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Germaneness and Religious Liberty

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GERMANENESS AND RELIGIOUS LIBERTY

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INTRODUCTION

One problem posed by a symposium on the doctrine of unconstitutional conditions and religious liberty is that it turns out there is not much actual *doctrine* in the area. The leading law and religion casebook contains only three references—each a passing mention—to unconstitutional conditions,[1] characterizing *Sherbert v. Verner*[2] as an unconstitutional conditions case and noting the relevance of unconstitutional conditions to the recent *Trinity Lutheran Church of Columbia, Inc. v. Comer*[3] to *Carson v. Makin*[4] line of funding cases. And so while the issue of unconstitutional conditions has been a topic in constitutional law more generally and is widely regarded as a doctrinal muddle, it has explicitly been invoked only rarely in religion cases.

That state of the topic might be changing, however, as government at different levels expands its regulatory reach and increasingly funds religious institutions with strings attached.[5] And so as courts

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1 MICHAEL W. MCCONNELL, THOMAS C. BERG, & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 115, 382, 407 (5th ed. 2022).

2 374 U.S. 398 (1963). See also the discussion of *Sherbert* and other unemployment insurance cases as posing the problem of unconstitutional conditions in Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 79–87 (1988).

3 137 S. Ct. 2012 (2017).

4 142 S. Ct 1987 (2022).

5 Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html [https://perma.cc/FD33-735M] (discussing Maine's enactment of an anti-discrimination requirement applied to private schools participating in the tuition program at issue in *Carson v. Makin*).

confront questions about unconstitutional conditions in the context of religious liberty, the need for doctrinal signposts has become more pressing. In this Essay, I propose that we look next door from free exercise of religion to the development of unconstitutional conditions in free speech doctrine, where there has been a series of cases over several decades developing (however haltingly) a set of criteria we can broadly lump under the heading of "germaneness" for assessing the constitutionality of conditions on recipients of government benefits. The germaneness requirement, variously understood, serves as both a criterion for permitting government regulation attached to a benefit and for when such regulation exceeds a constitutionally permissible limit. And even if germaneness is more a "standard" than a "rule," it at least provides a guide that is grounded in precedents that have traced out its content and serves the functional purpose of preventing government from leveraging its financial resources to accomplish objectives at odds with First Amendment rights.

To appreciate the doctrinal gap in the free exercise area, consider the *Trinity Lutheran* to *Espinoza v. Montana Department of Revenue*[6] to *Carson v. Makin* line of funding cases. In each case, the state established a funding program (playground resurfacing in *Trinity Lutheran*[7] or tuition scholarships in *Espinoza* and *Carson*)[8] and set a condition on recipients that there may not be "religious" (in *Trinity Lutheran* and *Espinoza*)[9] or "sectarian" (in *Carson*) participants or uses in the program.[10] Such a condition was deemed in all three cases to violate a nondiscrimination requirement of the Free Exercise Clause (and nonfunding of the schools was not required by the Establishment Clause).[11] But Chief Justice Roberts's opinions in all three cases did not explore the extent to which the state *could* constitutionally impose a condition on recipients of funding, only that the Free Exercise Clause operated as a categorical barrier to the imposition of the conditions in each of those cases.

Similarly in *Sherbert v. Verner* (also sometimes cited as an unconstitutional conditions case), the conditioning of unemployment compensation benefits on someone's willingness to work on her Sabbath was held to violate the Free Exercise Clause[12] and ushered in an era of

6 Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).

7 *Trinity Lutheran*, 137 S. Ct. at 2017.

8 *Espinoza*, 140 S. Ct. at 2251 (2020); *Carson*, 142 S. Ct. at 1993–94.

9 *Trinity Lutheran*, 137 S. Ct. at 2017; *Espinoza*, 140 S. Ct. at 2252.

10 Carson v. Makin, 142 S. Ct 1987, 1993 (2022).

11 *See Trinity Lutheran*, 137 S. Ct. at 2024; *Espinoza*, 140 S. Ct. at 2262; *Carson*, 142 S. Ct. at 2002.

12 Sherbert v. Verner, 374 U.S. 398, 409–10 (1963).

treating claims for substantial burdens on free exercise of religion with strict scrutiny (even if, as Justice Scalia noted in *Employment Division v. Smith*, the government prevailed with unusual frequency in such cases).[13] As in the recent school funding cases, the Court's opinion in *Sherbert* did not explore much if at all why such a condition on the government benefit is constitutionally impermissible, only that the condition there was a substantial burden on the claimant's free exercise rights and the state's proffered interests were not compelling.[14]

In free exercise cases, then, the doctrine of unconstitutional conditions (to the extent there is such a "doctrine") has drawn a categorical line that leaves for future cases development of criteria for when conditions might yet be constitutionally permissible. In a long line of unconstitutional conditions cases involving the Freedom of Speech Clause, however, the Court has, in fact, developed a set of criteria to help guide its decisions about when a condition is constitutionally excessive and when a condition is not. The Court has never given a precise label to this set of criteria, but I borrow and expand upon the term "germaneness" from Kathleen Sullivan's article on unconstitutional conditions[15] to cover both (a) the requirement that a condition be relevant to the purpose of the government benefit, and (b) a distinction between permissible conditions that define a program's boundaries and impermissible conditions that fall outside of it.

This Essay will proceed in Parts I and II to consider the free speech cases in which the Court has found conditions on a government benefit to be constitutionally permissible and impermissible. Part III will develop the emerging "germaneness" requirement and discuss possible applications of it to emerging free exercise controversies.

I. FREE SPEECH CASES UPHOLDING CONDITIONS

Regan v. Taxation with Representation of Washington[16] is an early and illustrative example of a case upholding a government condition against a First Amendment challenge. In *Regan*, the Court held that an Internal Revenue Code provision denying § 501(c)(3) tax-exempt status to nonprofit organizations substantially engaged in lobbying activities did not violate the First Amendment.[17] The Court reasoned that the case was controlled by an earlier lobbying-related case,

13 *See* 494 U.S. 872, 883 (1990).

14 *Sherbert*, 374 U.S. at 403–09.

15 Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1456–76 (1989).

16 461 U.S. 540 (1983).

17 *Id.* at 541–42, 550–51.

Cammarano v. United States,[18] that upheld a denial of business expense deductions for lobbying activities. "Congress," the Court explained, "is not required by the First Amendment to subsidize lobbying,"[19] and rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."[20] (As an aside, *Regan* and the peculiar features of the tax code may be the best explanation for why the prohibition on churches engaging in advocacy for political candidates is likely a constitutionally permissible condition.)

Perhaps the most controversial unconstitutional conditions free speech case remains *Rust v. Sullivan*,[21] where the Court upheld a condition imposed by regulations adopted by the Secretary of Health and Human Services that prohibited Title X family-planning funds from going to programs related to counseling, referral, and activities regarding abortion as a family-planning method[22] (there was also a provision requiring that Title X recipients be organized so that abortion-related activities were "physically and financially separate").[23] In upholding the Title X regulations, the Court rejected arguments that the regulations were viewpoint discriminatory and that they were an unconstitutional condition on receipt of a funding benefit.[24] As to viewpoint discrimination, Chief Justice Rehnquist's opinion noted that the Court had already held that "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'"[25] When deciding what activities to fund, the government can make determinations based on particular views it seeks to foster. "The Government can . . . selectively fund a program to encourage certain activities it believes to be in the public interest," the Court said, "without at the same time funding an alternative program which seeks to deal with the problem in another way."[26]

Furthermore, the prohibition on abortion counseling did not violate the Title X grantees' First Amendment free speech rights because it was directed toward Title X-funded *activities* only, leaving the grantee

18 358 U.S. 498 (1959).

19 *Regan*, 461 U.S. at 545 (citing *Cammarano*, 358 U.S. at 513).

20 *Id.* at 515 (quoting *Cammarano*, 358 U.S. at 515 (Douglas, J., concurring)).

21 500 U.S. 173 (1991).

22 *Id.* at 177–81, 203.

23 42 C.F.R § 59.8(a)(1) (1989).

24 *Rust*, 500 U.S. at 194, 196.

25 *Id.* at 192–93 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977) (alteration in original)).

26 *Id.* at 193 (first citing *Maher*, 432 U.S. at 474; and then citing Harris v. McRae, 448 U.S. 297 (1980)).

"unfettered in its other activities"[27] that are "outside the scope of the federally funded program."[28] As to unconstitutional conditions, the Court characterized earlier cases (such as *FCC v. League of Women Voters of California*, discussed below) as "involv[ing] situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service."[29] The constitutional infirmity in such cases was that the government "effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program."[30] "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights," the Court concluded.[31] *Rust*, then, is a high-water mark of allowing the government to set conditions on a federal program, but later cases qualify some of its reasoning and note the boundaries of what the government may do when imposing a condition on a benefit.[32]

Later cases upholding conditions include *National Endowment for the Arts v. Finley*,[33] *United States v. American Library Ass'n, Inc.*,[34] and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[35] In *Finley*, the Court held that a grant condition requiring the NEA to consider "decency and respect"[36] for diverse beliefs and values when reviewing grant applications did not interfere with grant applicants' First Amendment rights because it aligns with the purpose behind the statute establishing the NEA insofar as "the Government may allocate competitive funding according to criteria that would be impermissible were

27 *Id.* at 196.

28 *Id.* at 197.

29 *Id.* (emphasis in original).

30 *Id.*

31 *Id.* at 198.

32 Indeed, Chief Justice Rehnquist strongly tended to defer to the government's ability to set conditions on grants even where there were free speech concerns, with the outer limit of a viewpoint-discriminatory suppression of "dangerous ideas." *Id.* at 192 (quoting Regan v. Tax'n with Representation of Washington, 461 U.S. 540, 548 (1983)). In addition to his majority opinions in *Regan* and *Rust* (upholding the constitutionality of conditions), then-Justice Rehnquist dissented in *FCC v. League of Women Voters* and as Chief Justice joined Justice Scalia's dissent in *Legal Services Corp. v. Velazquez* (cases that struck down conditions). *See* FCC v. League of Women Voters of California, 468 U.S. 364, 407 (1984) ("[W]hen the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily 'aimed at the suppression of dangerous ideas.'") (Rehnquist, J., dissenting) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001) (Scalia, J., dissenting).

33 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

34 539 U.S. 194 (2003).

35 547 U.S. 47 (2006).

36 *Finley*, 524 U.S. at 572 (quoting 20 U.S.C. § 954(a)(1) (1994)).

direct regulation of speech or a criminal penalty at stake."[37] The Court noted that "[p]ublic funds . . . must ultimately serve public purposes the Congress defines" and also applied *Rust*: "Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest.'"[38]

In *American Library Ass'n*, the Court held that a statute requiring public libraries to use Internet filters as a condition for receiving federal funding did not violate the libraries' free speech rights.[39] The plurality again claimed to be applying *Rust*:

> Congress may certainly insist that these "public funds be spent for the purposes for which they were authorized." Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*.[40]

Finally, in *Rumsfeld*, the Court upheld the Solomon Amendment, which required law schools to allow military recruiters to recruit on campus as a condition of receiving federal funds.[41] The Court held that the Amendment did not violate the law schools' First Amendment freedom of expressive association because "[s]tudents and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable."[42]

Taken together, these cases show that conditions on funding do not violate the First Amendment if they (a) serve the purpose for which the funds were authorized and the activities are within the program's scope, (b) the government is disbursing public funds to private entities to convey the government's message and the conditions ensure the message does not get garbled, and (c) limit the use of funds that are substantially directed toward lobbying or other such activities that the government is not obliged to subsidize.

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37 *Id.* at 587–88.

38 *Id.* at 588 (first quoting 20 U.S.C. § 951(5) (1994); and then quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

39 *Am. Libr. Ass'n*, 539 U.S. at 214 (plurality opinion).

40 *Id.* at 211–12 (citation omitted) (quoting *Rust*, 500 U.S. at 196).

41 Rumsfeld v. F. for Acad. and Inst. Rts., 547 U.S. 47, 70 (2006).

42 *Id.* at 69–70.

II. CASES HOLDING CONDITIONS UNCONSTITUTIONAL

By contrast, several cases show the constitutional limits of permissible conditions. In the early case of *Speiser v. Randall*,[43] the Court held that a property tax exemption program requiring veterans to sign an oath vowing not to overthrow the government violated their First Amendment free speech rights.[44] The Court explained that

> when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.[45]

In *FCC v. League of Women Voters*,[46] the Court held that a statutory provision denying federal funds to any noncommercial, educational broadcasting stations that engage in "editorializing" violated the free speech rights of the stations.[47] Among the problems with such a condition were that there was no way for the station to segregate its federal funds to only noneditorializing activities, in contrast to the organization in *Regan* that could erect an affiliated organization to engage in lobbying activities, and the all-or-nothing problem that "a noncommercial educational station that receives only 1% of its overall income from [the Corporation for Public Broadcasting] grants is barred absolutely from all editorializing."[48] And while the discussion of unconstitutional conditions has not always been mapped onto the tiers of scrutiny approach that marks many cases involving direct regulation of speech, the Court noted in *League of Women Voters* that "the specific interests sought to be advanced by [the] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects."[49]

In *Legal Services Corporation v. Velazquez*,[50] the Court considered a condition on grants dispersed to programs providing legal assistance that the programs not engage in "litigation, lobbying, or rulemaking,

43 357 U.S. 513 (1958).
44 *Id.* at 529.
45 *Id.* at 528–29.
46 468 U.S. 364 (1984).
47 *Id.* at 366 (quoting 47 U.S.C. § 399 (1982)).
48 *Id.* at 400.
49 *Id.* at 402.
50 531 U.S. 533 (2001).

involving an effort to reform a Federal or State welfare system."[51] Legal Services Corporation (LSC) programs could take on welfare clients for the purpose of helping them obtain benefits that had been erroneously denied, but such a representation could not extend to any efforts to change the underlying welfare laws. The Court held that this was an attempt to regulate private speech, as in *Rust*, but distinguished *Rust* on the grounds that there "the government 'used private speakers to transmit specific information pertaining to its own program.'"[52] When the government defended the condition on LSC representations on the grounds that it was "necessary to define the scope and contours of the federal program," the Court countered 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."[53]

Perhaps the most significant and thorough statement of the free speech limits on conditions is *Agency for International Development v. Alliance for an Open Society International, Inc.*,[54] which brought considerably more doctrinal clarity to the free speech and unconstitutional conditions question. The condition was imposed by a statutory requirement that no organization could receive a grant for a federally funded HIV/AIDS global prevention program "that does not have a policy explicitly opposing prostitution and sex trafficking."[55] Chief Justice Roberts noted that the spending power "includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends,"[56] but requiring domestic organizations to adopt a policy explicitly opposing sex trafficking and the decriminalization of prostitution as a condition of receiving federal funds violated the organizations' First Amendment free speech rights.[57]

The Court reaffirmed the view from *Rust* that it is constitutionally permissible to place a condition on a program or activity, but not a *recipient*. *Agency for International Development* distinguished *Rust* insofar as "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the

51 *Id.* (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321–55)).

52 *Id.* at 541 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

53 *Id.* at 547.

54 570 U.S. 205 (2013).

55 22 U.S.C. § 7631(f) (2012).

56 *Agency for Int'l Dev.*, 570 U.S. at 213.

57 *Id.* at 218–19.

federally funded program.'"[58] The Chief Justice's characterizations of the prior caselaw emphasized two key distinctions: between recipients and programs, and between "defining the limits" of a program and regulating "outside" the program.[59]

> [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 speech outside the contours of that program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. 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."[60]

The Court also emphasized in *Agency for International Development* the unavailability of the so-called "affiliate option" that the lobbying organization had in *Regan*. "When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program."[61]

From this discussion, we can glean a few guideposts for when conditions on spending will be held to be an unconstitutional infringement on free speech. Where (a) the conditions are targeted toward *recipients* of the funds, rather than a particular *program* or *activity*, (b) conditions are targeted toward activities outside the scope of the funded program, (c) the conditions fail strict scrutiny, that is, they do not serve a compelling government interest and are not the least restrictive means to achieve that interest, and (d) the organization cannot feasibly segregate or target the federal funds to a separate affiliate (*League of Women Voters* and *Agency for International Development*, unlike *Rust* and *Regan*).

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58 *Id.* at 218 (quoting Rust v. Sullivan, 500 U.S. 173, 197 (1991)).

59 *Id.* at 218; *see also id.* at 218–19 ("[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program[.]" (quoting *Rust*, 500 U.S. at 197)).

60 *Id.* at 214–15 (quoting Legal Servs. Corp. v. Velasquez, 531, 547 (2001)).

61 *Id.* at 219; *see also* Regan v. Tax'n with Representation of Washington, 461 U.S. 540, 543 (1983).

III. "GERMANENESS" AND RELIGIOUS FREE EXERCISE

Kathleen Sullivan called attention to a "germaneness" requirement in her widely regarded 1989 article on unconstitutional conditions.[62] For Sullivan, germaneness is not only a consideration in free speech or individual rights cases but cuts across other constitutional doctrines such as Spending Clause cases that pose federalism concerns. In *South Dakota v. Dole*,[63] for example, the Court noted that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[64] For Sullivan, germaneness "comes closest to providing [a] possible foundation" for the theory that the problem with unconstitutional conditions is that they are a form of "extortion, bribery, manipulation, and subterfuge."[65] Instead of the tiers of scrutiny that would be invoked in instances of direct regulation by the state, germaneness helps to understand whether a constitutional right has been burdened in the first place:

> [I]n unconstitutional conditions cases, the degree of germaneness helps to determine at the threshold what level of government justification would suffice to uphold a condition, not whether the government has provided that justification. Specifically, the Court has held that nongermane conditions trigger closer scrutiny than germane conditions pressuring the same rights.[66]

Sullivan notes the choice between what we might term either a "germaneness as triggering heightened scrutiny" view and a "the greater includes the lesser" view that would allow the government always to limit receipt of a benefit on a condition:

> One position argues that the less germane a condition to the reason for withholding benefits altogether, the more suspiciously it should be treated. The opposing position denies the significance of germaneness; instead, it argues that the greater power to withhold a gratuitous benefit always includes the lesser power to grant it on condition. From this second perspective, attachment of even rights-pressuring conditions to gratuitous benefits constitutes perfectly legitimate legislative activity.[67]

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62 Sullivan, *supra* note 15.

63 483 U.S. 203 (1987).

64 *Id.* at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

65 Sullivan, *supra* note 15, at 1457.

66 *Id.*

67 *Id.* at 1458.

In the three decades since Sullivan's article, the former view has prevailed in arguments that the "greater" power to withhold a benefit altogether does not entail a "lesser" power to condition receipt of the benefit on any ground whatsoever that the government might choose.[68]

Sullivan also notes how germaneness helps to understand the distinction throughout the unconstitutional conditions cases "between impermissible penalties on rights and permissible refusals to subsidize."[69] On this view, *Regan* is a refusal to subsidize case, but *League of Women Voters* is a penalty imposed on activities by the stations: "when federal funds subsidized only a portion of a public broadcasting station's expenses, the anti-editorializing condition burdened the use of *private* funds to editorialize."[70]

This pervasive requirement of germaneness that marks the doctrine of unconstitutional conditions in free speech (and other areas) reflects at least two themes: First, there is an anti-leveraging principle at work. As signaled by Chief Justice Roberts's opinion in *Agency for International Development*, the "inside" and "outside" the program distinction is meant to prevent the government from leveraging its vast spending authority to accomplish through the imposition of conditions what could not be imposed by direct regulation. Sullivan's article includes a discussion of various legislative process theories that might explain the germaneness requirement and finds each of them deficient, but there remains—in both the free speech and in the federalism cases—a worry about coercion brought about by setting conditions that would otherwise pose free speech (in First Amendment cases) or Spending Clause limitations or anti-commandeering (in federalism cases) worries.

Second, there is an analogue in unconstitutional conditions cases to the tiers of scrutiny and means-end analysis that marks cases involving direct regulation of speech, albeit absent some of the (seeming) precision in applying strict scrutiny or rational basis review. The requirements that a condition be relevant to the government's objective

68 This decline of the "greater includes the lesser" argument is also found in the related free speech doctrine of commercial speech, where the Court moved from the view of then-Justice Rehnquist in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), that the greater power to illegalize gambling included the lesser power to set limits on advertising for gambling to the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509–10 (1996) (plurality opinion), that a restriction on price advertising by liquor stores was unconstitutional even if the states enjoy plenary authority over liquor sales otherwise.

69 Sullivan, *supra* note 15, at 1464.

70 *Id.* at 1465 (footnote omitted).

in providing the benefit in the first place and that a condition be "inside" the program are a refracted form of scrutiny and matching of (im)permissible means to the end. This approach leaves the government able to accomplish the purposes sought through implementation of a program while appropriately raising concerns when the government goes "outside" the scope of a program and infringes on constitutional rights.

The concern about anti-leveraging that the germaneness requirement tries to capture might explain a seeming anomaly in the area of free exercise doctrine and unconstitutional conditions. In some instances, it may turn out that the government will have a stronger case (because of *Employment Division v. Smith*) in defending a neutral and generally applicable regulation that burdens religious free exercise when it does so directly and not as part of a condition on a benefit because *Smith* holds that heightened scrutiny is not applicable to such directly imposed regulations.[71] Under my view, however, when a regulation is appended as a condition to a benefit, the germaneness requirement—if not quite strict scrutiny in many respects—at least requires some showing of how a condition falls within the scope of the government program. There is a disjunction here between free speech and free exercise, to be sure. The government clearly could not punish extramural speech about abortion by the providers who brought the challenge in *Rust*, for example, because such content- or viewpoint-regulation of speech is prohibited under free speech doctrine, but *Rust* did hold that grant recipients could be limited in their counseling and referrals for abortion when administering the government-funded family-planning programs.[72]

So long as *Employment Division v. Smith* remains the governing case for constitutional free exercise claims, this mismatch between direct regulation (broadly permissible so long as neutral and generally applicable) and regulation by condition (impermissible if failing the germaneness requirement) does seem to present an anomaly. There may be a political process-related justification for it, though. Direct regulation of religious practice is frequently subject to exemptions, both statutory (wholesale protection as to federal regulations under the Religious Freedom Restoration Act (RFRA) and in similar state statutes)[73] and, particularly in some recent cases, constitutionally required exemptions given the willingness of courts to identify failures of general

71 *See* 494 U.S. 872, 879 (1990).

72 *See* Rust v. Sullivan, 500 U.S. 173, 192–200 (1991).

73 *See generally* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

applicability where the government has exemptions for secular reasons.[74] (And even if not precisely presenting an instance of an "exemption" but instead something like protecting a constitutional principle of "church autonomy," the line of ministerial exception cases also show the limits of direct regulation in some contexts.)[75] But where the government regulates directly and does so in such a way as to satisfy strict scrutiny (where RFRA is applicable) or where the government's purposes are sufficiently important that no exemption (secular or religious) is granted—as in some criminal laws, for example—then we might surmise that the government is acting within constitutional limits.

When a regulation is attached to a condition, however, the government is able to circumvent the requirements of strict scrutiny (where required by statute)[76] or impose of a set of requirements without any exemptions that would otherwise call into question a regulation's general applicability. Instead, the government is able to leverage its provision of benefits to impose a regulation unrelated (where germaneness has not been satisfied) to the purposes of the government program. When employing conditions on a benefit, a legislature or regulatory agency does not have to face up to the costs of imposing the regulation directly and can do so through legislative riders or added provisions in rulemaking that attach a seemingly innocuous condition to recipients of the benefit. Just as the strict scrutiny (where applicable) or no-exemptions requirements as to direct regulation protect free exercise, the germaneness requirement performs a similar function in the context of unconstitutional conditions.

In applying this discussion of when conditions on a benefit to a religious institution would be constitutionally impermissible in light of the germaneness requirement, consider three examples of conditions:

1. The requirement imposed by Maine leading up to the decision in *Carson* that schools participating in its private school tuition program comply with nondiscrimination admissions

74 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

75 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

76 Although whether the Religious Freedom Restoration Act (RFRA) requires strict scrutiny as to claims for unconstitutional conditions is an open question to my knowledge—all of the nascent unconstitutional conditions cases in the free exercise context (such as *Carson v. Makin*, 142 S. Ct. 1987 (2022)) have involved state conditions on a benefit, and the leading RFRA cases have been challenges to direct regulation of a person or entity.

or employment requirements to which some schools may have sincere objections.[77]

2. "Charitable choice" rules that require religiously affiliated social service agencies to comply with nondiscrimination requirements as to religion if they accept government funding.[78]
3. Requiring religiously affiliated hospitals that receive government funding to provide services (such as elective abortions) they deem morally objectionable.[79]

If the rights-protective germaneness requirement from cases such as *Agency for International Development* were applied to these cases, my provisional view is that all three would pose an unconstitutional condition, albeit with some countervailing *Rust*-style considerations. In each instance, the condition seeks to regulate *entities*, not merely *programs* or *activities*, which has been a consistent doctrinal theme. The government may regulate the programs that it funds (say, the requirements for Medicare and Medicaid reimbursement payments to hospitals treating patients covered by those programs), but it may not reach outside the program to regulate what procedures the hospital does or does not perform.

The entities/programs distinction is perhaps more difficult in the first two cases because the government could say it is regulating the *program* of education or social services by way of requiring certain admissions, employment, or other practices in the program, but *Carson v. Makin* (quoting *Velazquez*) cautioned against manipulating the definition of what constitutes the program to subsume a prohibited condition (there to rebuff Maine's argument that it sought to provide an equivalent "secular" education and was not imposing the unconstitutional condition that recipients could not be religious schools).[80] Including admissions or employment requirements within the scope of a program funding education and social services seems to engage in a similar redefinition by way of expanding the meaning of what constitutes the program, particularly where the free exercise or expressive associational rights of schools and social service agencies to admit, employ, and serve clients based on their own criteria (including religious considerations) would be affected by imposition of such a condition.

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77 *See* Tang, *supra* note 5.

78 *See Fulton*, 141 S. Ct. at 1875.

79 *See* Franciscan All., Inc. v. Becerra, 47 F.4th 368 (5th Cir. 2022) (upholding injunction against proposed Department of Health and Human Services rule regarding "discrimination on the basis of sex" including "termination of pregnancy").

80 *See Carson*, 142 S. Ct. at 1999.

Finally, the availability or ease of an affiliate option that the Court emphasized in *Regan* to uphold a condition[81] (and in *League of Women Voters* to strike down a condition[82]) argues for the unconstitutionality of each of the three conditions. Religious schools and hospitals (like the PBS stations in *League of Women Voters*) could not readily establish affiliate organizations that could avoid the conditions, although the level of burden suggested by "readily" has never been fully explained outside of the context of setting up distinct § 501(c)(3) and 501(c)(4) organizations to allow for lobbying by nonprofit entities. *Agency for International Development* suggests that the affiliate option is particularly troublesome when "the condition is that a funding recipient espouse a specific belief as its own," because even then the creation of an affiliate that is closely identified with the recipient means "the recipient can express [its] beliefs only at the price of evident hypocrisy."[83] Once again, this issue seems most acute for a hospital required to perform services it deems objectionable, where the condition both garbles the hospital's religious mission and would entail hypocrisy if the hospital created a putatively nonreligious affiliate to receive government funding and provide the objectionable services.

My conclusion here is that the germaneness requirement developed in the law of unconstitutional conditions on freedom of speech has been a workable framework for testing when a condition imposes an unconstitutional burden. Germaneness—and particularly the requirement that a condition be "internal" to a program—has also proven to be increasingly rights-protective, as the arc from *Regan* to *Agency for International Development* illustrates. By importing the germaneness requirement from free speech to free exercise, we would bring needed robustness and a measure of clarity to the question of unconstitutional conditions and religious liberty.

81 *See* Regan v. Tax'n with Representation of Washington, 461 U.S. 540, 543 (1983).
82 *See* FCC v. League of Women Voters of California, 468 U.S. 364, 400 (1984).
83 Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 219 (2013).