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## Nonprofits, Speech, and Unconstitutional Conditions

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## Article

### Nonprofits, Speech, and Unconstitutional Conditions

LLOYD HITOSHI MAYER

*This Article proposes a new constitutional framework for approaching the issue of speech-related conditions on government funding accepted by nonprofits and demonstrates its application by reviewing the Court's landmark decisions in this area. It argues that speech rights are generally inalienable as against the government under the First Amendment, and therefore any abridgement of such rights by the government—whether direct or indirect—is subject to strict scrutiny. As a result, the government is not permitted to buy an organization's speech absent a compelling governmental interest in doing so and then only if the purchase is done in a manner that is narrowly tailored to serve that interest.*

*This Article's approach contrasts with the current approach of the Supreme Court in this area, which in its various attempts to resolve disputes centering on such conditions has left courts, governments, and private parties understandably confused about the applicable constitutional standards. This tendency is illustrated in particular by the Court's recent *Agency for International Development v. Alliance for Open Society International* opinion. This framework also has two broader ramifications. First, it may prove useful for resolving constitutional disputes relating to other speech-related conditions, such as campaign finance limits tied to government funding or other government benefits. Second, it demonstrates that by drawing on the extensive unconstitutional conditions literature to create an approach customized to a particular constitutional context it may be possible to salvage the unconstitutional conditions doctrine even given its widely acknowledged incoherence. Salvaging the doctrine is particularly important in a world where government benefits both permeate almost every type of activity and are often accompanied by constitutionally suspect restrictions.*

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# Nonprofits, Speech, and Unconstitutional Conditions

LLOYD HITOSHI MAYER\*

## I. INTRODUCTION

If there is any consensus with respect to the doctrine of unconstitutional conditions, it is that the doctrine is a mess both generally and in the specific constitutional contexts in which the courts have applied it.<sup>1</sup> While some of the most prominent legal scholars have attempted to bring coherence to the doctrine,<sup>2</sup> others have concluded that coherence is unachievable.<sup>3</sup> Yet, at the same time, the Supreme Court and the lower federal courts continue to apply the doctrine to a wide variety of circumstances.<sup>4</sup>

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<sup>1</sup> See, e.g., Larry Alexander, *Impossible*, 72 DENV. U. L. REV. 1007, 1009 (1995) (“[The] larger portions of the area . . . cannot be theoretically rationalized.”); Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693, 763 (2002) (“Existing commercial speech doctrine is a mess.”); Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 951 (2006) (“A clear view of the unconstitutional conditions quagmire reveals a messy scene . . .”).

<sup>2</sup> See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 6 (2001) (attempting to effectuate a compromise with regards to unconstitutional conditions); Richard A. Epstein, *The Supreme Court—1987 Term: Foreword, Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 15 (1988) (showing the functionality of unconstitutional conditions in various contexts); Farber, *supra* note 1, at 915 (clarifying the problem of unconstitutional conditions by viewing constitutional rights like a contract default); Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 380 (1995) (articulating a more easily applicable conception of the doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1506 (1989) (providing a better depiction of the doctrine).

<sup>3</sup> See, e.g., Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995) (“[T]he problem of the doctrine of unconstitutional conditions is . . . an intractable problem.”); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 608 (1990) (arguing for the abandonment of the doctrine because of its ineffectiveness).

<sup>4</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595–97 (2013) (applying the unconstitutional conditions doctrine to a state’s decision to deny a permit based on a private party’s refusal to turn over property to the government); *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328–30 (2013) (applying the unconstitutional conditions doctrine to a speech-related condition on federal funding); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012) (applying the unconstitutional conditions doctrine to the withholding of all

This Article is not another attempt to bring clarity to the unconstitutional conditions doctrine across the entire constitutional landscape.<sup>5</sup> It instead has the more modest but also more achievable goal of bringing clarity to a particular place within that landscape on which the Supreme Court has focused repeatedly, most recently this past term in *Agency for International Development v. Alliance for Open Society International* (“*Alliance*”).<sup>6</sup> That place is speech-related conditions on government-provided benefits to nonprofit organizations.

There are several reasons to focus on this particular part of the legal terrain. First, this area has and is likely to continue to see significant conflict. Nonprofits both tend to seek government benefits and desire to speak freely about controversial issues, as illustrated by a series of disputes that have reached the Supreme Court.<sup>7</sup> Second, how the unconstitutional conditions doctrine applies to such conflicts remains highly uncertain. For example, in *Alliance*, the nonprofits prevailed at the appellate court level, but the judges split two-to-one, with both sides claiming that their position was clearly correct based on existing unconstitutional conditions precedent.<sup>8</sup> While such claims are in part a rhetorical device, the fact that both sides could plausibly make them illustrates the current confusion regarding the doctrine’s application in this context. While the Supreme Court affirmed the appellate court’s decision by a vote of six to two (Justice Kagan recused, presumably because she had been involved with the case as Solicitor General),<sup>9</sup> for reasons that will be detailed in this Article, the majority’s reasoning did little to help clarify the constitutional standards in this area. In fact, the majority’s subtle recharacterization of the Court’s previous decisions likely has actually created more uncertainty.

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federal Medicaid funding if a state did not agree to accept expanded Medicaid coverage and related conditions).

<sup>5</sup> The breadth of the landscape can be seen in the many contexts in which the federal courts have applied the doctrine. See, e.g., Epstein, *supra* note 2, at 4 (listing applications of the doctrine ranging from state incorporation powers to public roads to employment cases to tax exemptions); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 807 (2003) (listing a multitude of conditions that the Supreme Court has found to be unconstitutional).

<sup>6</sup> 133 S. Ct. 2321 (2013).

<sup>7</sup> Besides the most recent case, the Supreme Court also squarely addressed this issue in *Rust v. Sullivan*, 500 U.S. 173 (1991) (abortion), *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (noncommercial, educational broadcasting), and *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (federal taxation).

<sup>8</sup> See *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011) (“[W]e conclude that the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court and this Court have upheld as permissible funding conditions.” (emphasis added)); *id.* at 240 (Straub, J., dissenting) (“On the contrary, the Policy Requirement, together with the Guidelines implemented by Defendants, is precisely in line with the ‘unconstitutional conditions’ doctrine as it has been applied in the context of subsidy conditions alleged to violate the First Amendment.” (emphasis added)).

<sup>9</sup> *Alliance*, 133 S. Ct. at 2321.

Third, the approach developed in this limited area may have application to other, related disputes, such as challenges to conditions limiting the election-related speech of for-profit corporations receiving certain government benefits (a particularly contentious area in the wake of *Citizens United*).<sup>10</sup> That possibility in turn suggests a different way to approach the unconstitutional conditions doctrine more generally. Rather than attempting to develop a universal theory or approach for the doctrine, it may be more productive to instead develop a specific framework for applying the doctrine in a given constitutional context and then to extend that framework only to other, related disputes on an incremental basis. Given the pervasiveness of government benefits and therefore the risk to constitutionally guaranteed freedoms if there is not a robust unconstitutional conditions doctrine, it is critical that a way be found to salvage the doctrine whenever possible.<sup>11</sup>

Part II focuses on the issue of speech-related conditions on government-provided benefits to nonprofit organizations, developing a new framework for applying the unconstitutional conditions doctrine in this particular First Amendment context. This framework is based on the conclusion that speech rights are generally inalienable as against the government under the First Amendment, and therefore any abridgement of such rights by the government—whether direct or indirect—is subject to strict scrutiny. As a result, the government is not permitted to buy an organization’s speech absent a compelling governmental interest in doing so and then only if the purchase is done in a manner that is narrowly tailored to serve that interest.

Part III contrasts this framework with the shifting approaches taken by the Supreme Court in resolving three unconditional conditions disputes in this area, including *Alliance*. Part IV then considers broader ramifications of this approach, including the framework’s possible application to speech-related conditions on benefits received by for-profit entities, such as restrictions on election-related speech by government contractors, and whether this customized and incremental approach to developing the unconstitutional conditions doctrine might provide a better way of clarifying the doctrine in other contexts.

## II. RETHINKING SPEECH AND UNCONSTITUTIONAL CONDITIONS

The vast majority of nonprofits depend significantly on government benefits in a variety of forms. Besides the well-known benefits of

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<sup>10</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>11</sup> See Sullivan, *supra* note 2, at 1419 (“[The] unconstitutional conditions doctrine performs an important function. It identifies a characteristic technique by which government appears not to, but in fact does burden . . . liberties . . .”).

exemption from federal income tax and the ability to receive tax deductible contributions, nonprofits, especially charitable, educational, religious, and similar organizations, enjoy a host of other government-provided benefits.<sup>12</sup> In addition, many nonprofits receive substantial government financial support in the form of grants, contracts, and payments to benefit individuals, such as through the Medicare and Medicaid systems.<sup>13</sup> Not surprisingly, these benefits often come with numerous strings attached, including speech-related conditions.<sup>14</sup>

At the same time, many nonprofits consider it a fundamental part of their mission to communicate certain values, messages, or public policy positions to others. Such communications can and often have run afoul of the speech-related conditions on the government benefits they enjoy. The recent *Alliance* case illustrates this conflict. At issue in that case was a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“the Act”) that barred funding under the Act for any group or organization “that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>15</sup> To enforce this prohibition, the implementing agencies required the recipients of funding under the Act to document their opposition to prostitution and sex trafficking.<sup>16</sup> The agencies also established guidelines requiring sufficient separation from any affiliated entities that did not comply with this requirement, with the sufficiency of such separation determined by not only the extent of legal and financial separation but also the extent to which the organizations maintained separate personnel and physical facilities.<sup>17</sup> While the affected nonprofits could have chosen either to refuse the funding or accept the speech-related condition, they chose a third option: to challenge the condition as unconstitutional. This Part develops a new framework for resolving such disputes that is on more solid constitutional footing than the various approaches the Supreme Court has

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<sup>12</sup> See Bazil Facchina et al., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85, 85–86 (1993) (summarizing benefits charities receive from federal, state, and local governments); Memorandum from Erika Lunder, Legislative Att’y, Cong. Research Serv., to Joint Comm. on Taxation (Feb. 16, 2005) (summarizing statutes of the federal government and five states that confer legal benefits on to charities).

<sup>13</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-193, NONPROFIT SECTOR: SIGNIFICANT FEDERAL FUNDS REACH THE SECTOR THROUGH VARIOUS MECHANISMS, BUT MORE COMPLETE AND RELIABLE FUNDING DATA ARE NEEDED (2009) (describing and attempting to quantify the flow of federal funds to nonprofit organizations).

<sup>14</sup> See Steven Rathgeb Smith, *Government Financing of Nonprofit Activity*, in NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT 219, 234–36 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d ed. 2006) (describing strings that may be attached to the government benefits received by nonprofits).

<sup>15</sup> *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2324 (2013) (quoting 22 U.S.C. § 763(f) (2012)) (internal quotation marks omitted).

<sup>16</sup> *Id.* at 2326.

<sup>17</sup> *Id.* at 2326–27.

taken to date.

A. *The Inalienability of the Constitutional Right to Free Speech*

Kathleen Sullivan's landmark article provides perhaps the most quoted definition of the unconstitutional conditions doctrine, which states that the doctrine "reflects the triumph of the view that government may not do indirectly what it may not do directly."<sup>18</sup> More specifically, the doctrine of unconstitutional conditions is implicated in the following situation: "[The g]overnment offers a benefit that it is constitutionally permitted but not compelled to offer, on condition that the recipient undertake (or refrain from) future action that is legal for him to undertake (or to refrain from) but that government could not have constitutionally compelled (or prohibited) without especially strong justification."<sup>19</sup> That is, the doctrine applies when the government provides a constitutionally permitted but optional benefit conditioned on the recipient giving up a constitutionally protected right.<sup>20</sup> Of course, it may not always be clear whether a given benefit is optional or whether a given condition actually infringes on a constitutionally protected right. Fortunately, in the context of allegedly speech-related conditions on government funding, it is usually clear whether the benefit is optional on the part of the government and also whether the condition is in fact speech-related.<sup>21</sup> For purposes of this Article, it will, therefore, be assumed that it can be readily determined whether these threshold conditions for application of the unconstitutional conditions doctrine exist.

Even if the unconstitutional conditions doctrine is implicated, that does not automatically mean the condition is in fact unconstitutional. Whether the condition at issue is unconstitutional is the key question that the doctrine attempts to answer, but often with limited success for several reasons. A threshold problem is determining the extent to which constitutional rights generally, or certain constitutional rights specifically, are alienable with respect to the government—that is, can be traded with the government by the individual or entity enjoying them.<sup>22</sup> The role of the

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<sup>18</sup> Sullivan, *supra* note 2, at 1415.

<sup>19</sup> *Id.* at 1427.

<sup>20</sup> See Epstein, *supra* note 2, at 7 ("The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted.").

<sup>21</sup> For an example of a situation where the Supreme Court found an allegedly speech-related condition that did not implicate the First Amendment, see *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65, 66, 69–70 (2006).

<sup>22</sup> See Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 92 (2011) (indicating the idea for a "detailed framework of . . . intermediate alienability techniques" and the "modularity of alienability"); Farber, *supra* note 1, at 914 ("Despite the Declaration of Independence's proclamation of inalienable rights, constitutional rights are indeed alienable in the sense that they can be waived in

government as the other party is important, because usually part of having a right is the ability to choose how to exercise that right, including exercising the right in a way that another party who has paid the holder of the right directs or even foregoing to exercise the right at all in exchange for some type of consideration.<sup>23</sup> Simply because a right holder should generally be able to bargain away that right does not mean, however, that she should be permitted to do so when the other party is the government.<sup>24</sup> This limitation is of particular concern because constitutional rights for individuals are generally designed not to limit the dealings of private parties, including with respect to influencing others to exercise a right in a certain way or not to exercise a right at all, but instead to limit the actions of government.<sup>25</sup> Alienability, therefore, gets to the key issue of whether government can do indirectly what it cannot do directly.

That said, clearly some rights are currently tradable even with the government. For example, a criminal defendant can trade (although generally subject to court approval) her Sixth Amendment right to a jury trial in exchange for a plea bargain that guarantees conviction only for a lesser crime or provides for a lighter sentence than might otherwise apply if the defendant was convicted as a result of such a trial, although this practice is not exempt from criticism.<sup>26</sup> Indeed, for some rights the

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return for various benefits.” (footnote omitted)); Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1701 (2007) (“Waivability of constitutional protections is the constitutional default . . .”); Mazzone, *supra* note 5, at 801–02 (discussing unconstitutional conditions and the alienability of constitutional rights in relation to criminal proceedings).

<sup>23</sup> See William T. Mayton, “*Buying-Up Speech*”: *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 380 (1994) (stating that in general “a right is customarily justified by principles of personal autonomy and dignity” and “[a]n implication of this autonomy in rights is that they are alienable”); Sullivan, *supra* note 2, at 1486 (noting that making constitutional rights inalienable effectively creates duties).

<sup>24</sup> See Epstein, *supra* note 2, at 22 (stating that in some areas up for bargaining, the government has a permanent monopoly and it must be neutralized to constrain the government and give citizens a more level playing field); Steven G. Gey, *Contracting Away Rights: A Comment on Daniel Farber’s “Another View of the Quagmire,”* 33 FLA. ST. U. L. REV. 953, 954 (noting the idea that an individual can bargain his or her rights away “misconstrues the structural nature of constitutional rights in our system of limited government”).

<sup>25</sup> See, e.g., Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 484 (2012) (noting that constitutional rights “are framed as limits on government”); T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1559 (1997) (“[C]onstitutional rights are specifically designed to limit the actions of the government and its agents.”).

<sup>26</sup> See *Brady v. United States*, 397 U.S. 742, 744 (1970) (holding that a guilty plea could not be rejected as coercive just because the defendant received a benefit in exchange for waiving his right to trial); Ana Maria Gutierrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 696–97, 706 (2010) (arguing that the Sixth Amendment rights and the process of waiving those rights are not clear, leading to confusion during the plea bargain process); Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 34 (2007)

Constitution explicitly provides for such possible trades. For example, the Third Amendment permits the quartering of soldiers in a house in time of peace with “the consent of the owner,”<sup>27</sup> strongly implying that the government could buy this consent.<sup>28</sup> At the same time, some rights may not be tradable to the government because the government is never permitted, under the Constitution, to engage in the activity at issue. An example of this situation may be the imposition of cruel and unusual punishment even if a criminal agrees to it.<sup>29</sup>

As a threshold matter, whether an institution, as opposed to an individual, has a right to free speech under the Constitution is itself a controversial issue in at least some contexts.<sup>30</sup> One need not accept the Supreme Court’s holding in *Citizens United* that the source of speech is irrelevant for purposes of determining whether the speech itself is protected by the First Amendment, however.<sup>31</sup> Especially for nonprofit organizations engaged in advocacy activities, there is a very strong argument that even if First Amendment speech protection is limited to individuals, such organizations should also enjoy this protection because their speech reflects the speech-related desires of the individuals affiliated

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(stating that in plea bargain situations, the “state is essentially penalizing those defendants who choose to exercise their constitutional rights”).

<sup>27</sup> U.S. CONST. amend. III.

<sup>28</sup> The Third Amendment is rarely invoked in present day litigation, although parties in a recent federal lawsuit raised it as part of a claim arising from the police arresting a family after the family refused to let officers use their homes as a lookout post for a domestic violence investigation. Megan Gallegos, *Police Commandeer Homes, Get Sued*, COURTHOUSE NEWS SERV. (July 3, 2013), <https://www.courthousenews.com/2013/07/03/59061.htm>; see also Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The “Living Constitution,” the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 798–99, 804 (2000) (suggesting that the Third Amendment could be applied to the quartering of endangered species and that the government would need to purchase or compensate the owner for quartering the endangered animals); Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 158 (2005) (“The [Third] [A]mendment requires consent expressly, and therefore it is a dubious proposition that the government may presume consent simply because someone accepts ‘gratuitous’ federal benefits.”); James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL’Y 747, 759–63, 774 (2008) (arguing that violations of the Third Amendment occur today without people knowing their rights or that consent is needed).

<sup>29</sup> See Richard W. Garnett, *Sectarian Reflections on Lawyers’ Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 806–08 (2002) (raising this point in the context of capital punishment).

<sup>30</sup> See, e.g., Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765, 767, 779–805 (2013) (discussing the sharp disagreements within the Supreme Court in *Citizens United* on whether “corporations are entitled to the same First Amendment protection as natural persons”); Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 577–80 (2012) (discussing criticisms of the *Citizens United* decision).

<sup>31</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349, 353 (2010) (indicating that the identity of the speaker, whether a corporation or an individual, does not make the speech more or less valuable, and that “[a]t the founding . . . there were no limits on the sources of speech and knowledge”).

with such groups.<sup>32</sup> But regardless of the basis for extending First Amendment speech protection to nonprofits, for purposes of this Article, extension will be assumed (as it has apparently been by the Supreme Court well before the *Citizens United* decision<sup>33</sup>).

The key question to consider is therefore whether the particular constitutional right at issue here, the First Amendment right to free speech, is one that nonprofits as assumed holders of that right can trade to the government in exchange for a benefit. While in some constitutional contexts it may be very difficult to determine a clear answer to this question, for the reasons detailed below, that is not the case here.

The first place to start answering this question is with the text and history of the First Amendment.<sup>34</sup> In relevant part, it provides “Congress shall make no law . . . abridging the freedom of speech.”<sup>35</sup> On its face, the language does not suggest an ability on the part of the speaker to bargain this right away to the government unlike, for example, the Third Amendment.<sup>36</sup> At the same time, however, the language does not clearly prohibit such bargaining. While the term “abridging” could be interpreted as including laws that offer a speaker a benefit in return for waiving their freedom of speech in some respect or another, that interpretation is not necessarily correct.<sup>37</sup> The history of the First Amendment is also unclear on this point.<sup>38</sup>

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<sup>32</sup> See Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407, 418–19 (2011) (arguing that “the level of protection for institutional speech would depend on the strength of the speech’s connection to the desires of individuals affiliated with that institution,” including nonprofit corporations).

<sup>33</sup> See *infra* Part III (discussing the relevant Supreme Court decisions).

<sup>34</sup> See, e.g., Gey, *supra* note 24, at 955–57 (providing an analysis in determining the alienability of constitutional rights by examining the Eighth and Thirteenth Amendments as examples).

<sup>35</sup> U.S. CONST. amend. I.

<sup>36</sup> See *supra* note 28 and accompanying text.

<sup>37</sup> See Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 577 (1998) (“The constitutional text is assuredly as susceptible of one meaning as of the other . . . what constitutes a ‘law abridging the freedom of speech’ is either a matter of history or else it is a matter of opinion.” (quoting *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 688 (1995) (Scalia, J., dissenting))); Marin R. Scordato, *The Elusive Paradigm of the Press*, 72 B.U. L. REV. 673, 673 (1992) (reviewing LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* (1991)) (arguing that the complexity of the meaning of “abridging” is not natural, but instead is created because if the natural meaning of it was accepted, constitutional protection would be too broad); Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 248 (2011) (stating that the meaning of the First Amendment today has changed from what was asserted as the meaning by the ratifiers of the Constitution).

<sup>38</sup> See, e.g., Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1291–96 (1998) (arguing, contrary to some legal historians, that freedom of speech was understood at the time of the adoption of the Bill of Rights as an inalienable natural right, and concluding that “this makes it difficult to attribute any precise original meaning to the First Amendment”); Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623, 1633–34 (2005) (recognizing that “what history seems to make of the First Amendment is that the Amendment did not

Given the lack of clarity from either text or history, most commentators have looked instead to two related issues—the purpose of this constitutional right and whether that right is solely held by the speaker or also, at least in part, by the potential hearers of the speech.<sup>39</sup> While stated in various ways, the purpose is generally found to be to protect freedom of all types.<sup>40</sup> For example, the Supreme Court has stated that freedom of speech “safeguards a freedom which is the ‘matrix, the indispensable condition, of nearly every other form of freedom.’”<sup>41</sup> That purpose strongly suggests there is a public interest in preventing a speaker from trading away this freedom, particularly when the other party at the table is the State.<sup>42</sup>

Relying on similar reasons, the ability of the speaker to trade away their freedom of speech is often questioned on the grounds that other parties—namely the potential hearers of the speech—are not also at the

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mean much,” and arguing further that the restriction of “abridging the freedom of speech” was thought initially to only apply to Congress); see also Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1080, 1091 (1991) (suggesting that James Madison and Roger Sherman viewed freedom of speech as an alienable natural right, but even if freedom of speech is an alienable natural right, Congress may only infringe on that right if it provides equivalent greater security and safety for individuals and society in exchange). *But see* Mayton, *supra* note 23, at 390–91 (arguing that the text and history of the First Amendment demonstrate that freedom of speech was viewed as a common good and is, therefore, inalienable as against the government). Note that even if freedom of speech is an alienable natural right, meaning that the people may choose to surrender some aspect of that right as part of enacting a constitution, it may be an inalienable constitutional right to the extent it is provided for in that constitution, i.e., the right may only be alienable by the people acting collectively, not by each citizen or entity acting individually).

<sup>39</sup> See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (upholding First Amendment right to receive mailings from foreign governments); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387 (1984) (“But many constitutional rights protect other values or protect individual choice only as a means to the realization of other ends. For such rights, there is no paradox in asserting that the choice of the individual should not decide the applicability of the right in question.”); Burt Neuborne, *Taking Hearers Seriously*, 91 TEX. L. REV. 1425, 1434–35 (2013) (reviewing TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012)) (noting that hearers have an independent right to receive information, and thus have a constitutional right as a hearer rather than only as a speaker).

<sup>40</sup> See, e.g., Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 987 (2011) (“The First Amendment protects all those individuals and groups that would exercise their right to speak and communicate by disabling government from abridging the freedom of speech.”).

<sup>41</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 145 (1967) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

<sup>42</sup> See Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 356 (1998) (arguing for courts to apply a more stringent standard of review to the waiver of First Amendment rights “because a waiver of speech rights implicates both the public’s interest as well as the individual’s interest”); Mayton, *supra* note 23, at 381 (contending that if the government can buy-off a speaker, “the community is denied speech, and in this way freedom of speech as a common good is limited”).

table.<sup>43</sup> This conclusion is complicated by the fact that generally speakers are free to surrender their freedom of speech in trades with other private parties—indeed, that is seen as part of the freedom of speech—and the State will generally enforce such private bargains.<sup>44</sup> Nevertheless, there is a difference when the other party is the State, because then the other party is acting pursuant to law enacted by Congress (or a state legislature) and so the language of the First Amendment is directly implicated in a manner not true in private-party-only transactions.

Even those commentators who consider essentially all constitutional rights to be alienable, including with respect to the government, acknowledge that these last two considerations may render the right to freedom of speech an inappropriate one for bargaining between the speaker and government.<sup>45</sup> For example, Daniel Farber suggests that perhaps any condition relating to speech results in an unacceptable level of externalities because the public has an interest in freedom of speech, not just the speaker.<sup>46</sup> Richard Epstein makes a similar point, although to a more limited extent, arguing that if a speech-related condition distorts the political process by favoring some views over others then the condition is

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<sup>43</sup> See Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 18 (1989) (recognizing the distinction between speaker-centered and hearer-centered benefits of free speech and how both are reasons for the protection of the right of free speech).

<sup>44</sup> Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1677–78 (2009) (acknowledging that “[t]he consensual waiver approach [which] views a person’s consent to the waiver of her First Amendment rights as dispositive for First Amendment purposes” has “a great deal of merit” but criticizing it both for being underinclusive and for failing to explain the problem of unconstitutional conditions, i.e., when the government is the party seeking the waiver); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000) (recognizing that in the context of transactions between private parties, “the free speech right must turn on the rights of the speakers, and . . . it’s proper to let speakers contract away their rights”).

<sup>45</sup> These commentators generally draw on contract law to determine when otherwise alienable rights should be tradable to the state. See Epstein, *supra* note 2, at 15–21 (noting that such bargains should not be permitted when either the state or the individual citizen can misuse the bargain either to benefit one group of citizens over another (the state) or to benefit himself or herself over all other citizens because of a monopoly position, collective action problems, or externalities); Farber, *supra* note 1, at 934 (arguing that constitutional rights can be viewed as contractual defaults, with departures from those defaults permitted unless the bargaining process is flawed by monopoly power, transaction costs, information asymmetries or other information problems, or exclusion of affected third parties, i.e., externalities); see also Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 349 (discussing circumstances when permitting an individual to surrender an otherwise alienable constitutional right might be problematic); Sian E. Provost, Note, *A Defense of Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629, 632–33 (1995) (discussing generally how contracts between private parties will not be upheld if various forms of coercion are at play such as unequal bargaining powers, undue influence, economic coercion, or adhesion contracts).

<sup>46</sup> Farber, *supra* note 1, at 935.

in fact unconstitutional.<sup>47</sup>

The weight of authority and commentary therefore leads to the conclusion that in general the right of speech, whether speech by nonprofits or others, is inalienable with respect to the government regardless of whether one thinks constitutional rights are generally alienable with respect to the government. This conclusion does not, however, end the inquiry regarding the application of the unconstitutional conditions doctrine in this context. Even if the right to freedom of speech is generally inalienable, there may still be situations when the government can constitutionally condition a benefit on acceptance of a speech-related restriction.<sup>48</sup> The next Section considers when this may be the case.

#### B. *When Is the Inalienable Constitutional Right to Free Speech Alienable?*

Under what circumstances, if any, should the government be able to condition a benefit on the surrender of an otherwise inalienable constitutional right? Kathleen Sullivan argues generally for the inalienability of constitutional rights with respect to the government, but she also provides two avenues for governments to constitutionally condition benefits on the surrender of such rights.<sup>49</sup> The first avenue is when the interference with a constitutional right is only an unintentional side effect of the benefit program at issue. Sullivan provides the example of the government restricting food stamps to food purchases, which has the effect if not the specific intention of preventing the recipients from using the food stamps to buy contraceptives or a television ad—that is, otherwise constitutionally protected activities.<sup>50</sup> She views this avenue as a relatively narrow one, however, with close cases falling outside of this exception to the general rule of inalienability.<sup>51</sup>

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<sup>47</sup> Epstein, *supra* note 2, at 74–79. Some commentators have also identified broader concerns, such as efficiency, distributional concerns, and the relationship of the right to personal identity, as possibly being relevant to the question of alienability with respect to the government. *E.g.*, Sullivan, *supra* note 2, at 1481–86. Sometimes personal consent is given as a solution to unconstitutional conditions. *But see* Hamburger, *supra* note 25, at 481 (arguing that consent is even more concerning than the usual unconstitutional condition worries because consent can become itself a threat and it can create “many more loose ends” without fixing the actual problems).

<sup>48</sup> *See* Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 759 (2001) (arguing that there may be exceptions to the inalienability of constitutional rights that stem from a historical perspective of what the founders meant to be inalienable rights); Sullivan, *supra* note 2, at 1501–02 (giving examples of when the government can constitutionally condition a benefit on acceptance of a speech-related condition). *But see* Kreimer, *supra* note 39, at 1386 (making an argument that unless the constitutional right is alienable, it cannot be waived or surrendered).

<sup>49</sup> Sullivan, *supra* note 2, at 1490–501.

<sup>50</sup> *Id.* at 1501.

<sup>51</sup> *Id.* at 1501–02.

More importantly, Sullivan argues that a “strict review” standard should apply in all other instances where a government provided benefit comes with a condition relating to the exercise of a constitutional right.<sup>52</sup> In her view, such strict review would require the government to demonstrate a compelling justification for the condition.<sup>53</sup> Interestingly, however, she does not elaborate explicitly on the extent to which the benefit/condition arrangement needs to be closely or narrowly tailored to the asserted compelling justification, although she suggests that an analysis similar to that found when “strict scrutiny” applies is appropriate.<sup>54</sup>

Perhaps the most obvious situation where a government benefit can still be conditioned on surrendering the right to free speech is when the government is paying the full cost of that speech.<sup>55</sup> While the unconstitutional conditions doctrine generally reflects the view that the government cannot do indirectly what it cannot do directly,<sup>56</sup> the opposite is generally true as well—the government should be able to do indirectly what it can do directly. By this I mean that if the government is permitted to say *X* itself, it follows that the government should be able to pay a nonprofit or other private party to say *X*—in other words, the government has a compelling interest in ensuring that it gets what it pays for.<sup>57</sup> This interest is rooted in the Spending Clause, which explicitly grants Congress the broad authority to “provide for the common Defence and general Welfare of the United States.”<sup>58</sup> At least as long as the government is paying the entire cost of the speech, the hired party should not be able to argue that as an exercise of its free speech rights it must be able to use the

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<sup>52</sup> *Id.* at 1499–500.

<sup>53</sup> *Id.* at 1503.

<sup>54</sup> *Id.* at 1506.

<sup>55</sup> See Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612 (2008) (analyzing *United States v. Rust*, where the Court upheld the government’s regulation of subsidized doctors, thereby preventing them from discussing abortion with their patients); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983–88 (2005) (providing examples of where the government was able to direct private speech because the government provided the funding); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374–75 (2009) (highlighting that the United States Supreme Court has affirmed the government’s ability to define the scope and limits of its spending programs, even if it involves viewpoint-based decisions).

<sup>56</sup> See, e.g., *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, 710 F.3d 1202, 1217 (11th Cir. 2013) (“[W]hat the state may not do directly it may not do indirectly.” (quoting *Bailey v. Alabama*, 219 U.S. 219, 244 (1910))).

<sup>57</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”).

<sup>58</sup> U.S. CONST. art. I, § 8, cl. 1; see, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327–28 (2013) (“The [Spending] Clause provides Congress broad discretion to tax or spend for the ‘general Welfare,’ including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends.”).

government-provided funds to say *Y* instead of *X*. This may in fact be a better way to approach the previously mentioned exception posited by Sullivan for unintentional or incidental conditions, such as requiring the recipient of food stamps to spend those stamps on food and not, for example, on speech.<sup>59</sup> If government is paying the full cost of an activity, it has the authority to limit the use of its funds even if by doing so it denies the recipient the ability to use those funds to exercise a constitutional right, such as speech.

It is important, however, to note three important limitations on this exception to the inalienability of free speech rights with respect to the government. First, the government must be paying the full cost of the speech or other activity at issue; that is, none of the private party's financial resources, which otherwise it could use for speech of its choosing, are being consumed.<sup>60</sup> (The next Part will explore situations where the speech is only partly funded by the government.) Second, the speech or activity must be one that the government could make or do directly. For example, the funded activity could not be speech endorsing a particular religious faith, as such speech would violate the Establishment Clause of the First Amendment.<sup>61</sup> Third, the government funding must not be for the purpose of creating a public forum designed to facilitate a broad range of private, not government, speech. In that situation, the First Amendment bars the government from engaging in viewpoint discrimination, although it may permit content discrimination under some circumstances.<sup>62</sup>

Part of the reason to interpret this exception narrowly is because the standard for review of conditions that do not fall within this exception should be one that mirrors the strict scrutiny standard that usually applies to direct government restrictions on speech.<sup>63</sup> Exceptions to this strict

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<sup>59</sup> See Sullivan, *supra* note 2, at 1438, 1501 (providing examples where the government incidentally or unintentionally alters the incentives for a benefits recipient to exercise his or her constitutional rights).

<sup>60</sup> See Olree, *supra* note 55, at 374 (providing examples of the Supreme Court upholding viewpoint-based funding decisions "as a permissible decision by the federal government about how it would design its own programs and spend its own money").

<sup>61</sup> See Kreimer, *supra* note 39, at 1391 (using the Establishment Clause as an example of a constitutional provision that prevents the government from seeking the waiver of certain constitutional rights). A better characterization of the Establishment Clause limitation on government authority, and indeed of many constitutional limitations on government authority, may be as a structural as opposed to individual rights-based limitation.

<sup>62</sup> *Rosenberger*, 515 U.S. at 833–34. For a discussion of the sometimes unclear distinction between viewpoint and content discrimination, see *infra* note 142 and accompanying text.

<sup>63</sup> See, e.g., *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741–42 (2011) (holding that California's ban on selling violent video games to minors was unconstitutional and the state could not meet its burden under a strict scrutiny test); *United States v. Stevens*, 559 U.S. 460, 467, 482 (2010) (deciding that a statute prohibiting depictions of animal cruelty was an overly broad burden on free speech after the lower court held that the state failed to meet its burden under a strict scrutiny test). *But*

review should therefore be interpreted narrowly, lest they undermine the high bar that otherwise applies to government imposed limits on speech. The reason for applying a version of strict scrutiny adapted to the unconstitutional conditions context is that if the right to free speech is inalienable, the government should have to provide as strong a justification for burdening that right indirectly as it does directly. That is, the government should not be able to escape the restrictions it faces on direct action by bargaining with a speaker, since such trading should not generally be permitted for the reasons already discussed. If instead the standard of review for speech-restricting conditions was a lower one—such as the reasonableness standard essentially urged by the government in the recent *Alliance* case<sup>64</sup>—the government would be able to do indirectly what it could not do directly.

While this approach has much in common with the methodology suggested by Sullivan more generally,<sup>65</sup> this new approach goes further by arguing that not only must the government have a compelling interest for the speech-related condition, but the condition itself must be closely or narrowly tailored to further that interest. Sullivan did not take this second step in her analysis, perhaps in part because she was trying to develop a more generally applicable unconstitutional conditions doctrine.<sup>66</sup> At least in the speech context, however, this second step seems a necessary one lest the mere existence of a compelling interest in the general vicinity of a speech-related condition provide sufficient justification for that condition, even if the condition is only tenuously related to that interest. A mere requirement that there be some type of connection between the condition at issue and a compelling governmental interest results in an extremely malleable test that undermines the requirement that the interest be compelling.<sup>67</sup>

This approach differs from the “germaneness” standard applied in some other contexts that implicate the unconstitutional conditions doctrine.<sup>68</sup> For example, in *South Dakota v. Dole*,<sup>69</sup> the Supreme Court

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*see* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724, 2730–31 (2010) (holding that the material-support statute was not unconstitutional, although a strict scrutiny test was not applied, while Justice Breyer dissented arguing that strict scrutiny should have been applied to the government action); *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358–59, 366–67 (2009) (finding that a ban on payroll deductions was not subject to a strict scrutiny test, with three justices dissenting at least in part, including one justice who advocated for usage of a strict scrutiny test).

<sup>64</sup> *See infra* notes 74–76 and accompanying text.

<sup>65</sup> *See* Sullivan, *supra* note 2, at 1452–54 (stating that government monopoly on supplying a benefit always restricts beneficiaries’ choices, regardless of how the state created the monopoly).

<sup>66</sup> *Id.* at 1458.

<sup>67</sup> *See id.* at 1474 (making a similar argument that whether a condition is constitutional should turn on whether it is “germane” to the purpose of the benefit at issue).

<sup>68</sup> *See* Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 775–78 (2007) (outlining an analysis of constitutional conditions on

noted that conditions on federal grants to the states might be unconstitutional under the Tenth Amendment “if they are unrelated ‘to the federal interest in particular national projects or programs.’”<sup>70</sup> Merely being related to a particular national project or program is a far step from the condition being narrowly tailored to the relevant project or program, and also does not ensure that the purpose of the project or program is to further a compelling governmental interest, as illustrated by Justice O’Connor’s dissent highlighting the relatively loose connection between the condition at issue in that case and the federal government interest at stake.<sup>71</sup> Similarly, in *Dolan v. City of Tigard*,<sup>72</sup> the Supreme Court required something more rigorous than a rational basis standard in the context of a Fifth Amendment takings claim, calling instead for “rough proportionality” with a “legitimate state interest.”<sup>73</sup> The very language the Court used confirms that the bar is set well below the standard of being narrowly tailored to a compelling government interest—which should apply in the First Amendment speech context for the reasons already discussed.

The approach proposed here also contrasts with the one urged, unsuccessfully, by the government in *Alliance*. The government argued that “Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives,”<sup>74</sup> and further stated that even heightened scrutiny would only apply when a funding condition “is aimed at suppressing dangerous ideas or disfavored viewpoints.”<sup>75</sup> The government further argued that “Congress therefore *reasonably decided* that recipients should be required to make a commitment to the government that they will further central objectives of the very program under which they seek and accept federal funds,”<sup>76</sup> essentially confirming that the government was arguing for a reasonableness standard to apply to this type of situation. The above analysis leads to the conclusion that a strict scrutiny standard should apply

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the Institutional Review Board regime, which conditions federal funding of academic research on human beings at universities based on compliance with applicable federal statutes and regulations); Ilan Wurman, Note, *Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153, 1178–84 (2013) (providing examples of unconstitutional conditions analyses in a variety of contexts and examining the constitutionality of suspicionless drug testing as a condition of receiving welfare benefits).

<sup>69</sup> 483 U.S. 203 (1987).

<sup>70</sup> *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

<sup>71</sup> *Id.* at 214–15 (O’Connor, J., dissenting).

<sup>72</sup> 512 U.S. 374 (1994).

<sup>73</sup> *Id.* at 386, 391 (internal quotation marks omitted).

<sup>74</sup> Brief for Petitioner at 17, *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013) (No. 12-10).

<sup>75</sup> *Id.* at 13.

<sup>76</sup> *Id.* at 21 (emphasis added).

instead.

Applying a strict scrutiny standard as opposed to a reasonableness standard because of the burden on the exercise of free speech created by the condition at issue also tracks the standard applied by the Supreme Court in a number of other situations implicating constitutional rights that otherwise would only merit application of the reasonableness standard. For example, while economic legislation generally merits only application of the reasonableness standard, the Court has applied the strict scrutiny standard not only when speech is burdened by such legislation, but also when racial discrimination that may violate the Fifth Amendment or the Fourteenth Amendment is at issue, when other fundamental rights protected by those amendments are at issue, and when freedom of association is at issue.<sup>77</sup> This is not to say that a burden on any constitutional right triggers strict scrutiny. For example, after applying strict scrutiny, at least in name, to free exercise claims for several decades, in 1990 the Supreme Court reverted to a reasonableness standard when a law burdens religious exercise—so long as that law is a generally applicable and neutral one.<sup>78</sup> But particularly in the context of laws that infringe on speech, the Court (and lower federal courts following the Court's lead) has applied a strict scrutiny standard when the “government regulates protected speech on the basis of the substance of what is expressed.”<sup>79</sup>

The above discussion therefore provides a framework for approaching speech-related conditions imposed on benefits provided to nonprofits. It does not, however, fully answer the question of what interests might be compelling enough to justify such conditions, or what it means for a condition to be closely or narrowly tailored to further that interest. The next Part begins to answer those questions by considering the actual disputes in this area that have reached the Supreme Court, particularly the recent *Alliance* case.

### III. APPLYING UNCONSTITUTIONAL CONDITIONS TO NONPROFIT SPEECH

It is not difficult to identify actual disputes between nonprofits and

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<sup>77</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 833–40 (2006) (discussing contexts in which the Supreme Court applies strict scrutiny). As Winkler notes, this heightened standard can be traced back to the famous footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). Winkler, *supra*, at 798.

<sup>78</sup> See *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (upholding a denial of unemployment benefits as the ingestion of peyote for religious ceremonies still constitutes ingestion of illegal drugs for employment purposes); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1157–58 (2009) (examining pre-*Smith* case law).

<sup>79</sup> Winkler, *supra* note 77, at 844.

government involving speech-related conditions. This Part focuses on three disputes resolved by the Supreme Court. The first two involve, respectively, a condition on indirect government funding that did not involve a nonprofit speaking on behalf of the government (i.e., government speech) and a condition on direct government funding that may have involved government speech. The third and most recent dispute, the *Alliance* case, involved a condition on direct government funding. In that case, however, the Court shifted its categorization of cases from whether the government was funding government speech to whether the government was funding the program in which the speech occurred (regardless of whether the nonprofit was channeling the government's voice).<sup>80</sup> This shift is important because the understanding of the earlier cases among federal courts appears to have been that the government speech issue was critical. This view, in turn, leads to the conclusion that speech-related conditions are more vulnerable constitutionally if the nonprofit beneficiary is not speaking on the government's behalf but instead receiving government funding for other reasons—a conclusion that is consistent with the framework developed above. If that view is now suspect, however, it moves the application of the unconstitutional conditions doctrine in this context in the wrong direction.

#### A. *Regan v. Taxation with Representation of Washington*

*Regan v. Taxation with Representation of Washington*<sup>81</sup> (“*TWR*”) involved a nonprofit organization challenging the lobbying limitation on charitable, educational, and similar organizations that claim both exemption from federal income tax and the ability to receive tax deductible charitable contributions (“charities”).<sup>82</sup> The government funding was therefore indirect (through tax exemption and deductibility instead of through a grant) and intermingled with private funding, and the speech at issue was clearly not government speech.<sup>83</sup> The Supreme Court nevertheless concluded the limitation was constitutional, in significant part because the nonprofit at issue had the option of creating a non-charitable affiliate that could engage in unlimited lobbying—that is, an affiliate that did not have access to the government “subsidy” provided through tax deductible charitable contributions.<sup>84</sup>

The difficult issue raised by this case is that given the absence of government speech, the limitation on speech paid for with non-government funds is problematic. That said, there are two related grounds for

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<sup>80</sup> *Alliance*, 133 S. Ct at 2327–28, 2332.

<sup>81</sup> 461 U.S. 540 (1983).

<sup>82</sup> *Id.* at 540–43.

<sup>83</sup> *Id.* at 544–46.

<sup>84</sup> *Id.* at 544–45.

concluding that permitting the alternate channel of a non-charitable affiliate for the limited speech renders the lobbying limitations sufficiently narrowly tailored to the government's compelling interest in ensuring the funds it provides are not used to pay for lobbying. First, with respect to the charitable contribution deduction, if the availability of the deduction results in increased giving because of the tax savings at least some donors enjoy, then it becomes difficult, if not impossible, to separate the government subsidy from the private, donated funds. While each donor knows whether they benefit from the deduction (which for individuals is only available if they itemize their deductions), the recipient charities are unlikely to have this information, making it impractical for them to differentiate between subsidized and non-subsidized donations.

It is possible, however, for charities to segregate their donations from their other sources of revenue. If the deduction was the only subsidy, it could be argued that a better tailored condition would be one that only limited the use of contributions for lobbying, leaving charities free to spend other funds on lobbying in an unlimited amount. The deduction is not the only subsidy, however, because the Court also identified the exemption from federal income tax as a subsidy.<sup>85</sup> Since that subsidy is triggered by merely having gross income that is greater than deductible expenses, that subsidy is inseparable from all of the otherwise taxable income of the charity (which would likely be most if not all income other than contributions).<sup>86</sup> The fact that Congress has chosen to permit other types of nonprofits to receive these tax subsidies and engage in unlimited lobbying does not undermine this reasoning as long as there is a reasonable basis for distinguishing them from charities.<sup>87</sup>

It is true that an alternate system under which charities could lobby without limitation, but only by using non-contribution income and paying income tax on lobbying expenditures, would also accomplish the goal of eliminating government funding for lobbying. That alternate system, however, does not appear to be better tailored to the government's compelling interest in seeing its support only used for what it, permissibly, chooses to support than a system under which a charitable organization can

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<sup>85</sup> 461 U.S. at 544. *But see* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011) (refusing to equate tax credits with governmental expenditures in the standing context).

<sup>86</sup> The inability to separate the government funding from private funding was also present in *United States v. American Library Ass'n*, 539 U.S. 194, 213–14 (2003), where the Court held that Congress could constitutionally condition access to a discount and grants that helped cover the cost of Internet access for public libraries installing Internet filtering software to block obscenity and child pornography.

<sup>87</sup> *See TWR*, 461 U.S. at 550–51 (concluding that Congress's decision to permit tax-exempt veterans organizations to both receive deductible contributions and engage in unlimited lobbying was neither a violation of the Equal Protection Clause nor otherwise unconstitutional because it was not irrational for Congress to subsidize lobbying by veterans organizations but not charities).

easily create a closely related and even controlled non-charitable affiliate to engage in lobbying.<sup>88</sup> So while the Court did not apply the exact framework developed above, the Court reached the same conclusion as is reached under this framework. That said, and as emphasized in Justice Blackmun's concurrence, the constitutionality of the lobbying limitation condition (and presumably the similar political campaign intervention prohibition) depends on it remaining relatively easy for charities to create such non-charitable affiliates.<sup>89</sup>

The Supreme Court has since repeatedly appeared to indicate that this easily-created-affiliate reasoning enjoys the support of a majority of the Court.<sup>90</sup> In fact, only a year later in *FCC v. League of Women Voters*,<sup>91</sup> the Court struck down a speech-related condition on federal funding precisely because the statute at issue did not permit the creation of an affiliate organization to engage in the disfavored speech with nonfederal funds.<sup>92</sup> In *League of Women Voters*, Congress conditioned receipt of government funding by noncommercial stations through the Corporation for Public Broadcasting on not engaging in "editorializing."<sup>93</sup> Unlike in *TWR* (and in *Rust*, discussed below), the government did not provide a means for affected stations to engage in the prohibited speech through a closely related affiliate using only private funds.<sup>94</sup> That difference proved fatal to the government's attempt to rely on *TWR*, since the Court found that the government failed to meet the First Amendment standard that applied in the broadcast context absent the ability to create such affiliates.<sup>95</sup>

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<sup>88</sup> The Internal Revenue Service takes the position that a charity may not be directly affiliated with or control, either directly or indirectly, a non-charitable affiliate that engages in political campaign intervention because a charity is not permitted to engage in any such activity; it does, however, permit indirect affiliation between such entities. WARD L. THOMAS & JUDITH E. KINDELL, S. AFFILIATIONS AMONG POLITICAL, LOBBYING AND EDUCATIONAL ORGANIZATIONS 255, 260, 264 (1999), available at <http://www.irs.gov/pub/irs-tege/eotopics00.pdf>.

<sup>89</sup> *TWR*, 461 U.S. at 553–54 (Blackmun, J., concurring). For a case applying this reasoning to the prohibition on charities engaging in political campaign intervention, see *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000).

<sup>90</sup> *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2329 (2013); *Rust v. Sullivan*, 500 U.S. 173, 197–98 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 399–400 (1984); see also *Branch Ministries*, 211 F.3d at 143 (acknowledging that the Supreme Court accepts this reasoning); Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 FIRST AMEND. L. REV. 100, 116–17 (2007) (acknowledging that the majority of the justices accept this reasoning). But see *Alliance*, 133 S. Ct. at 2334 (Scalia, J., dissenting) (stating that the ability to use a closely related affiliate to engage in lobbying was "entirely nonessential to the Court's holding" in *TWR*).

<sup>91</sup> 468 U.S. 364 (1984).

<sup>92</sup> *Id.* at 400–01.

<sup>93</sup> *Id.* at 366.

<sup>94</sup> *Id.* at 400.

<sup>95</sup> *Id.* at 384–86, 402.

## B. *Rust v. Sullivan*

In *Rust v. Sullivan*,<sup>96</sup> nonprofit organizations received federal funds under Title X of the Public Health Service Act to provide family-planning services.<sup>97</sup> Regulations under that provision prohibited “Title X projects” from providing information regarding abortion as a method of family planning and further required such projects to be physically and financially separate from any prohibited abortion activities.<sup>98</sup> The organizations and doctors associated with them argued the regulations were unconstitutional both with respect to the limitations on speech funded by the Title X grants and with respect to the limitations on speech funded by non-federal funds but which were not spent in a physically separate facility.<sup>99</sup> In contrast to *TWR*, *Rust* therefore involved direct government funding. The Court characterized the challenge as a facial one to the regulations and concluded the regulations were in fact, on their face, constitutional.<sup>100</sup>

With respect to the limitation on speech funded by the government, the requirement that the speech be fully funded by the government was met.<sup>101</sup> The other requirement for the limitation to be constitutional—that the speech be speech the government could engage in directly—was a matter of dispute since the speech was about family planning and yet explicitly did not include discussion of abortion, the right to which is constitutionally protected under other Supreme Court decisions.<sup>102</sup> It is beyond the scope of this Article to address that dispute, but if the majority was correct that such selective speech by the government was permitted constitutionally then this requirement was met as well.<sup>103</sup> So under the framework developed above, the Court was correct in its conclusion that the limitation on speech fully funded by the government was constitutional.

The limitation on speech funded by non-federal funds is more problematic, however. As written, the majority opinion appears to conclude that the limitation is constitutional because it is a reasonable requirement to ensure federal funds are not used for the prohibited speech.<sup>104</sup> The separate physical facility requirement is not, however,

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<sup>96</sup> 500 U.S. 173 (1991).

<sup>97</sup> *Id.* at 178–79.

<sup>98</sup> *Id.* at 179–80.

<sup>99</sup> *Id.* at 181, 192.

<sup>100</sup> *Id.* at 177–78.

<sup>101</sup> *See id.* at 192–193 (“[T]he Government may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.”).

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at 201–02 (“The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.”).

<sup>104</sup> *Id.* at 194–95.

narrowly tailored to further the government's compelling interest in ensuring its funds are spent as it has directed. Less burdensome measures, such as requiring careful cost accounting, plausibly would be sufficient to satisfy this interest.<sup>105</sup> On its face, therefore, the speech-related condition limiting the use of non-federal funds is not constitutional under the framework developed above.

An interesting aspect of subsequent decisions relying on this case is, however, that several of those later decisions appear to engage in what is arguably revisionist history by characterizing the government-funded speech as not only government-funded but in fact government speech, albeit done through a private party.<sup>106</sup> While this reading may not be accurate, it makes the result in the case consistent with the framework proposed here. Under this reading of the case, the government has a compelling interest not only in ensuring that its funds are spent on their designated purpose but also in ensuring that its speech is not undermined by or confused with other, non-government speech that is coming from the same speaker in the same physical facility.<sup>107</sup> In the case of government speech, therefore, the separate physical facility requirement is arguably

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<sup>105</sup> In fact, the petitioners in *Rust* argued that the physical separation requirement imposed a substantial burden on their speech and might in fact make it impossible for them to engage in desired speech with non-government funds. Brief for Petitioners at 27–30, *Rust*, 500 U.S. 173 (No. 89-1391). The Supreme Court did not directly address this argument.

<sup>106</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (characterizing the situation in *Rust* as one where “the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program”); *DKT Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 477 F.3d 758, 762 (D.C. Cir. 2007) (“Under *Rust*, as interpreted by *Rosenberger* and *Velazquez*, the government may thus constitutionally communicate a particular viewpoint through its agents and require those agents not convey contrary messages.”); Brian H. Bix, *Perfectionist Policies in Family Law*, 2007 U. ILL. L. REV. 1055, 1059 & n.24 (reviewing LINDA MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY*) (stating that the “Court’s views on government speech and subsidy of speech are scanty and inconsistent” while also stating that the Court distinguished *Rust* in several subsequent cases and reaffirmed the government’s right “to subsidize viewpoints selectively when the government . . . uses private speakers to promote the government’s views”); Deborah Kelly, Note, *The Legal Services Corporation’s Solicitation Restriction and the Unconstitutional Conditions Doctrine: Has the Death Knell Sounded for Future Challenges to the Restriction?*, 29 SETON HALL LEGIS. J. 247, 270 n.160 (2004) (stating that the majority opinion in *Rust* has since been distinguished in subsequent cases to apply only to “instances of governmental speech”). Interestingly, Justice Kennedy wrote the Court’s opinions in both *Velazquez* and *Rosenberger*, but there is no overlap between the other justices in the five-justice majorities in the two cases (Stevens, Souter, Ginsburg, and Breyer comprised the majority in *Velazquez* and Rehnquist, O’Connor, Scalia, and Thomas comprised the majority in *Rosenberger*). *Velazquez*, 531 U.S. at 533; *Rosenberger*, 515 U.S. at 819.

<sup>107</sup> See *Rosenberger*, 515 U.S. at 833 (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”).

narrowly tailored to a compelling interest because of this risk of such undermining or confusion.

As these two different views and results demonstrate, it was therefore critical whether the speech at issue is only government-funded or is in fact also identified as government speech, at least prior to the recent *Alliance* decision. The line between these two types of speech can be difficult to draw.<sup>108</sup> Given the strict scrutiny that applies to speech-related conditions, the government should have the burden of clearly demonstrating that the speech was government speech. What arguably was absent in *Rust* was such a clear demonstration, and absent such a clear demonstration the government should not have been able to impose a speech-related condition. The Court therefore was incorrect to uphold as constitutional the limitation on the non-government funded speech, at least on the record available to it at the time. The revised version of the facts apparently adopted by the Court in later decisions would, however, have provided a sufficient basis for upholding the limitation on non-government funded speech at issue in *Rust*. In its latest decision in this area, however, the Supreme Court avoided this distinction by instead reformulating the key issue as whether the condition is within or outside of a government spending program, a shift that both could have significant consequences in this area and is contrary to the framework proposed in this Article.<sup>109</sup>

### C. Agency for International Development v. Alliance for Open Society International

In the most recent dispute in this area to reach the Supreme Court, at issue was a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“the Act”) that barred funding under the Act for any group or organization “that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>110</sup> To enforce this prohibition, the implementing agencies required the recipients of funding under the Act to document their opposition to prostitution and sex trafficking.<sup>111</sup> The agencies also established guidelines requiring sufficient

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<sup>108</sup> See, e.g., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 163 (1996) (“The criteria for establishing whether speech ought to be characterized as public discourse [a subset of non-governmental speech that contributes to democratic self-governance], are complex, contextual, and obscure, and particularly so in cases of subsidized speech. I am confident that there can be no simple empirical or descriptive line of demarcation.” (footnote omitted)). In part to address this difficulty, Post develops a new category of speech that he characterizes as speech within a “managerial” domain. *Id.* at 164.

<sup>109</sup> See *infra* notes 131–36 and accompanying text (discussing *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219 (2d Cir. 2006)).

<sup>110</sup> Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc., 133 S. Ct. 2321, 2324 (2013) (quoting 22 U.S.C. § 7631(f) (2012)) (internal quotation marks omitted).

<sup>111</sup> *Id.* at 2326.

separation from any affiliated entities that did not comply with this requirement, with the sufficiency of such separation determined based on not only the extent of legal and financial separation but also the extent to which the organizations maintained separate personnel and physical facilities.<sup>112</sup>

Under the framework developed above, the government is constitutionally permitted to provide funding that can only be used for speech opposing prostitution, assuming the government could engage in such speech directly, and to bar the use of its funding for any speech or activity promoting prostitution. The Act here, in fact, included such a bar, which was not challenged in this litigation.<sup>113</sup> The challenged provision went further, however, in that it required the recipient groups to also comply with speech-related restrictions relating to their use of non-government funds by affirmatively taking a position opposing prostitution and sex trafficking, with the ability to take an inconsistent position permitted only if they not only acted through an affiliate, but an affiliate that was sufficiently separate from the group receiving funds under the Act.

As discussed in connection with *Rust*, such restrictions on the use of private funds might be justified if the recipient of the government funding was clearly identified as speaking on behalf of the government and a failure to maintain this level of separation would undermine or confuse that government speech.<sup>114</sup> But also as noted with respect to *Rust*, if speech-related conditions are subject to strict scrutiny as proposed in this Article, the government should bear the burden of demonstrating both that clearly the speech was government speech, not merely government-funded speech, and that the degree of separation required is necessary to protect the integrity of that speech.<sup>115</sup> The record in this case indicates the government failed to make either demonstration. The funding was not for an anti-prostitution messaging campaign on behalf of the government, which campaign would be clearly undermined if in essentially the organization's next (non-government funded) breath the recipient group could contradict that message. Rather, the funding was for programs combatting HIV/AIDS, tuberculosis, and malaria more generally.<sup>116</sup> In addition, the government was requiring the recipient organizations to assume for all purposes an anti-prostitution position *as their own*

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<sup>112</sup> *Id.* at 2326–27.

<sup>113</sup> *Id.*

<sup>114</sup> See text accompanying *supra* note 106.

<sup>115</sup> See text accompanying *supra* note 107.

<sup>116</sup> *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 237–38, 264 (2d Cir. 2011) (“The stated purpose of the Leadership Act is to *fight HIV/AIDS*, as well as tuberculosis, and malaria. Defendants cannot now recast the Leadership Act’s global HIV/AIDS-prevention program as an anti-prostitution messaging campaign.” (footnote omitted)).

*position*—not merely to promulgate that position on behalf of the government.<sup>117</sup>

The Supreme Court did not rely on the government speech versus private speech divide, however (the “speech” approach). Instead, the Court recharacterized the relevant divide as between “conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”<sup>118</sup> It then cited *TWR*, *League of Women Voters*, and *Rust* as exemplifying this “spending” approach, categorizing *TWR* and *Rust* as involving speech-related conditions only on the relevant government spending program and *League of Women Voters* as involving conditions relating to speech outside the contours of such a program.<sup>119</sup>

This is a subtle but important, and ultimately problematic, shift. Under either the speech or the spending approach, a one hundred percent government funded effort may constitutionally have speech-related conditions—that is, the government has a compelling interest in getting what it is paying for—subject to the three limitations noted earlier.<sup>120</sup> Similarly, if a government-imposed condition restricts speech that is not funded by the government and is clearly separate from and does not interfere with or undermine the government-funded activities or speech, then such a condition is almost certainly unconstitutional under either the speech or the spending approach. The differing approaches may, however, lead to significantly different results in between these extremes for at least two reasons.

First, the speech approach is significantly narrower than the spending approach in that it only allows a lower level of constitutional protection for a significantly smaller segment of activities. *TWR* provides a striking example of this difference. *TWR* did not involve government speech—charities that receive government subsidies in the form of tax deductible contributions are not speaking on behalf of the government in any way.<sup>121</sup> Yet, using the spending approach, the Supreme Court in *Alliance* characterized *TWR*’s activities—and by extension, the activities of all charities—as a government spending program.<sup>122</sup> The spending approach therefore creates the possibility of speech-related restrictions being permitted, as a constitutional matter, on a much broader range of activities

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<sup>117</sup> *Alliance*, 133 S. Ct. at 2330.

<sup>118</sup> *Id.* at 2328.

<sup>119</sup> *Id.* at 2328–29.

<sup>120</sup> See *supra* text accompanying notes 61–62.

<sup>121</sup> *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 542 (1983) (recognizing that *Taxation with Representation* “proposes to advocate *its* point of view” (emphasis added)).

<sup>122</sup> *Alliance*, 133 S. Ct. at 2328–29.

that receive some level of government support even if those activities do not constitute government speech.

Relatedly, the spending approach as described by the Supreme Court would subject any activity that received even a relatively small proportion of funding from the government as a government spending program and thus subject to less protection from speech-related conditions under the First Amendment. While *TWR* involved activities only partially funded by the government, for the reasons detailed above, it was difficult—if not impossible—for a charity to separate the government funding stream from private sources because of how tax deductions and tax exemptions function, and so requiring charities to create separate affiliates that do not receive any government funding to engage in the speech at issue (lobbying) was narrowly tailored to further the compelling governmental interest in not having the government funds be used for such speech.<sup>123</sup> This was only true, however, if the burden of creating and maintaining such entities was relatively light.<sup>124</sup>

This contrasts with the situation in *Rust*, which at least later decisions characterized as involving government speech.<sup>125</sup> In *Rust*, the Supreme Court upheld the speech-related condition even though the government required that a privately funded affiliate that engaged in the speech at issue not only be legally and financially separate but also have separate staff and physical facilities.<sup>126</sup> If, therefore, the spending approach is the one to be used going forward, as opposed to the speech approach, it would suggest that the government could constitutionally require the lobbying affiliate of a charity to not only be legally and financially separate but also, as was the case in *Rust*, to have separate staffs and facilities even if doing so would impose a substantial burden on the ability of the charity to engage in substantial lobbying through that affiliate. This result would be inconsistent with both the *TWR* majority opinion and the more extensive discussion of this issue in Justice Blackmun's concurrence, which at least up to now appeared to have been adopted by the Court in its later decisions.<sup>127</sup>

The Supreme Court in *Alliance* did not accept an argument by the government along these lines, but the reason it cited for not doing so turned on the fact that the speech-related condition in this case did not only forbid certain speech, but affirmatively required certain speech.<sup>128</sup> More

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<sup>123</sup> See *supra* notes 85–87 and accompanying text.

<sup>124</sup> See *supra* notes 88–89 and accompanying text.

<sup>125</sup> See *supra* note 106 and accompanying text.

<sup>126</sup> See *Rust v. Sullivan*, 500 U.S. 173, 180–81 (1991) (describing the required degree of separation).

<sup>127</sup> See *supra* note 90 and accompanying text.

<sup>128</sup> *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330–31 (2013).

specifically, the government argued that the speech-related condition was constitutional because it allowed recipients of funding under the Act to establish affiliates that communicated a contrary message relating to prostitution as long those affiliates were sufficiently separate.<sup>129</sup> The Court rejected this argument, reasoning that the speech-related condition required a recipient to state a specific belief and so if the affiliate was closely enough associated with the recipient such that the affiliate's speech would be considered effectively the recipient's speech (although funded with non-governmental funds), "the recipient can express those beliefs [that are contrary to opposing legalization of prostitution] only at the price of evident hypocrisy."<sup>130</sup> The Court, therefore, did not address the situation where the condition imposed by the government only *prohibited* certain speech as opposed to requiring certain speech, leaving open the possibility that the affiliate argument would have been successful in that situation even if the government required the affiliate to be separate not only legally and financially, but also physically and with respect to its staff.

The existence of this possibility is significant for at least three reasons. First, under the speech approach that appears to have controlled before this decision, the government would bear the more difficult burden of demonstrating that the recipient was in fact speaking on behalf of the government before the government could constitutionally require an affiliate engaging in the prohibited speech to have a high (and likely burdensome) level of separation. Under the spending approach, all the government has to show is that there is at least partial government funding, that the condition prohibits speech but does not require it, and that the government permits the recipient to engage in the prohibited speech with non-governmental funds through an affiliate that satisfies a reasonable (not narrowly tailored) separation requirement. As the petitioners in *Rust* noted, requiring separate physical facilities and separate staffs will often impose significant additional financial costs.<sup>131</sup>

Second, this shift could resolve in the government's favor a long-running dispute involving legal services organizations, albeit a dispute that was already trending the government's way. The dispute involves the government subjecting recipients of government funding from the Legal Services Corporation<sup>132</sup> to a requirement that they engage in certain speech-related activities—such as participating in class action lawsuits and

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<sup>129</sup> *Id.* at 2331.

<sup>130</sup> *Id.*

<sup>131</sup> See *supra* note 105.

<sup>132</sup> The Legal Services Corporation is a federally funded charitable nonprofit controlled by directors appointed by the President (and confirmed by the Senate); it distributes federal funds to independent nonprofit legal aid programs across the country. *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Jan. 26, 2014).

in-person solicitation of clients—only through affiliates that are legally, financially, and physically separate from the entity receiving the government funding.<sup>133</sup> While the federal courts considering this challenge and similar challenges have generally concluded that this requirement is constitutional,<sup>134</sup> the U.S. Court of Appeals for the Second Circuit left open the possibility that the requirement would be unconstitutional as applied to the plaintiffs if they could demonstrate that the requirement did not provide an adequate alternative means of engaging in the speech using private funds, remanding the case back to the federal district court to resolve this factual point.<sup>135</sup> At the same time, the Second Circuit rejected the compelling interest, narrowly tailored approach urged in this Article,<sup>136</sup> and the Supreme Court’s reasoning in *Alliance* would provide further support for that rejection.

Third, this shift could possibly allow the government to impose this higher separation requirement on affiliates created by charities to engage in lobbying (and political campaign intervention) beyond the limits permitted for charities themselves, effectively overruling *TWR* in this regard. There are, however, at least two potential barriers to this outcome. First, neither Congress nor the Treasury Department may have any interest in imposing such a requirement given that charities and their non-charitable, tax-exempt affiliates from across the political spectrum have long relied on the ability of charities to easily create affiliates in order to engage in lobbying and political campaign intervention.<sup>137</sup> The Internal Revenue Service has been particularly solicitous in this regard, although in large part because it apparently felt that *TWR* required that approach.<sup>138</sup> While there have

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<sup>133</sup> See *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 222–23 (2d Cir. 2006) (discussing the prohibition of certain speech related activities); Kelly, *supra* note 106, at 256 (stating that certain restrictions prohibit LSC fund recipients from engaging in various speech related acts).

<sup>134</sup> See *Rust v. Sullivan*, 500 U.S. 173, 198–99 (1991) (finding that “Title X projects” that were physically and financially separate from any prohibited abortion activities regulations were in fact, on their face, constitutional); *DKT Int’l v. U.S. Agency for Int’l Dev.*, 477 F.3d 758, 764 (D.C. Cir. 2007) (finding that a subsidiary could constitutionally qualify for government funds as long as the two organizations’ activities were kept sufficiently separate).

<sup>135</sup> *Brooklyn Legal Servs. Corp.*, 462 F.3d at 223–24, 232–33. Recently, plaintiffs in the Second Circuit litigation voluntarily dismissed their case without public explanation. Notice of Voluntary Dismissal by Bronx Legal Services, *Dobbins v. Legal Servs. Corp.*, No. 1:01-CV-08371 (E.D.N.Y. July 23, 2013).

<sup>136</sup> *Brooklyn Legal Servs. Corp.*, 462 F.3d at 229–30.

<sup>137</sup> See THOMAS & KINDEL, *supra* note 88, at 255 (“In an increasingly common arrangement, an [Internal Revenue Code (“IRC”)] 501(c)(3) educational organization formally or informally affiliates with an IRC 501(c) (4), (5), or (6) lobbying organization with a related IRC 527 political organization or PAC.”).

<sup>138</sup> See Memorandum from Lois G. Lerner, Dir., Exempt Org., Internal Revenue Serv., to Marsha Ramirez, Dir., Examinations, Internal Revenue Serv. (Apr. 17, 2008), available at [www.irs.gov/pub/irs-tege/2008\\_paci\\_program\\_letter.pdf](http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf) (“Enforcement in this area requires [the IRS Exempt Organizations Division] to consider the implications of *Taxation with Representation of Washington*, particularly Justice Blackmun’s concurring opinion.”).

recently been numerous calls for reining in non-charitable tax-exempt organizations, particularly with respect to political campaign intervention, those criticisms do not appear to have created much momentum for legislation or regulatory change.<sup>139</sup> This barrier is political, however, not constitutional.

The second potential barrier is the third limitation on the government controlling how its funds are spent with respect to speech noted above.<sup>140</sup> That limitation is the holding in the *Rosenberger* case: if the government funds a public forum in which it permits and indeed encourages many forms of private speech, it generally may not discriminate based on viewpoint with respect to the speech it funds, although it may discriminate based on content if such discrimination preserves the limited purposes of the forum.<sup>141</sup> While what distinguishes “content” discrimination from “viewpoint” discrimination is not completely clear from the opinion, or, indeed, subsequent case law, it is a distinction the Court continues to support.<sup>142</sup> This barrier is not, however, very strong, in that *Rosenberger* cited *TWR* as an example of a situation where viewpoint discrimination did *not* occur.<sup>143</sup> That is, restrictions that apply to lobbying (and political campaign intervention) are only content restrictions and not viewpoint restrictions—as long as they apply to all lobbying and not lobbying from a particular policy or political perspective. This conclusion appears unavoidable, and thus *Rosenberger* is not in fact a real barrier to the government imposing a higher separation requirement.

Finally, it should be noted that the government also was unsuccessful with an affiliate argument in the *Citizens United* campaign finance case.<sup>144</sup>

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<sup>139</sup> The limited amount of bipartisan support for proposals along these lines makes their passage unlikely given the current partisan divide in Congress. See Kenneth P. Doyle, *501(c)(4) Limit, Corporate, Union Disclosure, Combined in Rep. Cartwright’s New Measure*, BLOOMBERG BNA MONEY & POL. REP., July 16, 2013 (reporting on the introduction of a bill in this area by House Democrat with twenty House Democrat co-sponsors but no apparent Republican support); Kenneth P. Doyle, *New Murkowski-Wyden Disclosure Measure Stirs Hope for Bipartisan Campaign Reform*, BLOOMBERG BNA MONEY & POL. REP., Apr. 24, 2013 (reporting on the introduction of a bipartisan campaign finance bill, but quoting the participating Republican Senator as conceding that passage would not be easy).

<sup>140</sup> See *supra* note 62 and accompanying text.

<sup>141</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>142</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (stating that in the context of speech on government property, “any restriction based on the content of the speech must satisfy strict scrutiny . . . and restrictions based on viewpoint are prohibited” (citation omitted)); *Rosenberger*, 515 U.S. at 831 (“[I]t must be acknowledged, the distinction [between content discrimination and viewpoint discrimination] is not a precise one.”). But see *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 584–86 (1998) (concluding that the NEA could constitutionally make aesthetic judgments, including taking into consideration general standards of decency and respect for the “diverse beliefs and values of the American public” when making funding decisions).

<sup>143</sup> *Rosenberger*, 515 U.S. at 834.

<sup>144</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356, 361 (2010).

In that case, the government was defending the ban on corporate general treasury spending on express advocacy and electioneering communications.<sup>145</sup> In holding that ban unconstitutional, the Supreme Court discussed whether the ability of a corporation to create a political action committee, or PAC, provided a constitutionally sufficient alternate channel for the corporation's speech.<sup>146</sup> The Court concluded that it did not, both because, as a separate entity, a PAC is not the corporation, so its speech is not the corporation's speech, and because PACs "are burdensome alternatives; they are expensive to administer and subject to extensive regulations."<sup>147</sup> This conclusion likely is not incompatible with either *TWR* or *Rust*; however, a key distinction between *Citizens United* and the various unconstitutional conditions cases is that the latter cases involve government funding while *Citizens United* does not.<sup>148</sup>

The Supreme Court's decision in *Alliance* therefore appears to have both muddied the waters even more in this area and moved the Court in the wrong direction. Rather than clarifying the approaches taken in the earlier cases addressing similar situations, it instead recharacterized them in a manner that leaves even the strength of those cases as precedents uncertain. Is the critical factual determination whether the funded activity is government speech, as some cases have suggested, or is it now whether the speech condition is outside of a government spending program? *Alliance* suggests the latter,<sup>149</sup> but its failure to even acknowledge the former distinction makes it unclear whether that distinction also is still relevant. *Alliance* left undisturbed the (recharacterized) holding in *League of Women Voters* that a speech prohibition reaching beyond a government spending program is unconstitutional if the funding recipient is not permitted to engage in the speech as well, whether directly or through an affiliate. It, however, left uncertain under what circumstances the government can only require such an affiliate to be minimally separate from the funding recipient, as was the case in *TWR*, as opposed to being able to require a significantly greater (and more burdensome) extent of separation, as was the case in *Rust* and is the case in the legal services dispute.

It could be argued that the Court's adoption of a spending approach in *Alliance* is more consistent with the *Rust* decision in that the later

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<sup>145</sup> *Id.* at 318–19.

<sup>146</sup> *Id.* at 337, 339.

<sup>147</sup> *Id.* at 337.

<sup>148</sup> It has been argued that the state law benefits enjoyed by corporations are akin to a subsidy, but it is not clear that the *Citizens United* Court accepted that argument. Mayer, *supra* note 32, at 416. There are also numerous reasons to conclude that *Citizens United* did not implicitly overrule *TWR*. *Id.* at 415–16.

<sup>149</sup> See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (suggesting that the regulation of the speech condition is outside the context of a government spending program).

characterization of the latter case as involving government speech did not reflect the actual facts of that case.<sup>150</sup> For the reasons already discussed, however, if *Rust* did not involve government speech, then the case was wrongly decided under the framework put forward by this Article.<sup>151</sup> If indirect restrictions on speech are subject to strict scrutiny, as argued above, then the government can only impose such restrictions as a condition for receiving government funding either if the funding is for government speech and permitting the targeted speech would undermine that government communication, or if an easy alternate way is provided for engaging in such speech without the use of the government funding. In *Alliance*, neither situation applied. The speech in *Alliance* was not apparently government speech that would be undermined unless the recipient, as an entity, declared its opposition to the legalization of prostitution. Furthermore, the alternate way provided by the government was insufficient not only because it would be ineffective (since the affiliate's speech, if truly the speech of the recipient, would be hypocritical because it would be in direct conflict with the affiliate's (compelled) speech) but because it went well beyond what was arguably necessary to ensure the recipient used the government funds as directed. *Alliance*, therefore, is problematic under the framework argued for here, both because not only is it in itself inconsistent with that framework, but also because it reverses the longstanding (albeit perhaps untrue to the facts of the case) interpretation of *Rust* that was consistent with that framework.

Lastly, the argument of the dissent in *Alliance* is that the government should be free to choose recipients who adhere to the government's preferred views generally and not just in government-funded communications.<sup>152</sup> The majority argues both that this approach ignores aspects of the Court's own precedents and that the dissent incorrectly discounts the effect of the speech-related condition by characterizing it as only a selection criterion when it in fact serves as an incentive for potential recipients to adopt a position they otherwise would not adopt.<sup>153</sup> The first criticism is correct, although the majority is also guilty of selective ignorance with respect to the relevant precedents, as discussed above.<sup>154</sup> The problem with the second criticism is that the dissent is correct that there is no coercion, in the sense of an offer the recipients cannot refuse,

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<sup>150</sup> See *supra* note 106 and accompanying text.

<sup>151</sup> See *supra* notes 104–05 and accompanying text.

<sup>152</sup> See *Alliance*, 133 S. Ct. at 2332 (Scalia, J., dissenting) (discussing the importance of the government's freedom to choose which programs to assist based on similar viewpoints).

<sup>153</sup> See *id.* at 2328, 2330 (majority opinion) (suggesting that the policy condition proposed by the dissent "goes beyond defining the limits of the federally funded program to defining the recipient").

<sup>154</sup> See *supra* notes 118–19 and accompanying text (discussing the Supreme Court's decisions in *Rust*, *Regan*, and *League of Women Voters* in the context of activities that receive government funding).

here.<sup>155</sup> Instead there is simply a purchasing of the recipient's constitutional right to free speech—whether that speech is government funded or not, since the required position must be adopted by the recipient as its own. But under the framework developed in this Article, that is the heart of the constitutional problem: If speech rights are generally inalienable as against the government under the First Amendment, and if therefore any abridgement of such rights by the government—whether direct or indirect—is subject to strict scrutiny, then the government is not permitted to buy an organization's speech absent a compelling governmental interest in doing so and then only if the purchase is done in a manner that is narrowly tailored to serve that interest. This standard cannot be met under the facts in *Alliance*.

The *Alliance* decision could therefore significantly increase the ability of the government to impose speech-related conditions on nonprofits that receive government funding in any form. As already noted, it solidifies the government's victories in the Legal Services Corporation dispute and potentially opens the door to the government imposing greater burdens on charities that create non-charitable affiliates to engage in speech that exceeds the limits imposed on the charities themselves. It also could permit both the federal and state governments to attach speech-related conditions to any of the vast array of government funding mechanisms that benefit nonprofits—not only contracts and grants, but also fees for services (such as health care) and indirect funding mechanisms such as exemptions from state and local taxes. For example, in recent years there have been attempts to tie federal National and Community Service Act funds to limits on lobbying by both the recipient organization and any “co-locat[ing]” entity<sup>156</sup> and to require affordable housing grant recipients to not engage in any election-related activity even with private funds and on a completely nonpartisan and neutral basis;<sup>157</sup> both of these measures successfully made it through the House of Representatives. While constitutionally suspect under both the framework proposed here and pre-*Alliance* case law, post-*Alliance* it is far less clear that such restrictions would be found by the courts to be unconstitutional conditions.

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<sup>155</sup> See *Alliance*, 133 S. Ct. at 2334 (Scalia, J., dissenting) (“Moreover, as I suggested earlier, the contention that the condition here ‘coerces’ respondents’ speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution ‘are as unconstrained now as they were before the enactment of [the Leadership Act].’” (alteration in original) (quoting *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring))).

<sup>156</sup> Generations Invigorating Volunteerism and Education Act, H.R. 1388, 111th Cong., § 1304(b) (as passed by House, Mar. 18, 2009).

<sup>157</sup> Federal Housing Finance Reform Act of 2005, H.R. 1461, 109th Cong., § 128 (as passed by House, Oct. 26, 2005).

## IV. BROADER RAMIFICATIONS

The previous Parts have developed and applied a framework for addressing the constitutionality of speech-related conditions imposed on government funding provided, whether directly or indirectly, to nonprofit organizations. The framework is both consistent with the Constitution and provides significant clarity to this area of law, clarity which the shifting reasoning of Supreme Court opinions, and particularly the recent *Alliance* decision, demonstrate is much needed. The approach taken in this Article may also help to clarify the application of the unconstitutional conditions doctrine more generally in two important ways. First, the specific framework used here may be applicable to speech-related conditions imposed in other contexts, such as in the campaign finance area. Second, the customized approach employed here may prove useful in more disparate constitutional settings.

A. *Speech in Other Contexts*

As others have detailed, attempts to develop global approaches to unconstitutional conditions have been unsuccessful in large part because of the many different constitutional contexts in which such conditions can arise.<sup>158</sup> This Article takes a different approach by focusing on how the doctrine should apply in a specific constitutional and factual context. By doing so, it is much easier to develop a coherent and constitutionally supportable approach. At the same time, however, that approach need not only be of use in the particular context of its origin. While the conflicts discussed in this Article related to speech and benefits received by nonprofit organizations, such disputes also extend to for-profit organizations. For example, the existing prohibition on federal campaign contributions from persons with government contracts faces a court challenge in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>159</sup> While not characterized as an unconditional conditions case by

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<sup>158</sup> See, e.g., Epstein, *supra* note 2, at 27 (“[The] hierarchy of legal rights makes the doctrine of unconstitutional conditions especially difficult to apply to complex modern statutory schemes that implement explicit or implicit transfers of wealth for purposes now regarded as unquestionably legitimate—for example, to regulate land use, or to help the needy or unemployed.”); Gabriel Gillett, Note, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition that Restricts Computer and Internet Access*, 79 *FORDHAM L. REV.* 217, 231 (2010) (“Though the unconstitutional conditions doctrine is centuries old, it remains difficult to predict when it applies, and if it applies, when it is violated.”).

<sup>159</sup> See *Wagner v. FEC*, 717 F.3d 1007, 1017 (D.C. Cir. 2013) (vacating the judgment of the district court and remanding the case to the district court for certification of facts and constitutional questions to the en banc court of appeals within five days of the opinion); Kenneth P. Doyle, *Contractor Campaign Money Case to Be Heard by D.C. Circuit Sept. 30*, *BLOOMBERG BNA MONEY & POL. REP.*, June 20, 2013 (“A constitutional challenge to the long-standing federal ban on campaign

the district court,<sup>160</sup> the case could and probably should be characterized in this way—the ability to receive a government contract is generally a benefit to which private parties do not have a right, and the campaign contributions bar imposed on persons receiving this benefit is a speech-related condition under current case law.<sup>161</sup> The resolution of this challenge should therefore turn on an application of the unconstitutional conditions doctrine, and therefore, the principles developed with respect to nonprofit organizations in similar situations should also apply. The more coherent framework developed here could have application outside of the limited context of speech-related conditions imposed on benefits received by nonprofit organizations.

Another specific situation implicated by this reasoning is speech by public employees. In this context, the Supreme Court has made a distinction between such employees speaking as citizens addressing matters of public concern, in which case they enjoy First Amendment protection from government retaliation for their speech, balanced against the government's need as an employer to operate efficiently and effectively, and when they are not doing so, in which case no First Amendment protection is available.<sup>162</sup> As Randy Kozel has detailed, however, the Court has failed to provide an adequate theoretical basis for the balancing test it has adopted in this area.<sup>163</sup> Kozel proposes instead a presumption of parity for First Amendment purposes between citizens and government employees, a presumption that can only be overcome if there is “a valid reason for permitting the government to treat the employee differently from her peers in the citizenry at large.”<sup>164</sup> While Kozel does not employ level of scrutiny language in his proposed approach to this situation, adopting the framework proposed here would appear to be consistent with his approach of limiting rebuttal of the presumption of

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money from government contractors will be considered by the full federal appeals court for Washington, D.C., in an argument now set for the end of September.”)

<sup>160</sup> See *Wagner v. FEC*, 901 F. Supp. 2d 101, 105 (D.D.C. 2012) (analyzing the case under a First Amendment challenge and an equal-protection argument), *vacated by* 717 F.3d 1007 (D.C. Cir. 2013); *Wagner v. FEC*, 854 F. Supp. 2d 83, 85 (D.D.C. 2012) (evaluating three federal contractors' motion for a preliminary injunction based on the likelihood of success of their First Amendment and Fifth Amendment equal-protection claims).

<sup>161</sup> See *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (plurality opinion) (“*Buckley* recognized that contribution limits . . . ‘implicate fundamental First Amendment interests,’ namely, the freedoms of ‘political expression’ and ‘political association.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976))); *Buckley*, 424 U.S. at 21 (“A contribution serves as a general expression of support for the candidate and his views . . .”).

<sup>162</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006); see also *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972) (applying the doctrine of unconstitutional conditions to an allegedly speech-related denial of public employment).

<sup>163</sup> Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2008–09 (2012).

<sup>164</sup> *Id.* at 2011.

parity only to situations where an employee speaks in discharging official responsibilities (i.e., the government's compelling interest in getting what it is paying for) and ensuring fulfillment of the institutional mission for the portion of government for which the employee works (i.e., the government's compelling interest in not having the purpose of its program undermined).<sup>165</sup>

While it is beyond the scope of this Article to fully explore the possible application of the framework developed here to these different but related contexts where the government has imposed speech-related conditions on the receipt of government funding, doing so may in fact help clarify the constitutional standards in those areas as well.

### B. *Other Constitutional Contexts*

More broadly, not attempting to develop a grand theory of unconstitutional conditions that is applicable to all constitutional rights in all situations, but instead focusing on the application of the doctrine to a particular constitutional context, and then considering whether that application can be incrementally extended, perhaps in a modified form, to other contexts may be a viable approach for achieving coherence in the unconstitutional conditions area more generally. Such coherence is important, particularly given the calls by some scholars to abandon the doctrine completely.<sup>166</sup>

It is important to recognize, however, that the framework developed for the specific context of speech-related conditions that implicate the First Amendment is almost certainly not readily transferrable to other constitutional contexts. For example, as illustrated by the recent Supreme Court decision in *Koontz v. St. Johns River Water Management District*,<sup>167</sup> the critical issue in the Fifth Amendment takings context is not whether the government may generally take private property in exchange for a government benefit—it of course can do so as long as it pays just compensation and the property is taken for public use.<sup>168</sup> Rather, the issue is under what circumstances can the government effectively take property as a condition for a permit or license *without* paying just compensation.<sup>169</sup> A completely different approach is therefore likely needed in this

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<sup>165</sup> *Id.* at 2022. Another possible context is speech-related conditions on tax benefits available to individuals or for-profit businesses. *See, e.g.*, *Cammarano v. United States*, 358 U.S. 498, 499 (1959) (denial of federal income tax deduction for amounts spent for defeat of legislation); *Speiser v. Randall*, 357 U.S. 513, 514–15 (1958) (state property tax exemption for veterans conditioned on taking an oath against violent or unlawful overthrow of the state or federal government).

<sup>166</sup> *See supra* note 3 and accompanying text.

<sup>167</sup> 133 S. Ct. 2586 (2013).

<sup>168</sup> *See* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>169</sup> *Koontz*, 133 S. Ct. at 2594–95.

constitutional context from the one taken in this Article with respect to the First Amendment-protected speech context.

Similarly, and as illustrated by the recent Supreme Court decision in *National Federation of Independent Business v. Sebelius*,<sup>170</sup> the unconstitutional conditions doctrine also applies in the Tenth Amendment context when the federal government places conditions on federal funding provided to the states.<sup>171</sup> In that context, the key inquiry is whether such a condition in effect undermines the constitutionally recognized sovereignty of the states, a constitutional structure consideration unique to that context.<sup>172</sup> Again, this significant constitutional difference likely requires a completely different approach to possible unconstitutional conditions than either the speech or takings contexts.

Cass Sunstein suggests such a customized approach, but he argues for abandoning the doctrine altogether.<sup>173</sup> While I agree that a fully unitary approach to the doctrine is misguided given the often significant differences between various constitutional contexts as noted above, at least in the constitutional context this Article focuses on, it appears that considerations of some of the broader themes developed under the doctrine, such as whether a given constitutional right is alienable, are useful. I therefore would hesitate to throw out the entire idea of an “unconstitutional conditions doctrine,” while still recognizing that the doctrine will not apply in the same way in all constitutional contexts.

## V. CONCLUSION

Given the pervasiveness of government benefits in the nonprofit sector and not uncommon attempts by governments to attach speech-related strings to such benefits, it is critical that a way be found to clarify the unconstitutional conditions doctrine in this context. This Article’s approach suggests a way that may be possible through careful consideration of the doctrine in this particular area. More specifically, in the context of a condition on a government benefit that implicates First Amendment protected speech, the questions to ask are whether the right to free speech is alienable as to the government and, if it is generally not, what the standard is for determining when there are constitutionally

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<sup>170</sup> 132 S. Ct. 2566 (2012).

<sup>171</sup> *See id.* at 2603–04 (“We have upheld Congress’s authority to condition the receipt of [federal] funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’ Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”).

<sup>172</sup> *Id.* at 2602.

<sup>173</sup> Sunstein, *supra* note 3, at 608.

acceptable exceptions to this conclusion. With the answers to these questions in hand, the situations addressed by the Supreme Court over the past several decades, and most recently in the *Alliance* case, can be readily resolved, and lower courts, the government, and private parties will have significantly clearer guidance regarding how to resolve future disputes in this area. Moreover, this approach may also be useful in other First Amendment situations, such as campaign finance rules tied to government benefits and limits on speech by public employees.

It is important to recognize, however, that the approach taken in this Article—determining the alienability with respect to the government of the constitutional right at issue and then when exceptions to that initial determination are available—likely only works with respect to the particular constitutional context considered here. In other constitutional contexts, different questions will likely need to be asked to determine when a condition on the provision of a government benefit is unconstitutional under the constitutional provision at issue. The challenge for both judges and scholars is therefore to avoid trying to impose greater uniformity with respect to the application of the “unconstitutional conditions doctrine” than as a constitutional matter is appropriate, and also to avoid importation of certain aspects of the unconstitutional conditions doctrine from one constitutional context to another without consideration of whether such importation is again supportable as a constitutional matter.