *supra* note 6, at 247–70.

139. Kaiser Family Foundation, *The Facts on Medicare Spending and Financing* (2015), <http://kff.org/medicare/fact-sheet/medicare-spending-and-financing-fact-sheet/>.

for the next decade.¹⁴⁰ Additionally, the so-called “disproportionate share” (“DSH”) payments for hospitals providing higher amounts of uncompensated care¹⁴¹ are slated to decrease by about seventy-five percent under the ACA, based on the Act’s presumption that the number of uninsured and under-insured people would fall dramatically.¹⁴²

On the EMTALA side, according to one estimate, the overall burden of uncompensated ED care alone is roughly \$6 billion per year.¹⁴³ Emergency care represents just under two percent of the nation’s \$2.4 trillion in health expenditures, or about \$12 billion per year.¹⁴⁴ Of this, over half is uncompensated,¹⁴⁵ since one in five patients is uninsured¹⁴⁶ and many of those who are uninsured come to

140. Melanie Evans, *Reform Update: Hospitals Slash Labor Costs to Make up for Lost Medicare Revenue*. Modern Healthcare (2013), <http://www.modernhealthcare.com/article/20131009/NEWS/310099963#> (citing Chapin White, Vivian Yaling Wu, *How Do Hospitals Cope with Sustained Slow Growth in Medicare Prices?* 49 Health Servs. Research 11 (2014)).

141. The Medicaid DSH (“disproportionate share hospital”) program was initiated in 1981 to help acute care hospitals, and some psychiatric hospitals, defray the costs for hospitals serving particularly large numbers of low-income patients. Payments are made to states, which in turn distribute the funds to hospitals. In 2011, these payments totaled \$11.3 Billion. The Medicare DSH program, established in 1986, paid out \$10.8 Billion in 2010. See Robert E. Mechanic, *Medicaid’s Disproportionate Share Hospital Program: Complex Structure, Critical Payments*, NHPF BACKGROUND PAPER (Nat’l Health Policy Forum, Wash., D.C.), Sept. 14, 2004, at 1, http://www.nhpf.org/library/background-papers/BP_MedicaidDSH_09-14-04.pdf; Christie Provost Peters, *Medicaid Disproportionate Share Hospital (DSH) Payments* (Nat’l Health Policy Forum, Wash. D.C.), June 15, 2009, at 1, http://www.nhpf.org/library/the-basics/Basics_DSH_06-15-09.pdf; Meeting Notice, 76 Fed. Reg. 148, 157 (Jan. 3, 2011); JOHN R. JACOB ET AL., *THE MEDICARE DSH ADJUSTMENT* 7 (2012), http://www.healthlawyers.org/Events/Programs/Materials/Documents/MM12/papers/M_jacob_etal_slides.pdf.

142. John A. Graves, *Medicaid Expansion Opt-Outs and Uncompensated Care*. 367 NEW ENGL. J. MED. 2365 (2012). The impact of these reductions is expected to be particularly great in states opting to forego Medicaid expansion in 2014.

143. *Id.*

144. American College of Emergency Physicians, *Costs of Emergency Care Fact Sheet*, (http://newsroom.acep.org/fact_sheets), <http://newsroom.acep.org/index.php?s=20301&item=29928>; American College of Emergency Physicians, *The Uninsured: Access to Medical Care*, Feb. 25, 2011, <http://www.acep.org/News-Media-top-banner/The-Uninsured—Access-To-Medical-Care/>.

145. *Id.*; American College of Emergency Physicians, *The Uninsured: Access to Medical Care*, Feb. 25, 2011, <http://www.acep.org/News-Media-top-banner/The-Uninsured—AccessTo-Medical-Care/>.

146. The CDC reported that nineteen percent of all emergency patients in 2009 were uninsured. See CDC, *National Hospital Ambulatory Medical Care Survey Factsheet: Emergency Department*, (2009), http://www.acep.org/uploadedFiles/ACEP/newsroom/NewsMediaResources/StatisticsData/2009%20NHAMCS_ED_Factsheet_ED.pdf. Admittedly, higher numbers of patients were insured in 2014, perhaps because of the ACA. However, that rise may or may not be permanent in future years.

the ER at a stage of illness or injury more serious than it might have been if cared for at an earlier, primary care stage.¹⁴⁷ A 2007 study in *Annals of Emergency Medicine* reported that overall payment for ED charges decreased from fifty-seven percent in 1996 to forty-two percent in 2004.¹⁴⁸

Uncompensated EMTALA expenditures do not end in the ER. As noted, ongoing care of an unstable patient who must be admitted as an inpatient is still an EMTALA-generated cost, because the hospital cannot simply transfer an indigent patient to some other hospital, so long as that person is unstable.¹⁴⁹ Between 2005 and 2011, inpatient admissions preceded by an ED visit rose from sixty-two percent to sixty-nine percent.¹⁵⁰ Then, we must add uncompensated EMTALA-mandated specialty care, provided in NICUs, shock-trauma units, burn units, and the like.¹⁵¹ Although precise numbers are unavailable, it is plausible to suppose that EMTALA's ED, plus ED-generated and specialty care, expenses could easily exceed \$18 billion—ten percent of hospitals' Medicare revenues.

It is difficult to discern, without more information, whether EMTALA's uncompensated costs are disproportionate to the overall benefit (revenues) hospitals earn by caring for Medicare beneficiaries. Perhaps it is not disproportionate, if hospitals' Medicare payments are otherwise generous—significantly in excess of the fair market costs of providing services to Medicare beneficiaries.

147. Institute of Medicine, *America's Uninsured Crisis: Consequences for Health and Health Care. Report Brief*, (February 2009), <http://iom.nationalacademies.org/~media/Files/Report%20Files/2009/Americas-Uninsured-Crisis-Consequences-for-Health-and-Health-Care/Americas%20Uninsured%20Crisis%202009%20Report%20Brief.pdf>.

148. Renee Y. Hsia, Donna MacIsaac, Laurence C. Baker, *Decreasing Reimbursements for Outpatient Emergency Department Visits Across Payer Groups from 1996 to 2004*. 51 ANN. EMERG. MED. 265 (2008).

149. Unstable patients, of course, generally require the most expensive kinds of care.

150. Medicare Payment Advisory Commission, *Health Care Spending and the Medicare Program*, June 2013, at 70, <http://www.medpac.gov/documents/Jun13DataBookEntireReport.pdf>.

151. A powerful example comes from twenty years ago. In *Matter of Baby K*, 16 F.3d 590 (4th Cir. 1994), the Fourth Circuit held, based on EMTALA, that a hospital must do whatever was necessary to sustain the life of an anencephalic infant, including placing her on a ventilator in the intensive care unit if necessary. Anencephaly is a condition in which the entire brain and a significant portion of the cranium, except for the brain stem, are missing. Because the person has no cerebrum, he or she is permanently unconscious. Baby K survived nearly two and a half years. Although this particular patient was insured and was able to live without ventilator support for at least some of her life, an uninsured anencephalic who needed constant intensive care would create a formidable expense for a hospital—all of it EMTALA generated, even though virtually none of it actually in the ER. See Morreim, *supra* note 6, at 227–29.

However, if Medicare payments barely cover the costs of providing services to the elderly and disabled, leaving no excess, then we might well conclude that the billions EMTALA generates in uncompensated costs are out of proportion to the “benefit” of being paid barely enough. It is largely an empirical question best left for another day.

D. Coercion

Overall, Medicare represents more than thirty percent of many hospitals’ budgets,¹⁵² while Medicare and Medicaid together account for about fifty-five percent of their revenues.¹⁵³ Here, the Court’s analysis in *NFIB* is instructive. The Court struck down the ACA’s Medicaid expansion requirement, partly because a threat to withdraw the funds that represented ten percent of states’ budgets would amount to “economic dragooning,” “gun to the head” coercion.¹⁵⁴

Twenty years after hospitals had come to rely on it as an integral part of their business model, EMTALA was imposed as a “do it or leave” imperative. If threatening a mere ten percent of states’ budgets constitutes an inordinate threat, then surely a threat to eliminate thirty percent of hospitals revenues would be at least as outsized, as a penalty for failing to fulfill EMTALA’s obligations.

Conclusion

If EMTALA fails either the germaneness test or the proportionality test (either alone is sufficient¹⁵⁵), it is unconstitutional. And as the Court emphasized in 2013: “[T]he 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

152. As of 2002, the two programs comprised just over forty-seven percent of hospital revenues—approximately thirty percent from Medicare and seventeen percent from Medicaid. Tammy Lundstrom, *Under-Reimbursement of Medicaid and Medicare Hospitalizations as an Unconstitutional Taking of Hospital Services*, 50 WAYNE L. REV. 1243, 1248 (2004).

153. Robert Pear, *Administration Offers Health Care Cuts as Part of Budget Negotiations*, N.Y. TIMES (July 4, 2011), <http://www.nytimes.com/2011/07/05/us/05deficit.html?pagewanted=all>.

154. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605 (2012).

155. As seen in case law such as *Nollan*, a lack of germaneness alone, or as in *Dolan* a disproportionality alone, would be sufficient to find a condition unconstitutional.

leverage funding to regulate . . . outside the contours of the program itself.”¹⁵⁶

As the Court pointed out in *AID*, “the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident.”¹⁵⁷ Nevertheless, it can still be possible to discern in a particular case that a condition on federal funding falls on the wrong side of the line.¹⁵⁸

Twenty years after hospitals became financially dependent on this program that was expressly focused on insuring healthcare for elderly and disabled beneficiaries, the federal government leveraged that dependence to extract an arguably outsized commitment for a completely different population: anyone who visits an ED or who needs specialty services. The price of continuing to participate in Medicare became a none-too-voluntary abdication of hospitals’ Fifth Amendment right against uncompensated takings.

If the “line” is defined by the use of leverage to extract conditions that exceed the contours of the government program, EMTALA clearly falls on the wrong side of that line, “impermissibly burden[ing] the right not to have property taken without just compensation.”¹⁵⁹ It is therefore unconstitutional.

So what’s next? The answer is quite simple: The government that mandates systematic takings must ensure they are justly compensated.¹⁶⁰

156. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013). The word “speech” is deleted because although the case refers to First Amendment speech protections, the Court’s message is broader. Applicable case law makes it clear that this distinction applies to whichever protected constitutional right is being burdened.

157. *Id.* at 2330.

158. As the Court went on to say in *AID*: “Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.” *Id.*

159. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2590 (2013).

160. *Morreim*, *supra* note 6, at 257–70. Patients have the first obligation to pay for their care. However, if patients cannot or will not pay, whether directly or via insurance, then the government that mandates the services must stand as guarantor of the compensation it has mandated.