THERE ARE NO UNCONSTITUTIONAL CONDITIONS ON FREE EXERCISE

*Michael A. Helfand**

INTRODUCTION

Maybe no passage about the unconstitutional conditions doctrine is quite as memorable as the judgment rendered by Adam Cox and Adam Samaha: "You can easily question the judgment of anyone who writes a paper, even an essay, with 'unconstitutional conditions' in the title. The topic is very 1980s and scholars lost their enthusiasm for it not long after the Go-Go's broke up."[1]

And yet, recent court decisions—and the government response to them—have thrust the doctrine back onto the scholarly agenda. At the center of this renewed interest is a series of recent Supreme Court cases prohibiting exclusion of religion and religious institutions from generally available government funding programs.[2] Such exclusions, according to the Court, constitute an impermissible targeting of religion and, as a result, violate the First Amendment's Free Exercise Clause. The consequences of these decisions are broad. While government has no obligation to fund religious institutions, they cannot maintain such programs without including religious institutions in such programs on equal footing.

* Brenden Mann Foundation Chair in Law and Religion, Professor of Law, and Co-Director of the Nootbaar Institute on Law, Religion and Ethics at Pepperdine Caruso School of Law; Visiting Professor and Oscar M. Ruebhausen Distinguished Fellow, Yale Law School; Senior Fellow, Shalom Hartman Institute.

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

2 *See* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2021 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020); Carson v. Makin, 142 S. Ct. 1987, 1997 (2022).

But what if government, instead of excluding religious institutions, places other conditions on receipt of funding? For example, can government condition funds on compliance with prevailing antidiscrimination norms—or can government go even further and require institutions to expressly waive their free exercise rights in order to receive funds? These sorts of puzzles naturally present themselves as questions about the unconstitutional conditions doctrine. The goal of this short Essay is to argue against that impulse. Instead, as detailed below, this Essay claims that when it comes to the Free Exercise Clause, the unconstitutional conditions doctrine does no independent work.[3] Instead, evaluating such conditions can and ought to be done with reference to the demands of the Free Exercise Clause itself. Conditions in this context will rise and fall on their ability to clear the hurdles presented by the free exercise doctrine—no more and no less.

I. WHY ARE WE TALKING ABOUT UNCONSTITUTIONAL CONDITIONS?

In 2022, the Supreme Court handed down its decision in *Carson v. Makin*.[4] A landmark decision, *Carson* addressed Maine's tuition assistance program. Over half the school districts in rural Maine do not have their own secondary schools.[5] Maine solved this problem by allowing parents in those districts to select an approved private school for their children. In turn, the state would pay tuition to the parents' chosen private school on the student's behalf. However, Maine's program expressly excluded "sectarian" schools from the tuition assistance program, even if they satisfied all other criteria for being an approved school.[6]

In *Carson*, the Supreme Court held that the exclusion of sectarian schools from Maine's tuition assistance program was unconstitutional.[7] According to the Court, "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[8] In turn, by excluding sectarian schools from participation,

3 The subject of this Symposium is unconstitutional conditions on the free exercise of religion. Whether or not the criticisms below apply in other constitutional contexts I will leave for another time. For now, I will simply note that where other constitutional doctrines leverage core intuitions about coercion, the unconstitutional conditions doctrine, at least on some views, might expand the scope of what qualifies as coercion.

4 142 S. Ct. 1987 (2022).

5 *See id.* at 1993.

6 *Id.* at 1993–94.

7 *Id.* at 2002.

8 *Id.* at 1996.

"Maine's tuition assistance program . . . 'effectively penalize[d] the free exercise' of religion."[9]

Carson is part of a recent trilogy of cases all addressing whether government can exclude religion and religious institutions from participation in government funding programs. The first of these cases, *Trinity Lutheran Church v. Comer*, held that Missouri's exclusion of religious institutions from its Scrap Tire Program violated the Free Exercise Clause because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[10] As the Court explained in 2017, "such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."[11] And the Court subsequently applied these same principles to the private school setting in its 2020 decision, *Espinoza v. Montana Department of Revenue*.[12]

But *Carson* stands out for applying this rule regardless of the underlying logic for why religion and religious institutions are excluded. In *Trinity Lutheran*, the Court had indicated that government could still deny funding based on what an individual or institution "proposed *to do*" with the funds.[13] By contrast, what the First Amendment prohibited were exclusions that denied funding to an institution "simply because of what it is."[14] For a brief time, this status-use distinction lingered in the caselaw,[15] with uneven application, until the Court in *Carson* expressly rejected it, holding that "the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."[16]

The elimination of the status-use distinction made clear that all religious exclusions from generally available government funding programs were now unconstitutional. Put differently, attempts to characterize such exclusions as based upon how the funds would be used would not enable government to evade the standard originally set out in *Trinity Lutheran*. Maybe most importantly, given the intense

9 *Id.* at 1997 (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978)).

10 137 S. Ct. 2012, 2021 (2017).

11 *Id.*

12 *See* 140 S. Ct. 2246, 2261 (2020).

13 *Trinity Lutheran*, 137 S. Ct. at 2023.

14 *Id.*

15 *Compare* Freedom from Religion Found. v. Morris Cnty. Bd. of Chosen Freeholders, 181 A.3d 992, 1008 (N.J. 2018) (relying on the status-use distinction to hold that a generally available, public historic preservation grant program could not award funds to churches for religious uses), *with* Am. C.L. Union v. Hendricks, 183 A.3d 931, 943 (N.J. 2018) (noting that the constitutionality of public grants to a yeshiva and a theological seminary turned on whether the educational institutions would necessarily put the funds to a religious use).

16 142 S. Ct. 1987, 2001 (2022).

national debate on school funding, the *Carson* decision meant that government funding programs available to private schools must also be made available to religious schools.

But the reaction to *Carson* demonstrates why it is far from the last word. On the same day the Court handed down *Carson*, the Attorney General of Maine stated he was not only "terribly disappointed and disheartened," but that he "intend[ed] to explore with Governor Mills' administration and members of the Legislature statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry."[17] To that end, he noted that "[e]ducational facilities that accept public funds must comply with anti-discrimination provisions of the Maine Human Rights Act, and this would require some religious schools to eliminate their current discriminatory practices."[18]

Indeed, in 2021, as the *Carson* litigation continued apace, Maine enacted amendments to its Human Rights Act,[19] which now defines "unlawful educational discrimination" as including discrimination on the basis of "sexual orientation or gender identity" that "[e]xclude[s] a person from participation in, den[ies] a person the benefits of, or subject[s] a person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity."[20] However, the revised Human Rights Act is careful to note that "[n]othing in this section . . . [r]equires a religious corporation, association or society that does not receive public funding to comply with this section as it relates to sexual orientation or gender identity."[21] Together, these two provisions prohibit religious schools from engaging in discrimination on the bases of sexual orientation and gender identity, but only so long as they receive government funds. Otherwise, the prohibitions on sexual orientation and gender identity discrimination do not apply.

As noted by Maine's attorney general, *Carson* may have opened the door for religious schools to apply for funds; but given the demands of Maine's Human Rights Law, "it is not clear whether any

17 OFF. OF THE ME. ATT'Y GEN., Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin* (June 21, 2022), https://www.maine.gov/ag/news/article.shtml?id=8075979 [https://perma.cc/Y3KT-BNDF] [hereinafter *Statement*].

18 *Id.*

19 An Act to Improve Consistency Within the Maine Human Rights Act, S.P. 544, 130th Leg., 1st Spec. Sess. (Me. 2021), https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0544&item=1&snum=130#_blank [https://perma.cc/MFU7-M4NZ].

20 ME. STAT. tit. 5, § 4602(1)(A) (2021).

21 *Id.* § 4602(5)(C).

religious schools will do so."[22] In this way, the conditions that Maine's Human Rights Law now places on receipt of government funding may have taken back whatever gains religious schools secured under *Carson*'s holding. And it has generated significant interest in whether these sorts of conditions can accomplish by other means what the Court prohibited in *Carson*. Put differently, it has once again raised questions as to the scope and applicability of the unconstitutional conditions doctrine.

II. UNCONSTITUTIONAL CONDITIONS: A PRIMER

What is the unconstitutional conditions doctrine? The Supreme Court has summarized the doctrine as follows:

> [E]ven though a person has no "right" to 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 interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."[23]

Put differently, application of the unconstitutional conditions requires "government [to] offer[] a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference."[24] In this way, it represents a rejection of the logic that the government's greater power to withhold a benefit all together authorizes the government to condition a benefit on the relinquishing of a constitutional right. Justice Holmes served as one of the earliest advocates of this "greater-includes-the-lesser" logic,[25] which he aptly summarized in *McAuliffe v. Mayor of New Bedford*—a case addressing the dismissal of a police officer for violating a police regulation prohibiting officers from engaging in political

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22 *Statement*, *supra* note 17.

23 Perry v. Sindermann, 408 U.S. 593, 597 (1972) (alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

24 Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989).

25 *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"*, 55 VAND. L. REV. 693 (2002).

canvassing: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[26]

To appreciate the underlying structure of unconstitutional conditions, consider *Speiser v. Randall*.[27] In *Speiser*, a group of honorably discharged World War II veterans sought the veterans' property-tax exemption.[28] However, California law conditioned receipt of such benefits upon completing an application form, which required applicants to sign an oath that they do not "advocate the overthrow of the Government of the United States or of the State of California."[29] The plaintiffs refused to do so, arguing that the requirement violated their free speech rights under the First Amendment.[30] And the Supreme Court agreed. According to the Court, "Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional."[31] The problem with allowing government to do so, at least according to the Court in *Speiser*, is that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."[32]

As scholars have uniformly noted, however, the doctrine of unconstitutional conditions—that is, the legal rules differentiating government conditions that are constitutional from those that are not—has become a hopeless mess.[33] Over the last half century or so, the Court has sorted various government-imposed conditions into constitutional and unconstitutional buckets, but critics contend that there isn't much method to the madness.

Numerous scholars have attempted to fill this doctrinal void with their own views as to the underlying logic of the doctrine—and, in turn, with their own prescriptions for how the doctrine ought to be

26 29 N.E. 517, 517 (Mass. 1892).

27 357 U.S. 513 (1958).

28 *Id.* at 514–15.

29 *Id.* at 515.

30 *Id.*

31 *Id.* at 518.

32 *Id.* at 519.

33 *See, e.g.*, Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 111 (2021) ("Even among the darkest corridors of constitutional law, the doctrine . . . of unconstitutional conditions is famously opaque."); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013) ("[I]f a doctrine is a set of rules or tests, then there is no such doctrine—at least none with more than trivial content."); Sullivan, *supra* note 24, at 1416 ("As applied, however, the doctrine of unconstitutional conditions is riven with inconsistencies."); Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1168 (2019) ("The doctrine of unconstitutional conditions is notoriously complex, convoluted, and inconsistent.").

applied by courts. In each case, scholars have identified a principle external to the constitutional right at stake, using that principle to differentiate between constitutional and unconstitutional conditions.

Thus, to name a few examples, Mitchell Berman has argued that degree of coerciveness should guide judgments on whether the government can condition a benefit on foregoing a constitutionally protected right.[34] Kathleen Sullivan has argued that the unconstitutional conditions doctrine aims to protect the distributive integrity of constitutional rights; it thus "preserve[s] a realm of private autonomy from government encroachment," maintains "neutrality or evenhandedness among rightholders," and prevents "discrimination among rightholders who would otherwise make the same constitutional choice, on the basis of their relative dependency on a government benefit."[35] Louis Fisher has contended that the doctrine is, at its core, "anticommodificationist," seeking to prevent the corruption of certain rights through their exchange for lower-valued goods.[36] And Randy Kozel, in a particularly insightful article, has argued that the unconstitutional conditions doctrine aims to prohibit "government's use of an asset to extract an unrelated concession."[37] In turn, "when there is too severe a mismatch between the benefit the government is offering and the burden it seeks to impose, its action may violate the prohibition against improper leverage."[38]

I take here no view on the merits of these approaches. For the purposes of this Essay, it is enough to note their shared objective: to provide an underlying rationale behind the unconstitutional conditions doctrine and then use that rationale to inform application of the doctrine. As a result, not every conditioning of a government benefit on the relinquishing of a constitutional right qualifies as an unconstitutional condition. For each theory, some conditions will be constitutional, and some will not.

Indeed, the same holds true for the Court's attempts to apply the unconstitutional conditions doctrine. As noted above, the structure of the Court's argument in *Speiser* had a similar format. Requiring veterans, in order to receive a tax exemption, to sign an oath to not "advocate the overthrow of the Government of the United States or of the

34 Berman, *supra* note 33, at 1289 (describing coercion as the "single theme" that has guided—and should guide—the Court's analysis of conditions).

35 Sullivan, *supra* note 24, at 1421.

36 Fisher, *supra* note 33, at 1172–73 (arguing that unconstitutional conditions should be evaluated in light of how such conditions treat rights as fungible objects or commodities, corrupting their moral and civic value).

37 Kozel, *supra* note 33, at 111.

38 *Id.*

State of California"[39] constituted a condition because it required exchanging a free speech right for a government benefit. What made the condition unconstitutional was that, given the context of the condition, enforcing it would have constituted an impermissible degree of coercion: "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."[40]

As a more recent example, consider *Agency for International Development v. Alliance for Open Society International, Inc.*[41] There, the Supreme Court considered the Leadership Act, which authorized appropriation of billions of dollars to fund NGOs which would assist in combatting the spread of AIDS/HIV around the world.[42] However, there was a condition on which NGOs could receive such funds: "no funds may be used by an organization 'that does not have a policy explicitly opposing prostitution and sex trafficking.'"[43] The Court deemed this stipulation an unconstitutional condition. The reasoning worked as follows. The First Amendment prohibits government from "telling people what they must say,"[44] and, therefore, a government directive requiring NGOs adopt such a policy would violate the Free Speech Clause.[45] Of course, the Leadership Act did not directly require NGOs to adopt such a policy. But the Court held that the "relevant distinction" when determining whether a condition is unconstitutional is the distinction "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."[46]

No doubt, *Agency for International Development* and *Speiser* advance different metrics to measure whether or not a condition is unconstitutional. For the *Agency for International Development* Court, what differentiated constitutional and unconstitutional conditions was the degree of relatedness between the condition and the underlying government funding program;[47] for the *Speiser* Court, what differentiated constitutional from unconstitutional conditions was the degree of coerciveness

39 357 U.S. 513, 515 (1958).

40 *Id.* at 519.

41 570 U.S. 205 (2013).

42 *See id.* at 208.

43 *Id.* at 208 (quoting 22 U.S.C. § 7631(f) (2018)).

44 *Id.* at 213 (quoting Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 61 (2006)).

45 *Id.*

46 *Id.* at 214–15.

47 *See id.*

imposed by the condition.[48] But the structure of the arguments in the two cases is the same: the unconstitutional conditions doctrine prohibits government, in some subset of cases, from conditioning a government benefit on the relinquishing of a constitutional right. Identifying that subset of cases requires some sort of principle external to the constitutional right in question—maybe it has to do with the relationship of the condition to the program, and maybe it has to do with the degree of coercive pressure being exercised by the government. It is by reference to your preferred principle—whatever it may be—that allows courts and scholars to determine the constitutionality of the condition.

III. WHY THERE ARE NO UNCONSTITUTIONAL CONDITIONS ON FREE EXERCISE

The central argument of this Essay is that the unconstitutional conditions doctrine no longer has application in the context of the Free Exercise Clause. Constitutional prohibitions on placing conditions on free exercise derive from the Free Exercise Clause, and, as a result, the unconstitutional conditions doctrine does not do any independent conceptual work. Although the Court originally conceived of free exercise doctrine as linked to the doctrine of unconstitutional conditions, the two have diverged. And to continue linking them would lead to conceptual errors and, in turn, distort the doctrine in problematic ways.

A. Unconstitutional Conditions Under the Sherbert *Regime*

The interpretation of the Free Exercise Clause has vacillated over the years between two broad categories of interpretation. While the precise contours of these categories remains a matter of significant debate, it seems fair to say that one of those broad categories is often described as the *Sherbert* standard, or the substantial burden standard.[49] *Sherbert v. Verner* addressed the claims of an employee who had been denied her unemployment compensation because she refused to work on Saturday.[50] However, her refusal to work on Saturday was on account of her religious commitments—she was a Seventh Day

48 *See* 357 U.S. 513, 519 (1958).

49 For discussion of the other category of interpretation, see *infra* Part III.B. For a discussion of the centrality of burden analysis in free exercise doctrine, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

50 374 U.S. 398, 399 (1963).

Adventist.[51] The Court held that the denial of unemployment benefits constituted a violation of the Free Exercise Clause.[52] In so doing, the Court described the trigger for a free exercise violation in terms of a "burden on the free exercise of . . . religion."[53] It noted that the burden in *Sherbert* was "indirect," but—citing its 1961 decision *Braunfeld v. Brown*—the Court nevertheless held that "[i]f the purpose or effect of a law is to impede the observance of one or all religions," even an indirect burden on religion would violate the Free Exercise Clause.[54]

In subsequent years, the Court would use different language to describe this burden standard. In *Wisconsin v. Yoder*, for example, the Court described this standard as applying to laws that "unduly burden[] the free exercise of religion."[55] And when Congress codified this standard in the Religious Freedom Restoration Act (RFRA), it specifically proscribed laws that "substantially burden" the free exercise of religion.[56] Together, these varying formulations all capture the notion that some more significant burdens on the free exercise of religion ought to trigger strict scrutiny.[57]

In *Sherbert*, the Court held that the burden at stake met this standard for the following reasons:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[58]

One can see, based on this formulation, the allure of describing this analysis in terms of unconstitutional conditions. As the Court described it, the denial of unemployment benefits was unconstitutional because it conditioned the receipt of such funds on Sherbert's

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51 *Id.*

52 *Id.* at 401–02.

53 *Id.* at 403.

54 *Id.* at 403–04 (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

55 406 U.S. 205, 220 (1972) (first citing *Sherbert*, 374 U.S. 398; and then citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

56 42 U.S.C. § 2000bb(a)–(b) (2018).

57 How exactly strict scrutiny ought to be applied in this context is also a deeply contested matter. For my own views, see Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 578–84 (2015).

58 *Sherbert*, 374 U.S. at 404.

willingness to forego the exercise of her religion—in the form of working on her Sabbath. Indeed, the Court explicitly linked its decision to the unconstitutional conditions doctrine to explain why "the imposition of such a condition upon even a gratuitous benefit" still violated the Free Exercise Clause.[59] Referencing *Speiser*, the Court explained that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[60] These factors all explain why the Court has repeatedly characterized *Sherbert* as an unconstitutional conditions case.[61]

But while the *Sherbert* Court couched its logic in the language of unconstitutional conditions, the *Sherbert* standard itself never relied on the doctrine. Consider, again, the Court's application of the doctrine in *Speiser v. Randall*.[62] There, government could not require veterans—or any American citizens—to renounce any advocacy to overthrow the United States government.[63] That would violate the Free Speech Clause. But the Free Speech Clause does not itself prohibit government from conditioning a government benefit on relinquishing these free speech protections.[64] After all, the government need not provide this benefit, so maybe, the logic goes, "the greater includes the lesser."[65] It is the unconstitutional conditions doctrine, however, that prohibits government from imposing this condition. In *Speiser*, the Court's underlying logic for why this particular type of condition was problematic rested on a conception of coercion: "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."[66] Coercive conditions qualify, on the *Speiser* Court's analysis, as unconstitutional conditions.

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59 *Id.* at 405.

60 *Id.* at 406.

61 *See, e.g.*, United States v. Am. Libr. Ass'n, 539 U.S. 194, 227 (2003); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

62 *See supra* notes 39–40 and accompanying text.

63 Speiser v. Randall, 357 U.S. 513, 515 (1958).

64 *See* Fisher, *supra* note 33, at 1170 (noting that the unconstitutional conditions doctrine is not itself rooted in any particular constitutional provision, but rather is a "constitutional 'glue,' filling in the interstitial space" between enumerated rights and limitations on government power); *cf.* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10 (1988) (noting that the unconstitutional conditions doctrine is not "anchored to any single clause of the Constitution").

65 *Cf.* Berman, *supra* note 25.

66 *Speiser*, 357 U.S. at 519.

The internal logic of *Sherbert* worked, maybe in a subtle way, quite differently. It generated a standard where certain burdens—undue or substantial burdens—triggered strict scrutiny. And it did so based not on a logic predicated on the unconstitutional conditions doctrine, but on a logic internal to the Free Exercise Clause. Thus, the *Sherbert* standard focused on the existence of significant burdens that put religious claimants to a choice between observing their faith and receiving a government benefit.[67] But it conceived of such a choice as problematic based upon free exercise concerns. That is why it could analogize such burdens to a "fine imposed against appellant for her Saturday worship."[68] To put someone to a choice between religious exercise and a significant government benefit itself constituted a free exercise violation.

This explains how the *Sherbert* standard and the unconstitutional conditions doctrine employ different standards. The *Sherbert* standard examines the degree of burden to determine whether a law ought to trigger strict scrutiny. As noted above, the Court and scholars have debated what organizing principle differentiates constitutional conditions from unconstitutional conditions. Options include coercion, commodification, and leverage. But burdens under the *Sherbert* standard trigger strict scrutiny even when none of such principles have been met.

Scholars have debated the theory and application of *Sherbert*'s burden standard.[69] For my part, I have argued that under the *Sherbert* standard, courts should evaluate whether a burden triggers strict scrutiny by evaluating "whether, by engaging in religious exercise, persons will be subject to some sort of civil penalty."[70] As the Court noted in *Sherbert*, not all burdens qualify under the *Sherbert* standard.[71] Significant or substantial civil penalties will satisfy the *Sherbert* standard, not insignificant or insubstantial civil penalties. On my view, this is because "religious individuals can be expected to absorb some minimal costs for their religious observances."[72] Thus, the *Sherbert* standard aims to ensure that citizens can practice their faith while enduring, at most, insubstantial or insignificant civil burdens or penalties.

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67 *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

68 *Id.*

69 For a summary, see Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL L. REV. 1771 (2016).

70 *Id.* at 1791; *see also* Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 IOWA L. REV. (forthcoming 2023).

71 *See Sherbert*, 374 U.S. at 404–05.

72 Helfand, *supra* note 69, at 1793.

For present purposes, the precise details of the theory matter less. More important is recognizing that *Sherbert* differentiates between constitutional and unconstitutional burdens by considering the degree of penalty a religious citizen can be expected to bear. The unconstitutional conditions doctrine draws the line elsewhere.[73] True, what that line is remains deeply contested—and maybe unintelligible. But the unconstitutional conditions doctrine requires the violation of some other principle that simply isn't present in *Sherbert*. The fact that the scope of protections afforded by the *Sherbert* standard is broader than the unconstitutional conditions doctrine is because *Sherbert* conceptualizes all significant burdens on religious exercise as free exercise violations.

Indeed, the fact that the *Sherbert* standard was not cut from the cloth of unconstitutional conditions is why the Court was able to apply the *Sherbert* standard to cases that did not, at least in any obvious way, sound in the unconstitutional conditions doctrine. Prominent examples include *Yoder*, where the Court applied the *Sherbert* standard to conclude that imposing criminal penalties on an Amish family for refusing to comply with Wisconsin's compulsory education law violated the Free Exercise Clause.[74] Similarly, in *United States v. Lee*, the Court concluded that requiring an Amish employer to abide by social security taxes satisfied the *Sherbert* standard's burden requirement.[75] The Court found the imposition of social security taxes on the Amish employer constitutional only because such an imposition satisfied the demands of strict scrutiny.[76] These cases make plain that the rule underlying *Sherbert* was not simply a version of the unconstitutional conditions doctrine. It was its own doctrine sounding in the Free Exercise Clause.

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73 It is worth noting that some of the language in the Court's decision in *Thomas v. Review Board* does appear to align the substantial burden standard with the unconstitutional conditions' coercion standard. *See* 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."). But as Chris Lund has noted, this can't be quite right. Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 982 (2018) (noting that "*Thomas* could be read to suggest something slightly different—namely, that the loss of government benefits should count as a burden only when it creates religious pressure in the individual case," but arguing that "*Thomas* should not be read this way" because "[t]he idea that a burden exists only when there is 'substantial pressure' in some individual case, cannot square with the Supreme Court's other cases").

74 Wisconsin v. Yoder, 406 U.S. 205, 220, 234 (1972).

75 455 U.S. 252, 257–58, 261 (1982).

76 *Id.* at 261.

In sum, the logic of the *Sherbert* standard was not simply about the sorts of conditions government could place on government benefits. It was more broadly about the kinds of burdens that could constitutionally be placed on the exercise of religion. For this reason, the existence of a condition that required engaging in conduct contrary to one's faith did not constitute an unconstitutional condition—it more directly prevented the claimant from freely exercising their religion in violation of the First Amendment.

Recasting the conceptual frame of *Sherbert* has an important payoff. A number of Supreme Court Justices have expressed significant skepticism of the current free exercise regime—ushered in by *Employment Division v. Smith*[77]—which rejects the premise that incidental, but significant, burdens on free exercise ought to trigger strict scrutiny.[78] And the Supreme Court, in *Fulton v. City of Philadelphia*,[79] recently entertained the possibility of reversing *Smith*.[80] The Court—at least for now—took a more modest approach, deciding the case on far narrower grounds.[81] But that modest impulse may not last forever; a return to the *Sherbert* regime remains a very real possibility.

And here's the rub. If the Court does return to a *Sherbert* regime, mapping the unconstitutional conditions doctrine on to *Sherbert* might have significant consequences. As noted above, in more recent years, the Court has—at least in part—differentiated between constitutional and unconstitutional conditions by examining whether the condition itself is sufficiently related to the government funding program. Randy Kozel has described this doctrine as attempting to prevent government from using impermissible leverage.[82] Kathleen Sullivan characterized this requirement as "germaneness,"[83] and Michael Moreland, in his

77 494 U.S. 872 (1990).

78 *Cf.* Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Liberty Precedents*, WASH. POST (Nov. 3, 2020, 1:31 PM), https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrettt/ [https://perma.cc/7G84-2H7A] (discussing "[t]he possibility that the newly 6-3 conservative-majority court could overturn *Smith* and set a new precedent about the legal status of religion").

79 141 S. Ct. 1868 (2021).

80 Petition for a Writ of Certiorari at i, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (presenting the question of whether *Smith* should be revisited as one of the issues before the Court).

81 *Fulton*, 141 S. Ct. at 1876–77 ("CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so . . . . But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.").

82 *See* Kozel, *supra* note 33, at 110–11.

83 Sullivan, *supra* note 24, at 1456–76.

contribution to this Symposium, has rightly drawn our attention to that requirement.[84] Versions of this argument have been prominent in much of the unconstitutional conditions caselaw[85]—most notably, *Agency for International Development v. Alliance for Open Society International*.[86]

If the Court takes some version of germaneness or leverage as the criteria to differentiate between constitutional and unconstitutional conditions, characterizing the *Sherbert* standard as an application of the unconstitutional conditions doctrine could have significant effects. Government-imposed conditions on government funding that substantially burden religious exercise could be justified by demonstrating that the condition was sufficiently germane to the funding program in question. Thus, for example, where a state opened a funding program for all private schools, but imposed a requirement that put schools to a choice between accessing those funds and acting in accord with their religious tenets—such as compliance with a state's antidiscrimination laws—the state could prevent the condition from being subjected to strict scrutiny by arguing that the condition was sufficiently related to the purposes of the education program it intended to support. *Sherbert*'s burden regime, however, never incorporated that sort of side constraint into its doctrine precisely because it never was a case about unconstitutional conditions. The *Sherbert* standard prohibited undue or substantial burdens on religious exercise regardless of why the government adopted the burden. And the only way, under the *Sherbert* regime, to justify such burdens was to subject it to the demands of strict scrutiny. For that reason, crossing wires between free exercise and unconstitutional conditions threatens the doctrinal integrity of the *Sherbert* standard.

B. Unconstitutional Conditions Under the Smith *Regime*

Of course, *Sherbert*'s burden regime is not the current framework for the Free Exercise Clause (although some version of it does govern

84 *See generally* Michael P. Moreland, *Germaneness and Religious Liberty*, 98 NOTRE DAME L. REV. REFLECTION (SPECIAL ISSUE) S35 (2023).

85 *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 196 (1991) (upholding a condition "because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized").

86 570 U.S. 205, 214–15 (2013) (holding that the "relevant distinction" when determining whether a condition is unconstitutional 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").

RFRA).[87] As announced in *Employment Division v. Smith*, laws only trigger strict scrutiny under current free exercise doctrine when they are not neutral or generally applicable.[88] But under this regime, the unconstitutional conditions doctrine also has no bearing in the free exercise context.

To see how, consider again Maine's fix to *Carson v. Makin*.[89] As described above, private schools that receive public funding must abide by the requirements of Maine's Human Rights Act, including its prohibition against sexual orientation and gender-identity discrimination.[90] However, if a religious school forgoes such funding, then it need not "comply with this section as it relates to sexual orientation or gender identity."[91] In sum, Maine has made compliance with sexual orientation and gender identity antidiscrimination laws a condition on receipt of public funds. Is such a condition unconstitutional?

The answer is presumably no. The core criteria to trigger an unconstitutional condition is that government requires relinquishing of a constitutionally protected right in exchange for some sort of government benefit. But, under *Smith*, so long as the applicable antidiscrimination law is neutral and generally applicable, then requiring compliance with such a law to receive funds does not entail forgoing a constitutional right. Put differently, so long as enforcing the antidiscrimination law does not violate the Free Exercise Clause, then there can be no unconstitutional condition. And that is simply because there is no underlying constitutional right being exchanged for funding.

Of course, if the antidiscrimination law in question does not satisfy the neutrality and general applicability requirements, then it would violate the Free Exercise Clause. But if that's the case, then the unconstitutional conditions doctrine once again does no necessary work. To the extent any law fails the neutrality and general applicability test, then it fails on free exercise grounds. So, for example, if a state required schools to adhere to antidiscrimination law as a condition of receiving government funding—but then exempted a variety of nonreligious institutions from that condition—the law would fail on free exercise grounds. Under such circumstances, the law would not meet *Smith*'s general applicability requirement.[92] Once again, when it comes

87 *See* 42 U.S.C. § 2000bb(a)–(b) (2018) (noting that the purpose of RFRA serves, in part, "to restore the compelling interest test as set forth in" *Sherbert*).

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

89 *See supra* notes 16–22 and accompanying text.

90 *Statement*, *supra* note 17; ME. STAT. tit. 5, § 4602(1)(A) (2021).

91 ME. STAT. tit. 5, § 4602(5)(C) (2021).

92 *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curium) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny

to *Smith*'s free exercise regime, the unconstitutional conditions doctrine does not appear to do any work.

To be sure, one can imagine one potential line of free exercise cases where the unconstitutional conditions doctrine might do some work. Consider ministerial exception cases. Generally understood, the ministerial exception exempts religious institutions from complying with various antidiscrimination statutes in the hiring and firing of "ministers."[93] Thus, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[94] The Supreme Court has characterized the ministerial exception as sounding in both the Free Exercise Clause and the Establishment Clause.[95] In application, the ministerial exception would presumably protect a religious institution against liability for terminating a minister or a teacher providing religious instruction even if that termination was a result of the employee's sexual orientation or gender identity.[96]

Given the protections afforded by the ministerial exception, a state might condition receipt of funding not only on compliance with antidiscrimination law, but on relinquishing any defenses afforded by the ministerial exception. This sort of additional step would presumably be necessary because a religious school would remain in compliance with state and federal antidiscrimination laws if it made use of the ministerial exception when hiring and firing covered employees. Thus, conditioning government funding on a generic requirement to comply with antidiscrimination law would not, in all likelihood, prevent religious schools from asserting the ministerial exception. Doing so would require a more specific statutory requirement. And maybe if a state enacted such a requirement—trading funds for relinquishing

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under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

93 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 180–81 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–66 (2020).

94 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

95 *See id.*; *see also Hosanna-Tabor*, 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

96 For my own part, I have both argued that the ministerial exception is best viewed as a free exercise doctrine and, in turn, that church autonomy claims ought to be subjected to strict scrutiny. *See* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013); Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877 (2018). For more general background on the way in which the Court's understanding of the church autonomy doctrine has shifted over time, see Michael A. Helfand, *Litigating Religion*, 92 B.U. L. REV. 493 (2013).

the constitutionally protected ministerial exception defense—the unconstitutional conditions doctrine might do some work. Because the ministerial exception provides broader protections than those afforded by *Smith*'s neutral and generally applicable standard, the unconstitutional conditions doctrine might be relevant in such cases.

But once formulated in this way, it becomes clear that—even in ministerial exception cases—there may not be much for the unconstitutional conditions doctrine to do. To eliminate the ministerial exception defense would require a more specific statute—one that goes beyond merely requiring compliance with antidiscrimination law in order to receive funding. And the level of specificity necessary to achieve such an outcome might very well be the kind that is no longer neutral and generally applicable. That is simply because knocking out the ministerial exception would likely require language specifying the ministerial exception; and if a statute were to single out the doctrine as a necessary casualty for receipt of government funding, it would be hard to imagine such a statute not running afoul of the demands of neutrality and general applicability. If so, then the unconstitutional conditions doctrine would not have any independent work to do beyond what the Free Exercise Clause already demands.

CONCLUSION

The unconstitutional conditions doctrine is a mess. But the claim of this Essay is something different. Whether the doctrine is a mess or not—whether it is coherent or not—it has no independent conceptual or practical import when it comes to the Free Exercise Clause. This is true under either the *Sherbert* regime, because free exercise protections are broader than what the unconstitutional conditions doctrine provides, or under the *Smith* regime, because the demands of neutrality and general applicability are all that is necessary to determine whether there is a constitutional violation. Thus, while recent developments might make it tempting to begin mining the doctrine in advance of future litigation, that temptation is a mistake. The Free Exercise Clause, regardless of which standard, is up to the challenge all on its own.