Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination

IHELG Monograph 00-12

Nicole B. Casarez, Associate Professor, University of St. Thomas, Houston, TX. nicolebc@aol.com
University of Texas, B.J. 1976, J.D. 1979; University of Houston, M.A. 1991. I would like to thank Professor Michael A. Olivas at the University of Houston Law Center and Professor William A. Kaplin at Catholic University of America School of Law for their helpful comments on earlier drafts of this Article, and for their support and encouragement.

© November 2000, Nicole B. Casarez, $5.00
University of Houston Law Center/ Institute of Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHLC/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions -- with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholars whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

Programs and Resources

IHELG has as its purpose the stimulation of an international consciousness among higher education institutions concerning issues of higher education law and the provision of documentation and analysis relating to higher education development. The following activities form the core of the Institute's activities:

Higher Education Law Library
Houston Roundtable on Higher Education Law
Houston Roundtable on Higher Education Finance
Publication series
Study opportunities
Conferences
Bibliographical and document service
Networking and commentary
Research projects funded internally or externally
PUBLIC FORUMS, SELECTIVE SUBSIDIES, AND
SHIFTING STANDARDS OF VIEWPOINT DISCRIMINATION

by

Nicole B. Cásarez*

* Associate Professor, University of St. Thomas, Houston, TX. University of Texas, B.J. 1976, J.D. 1979; University of Houston, M.A. 1991. I would like to thank Professor Michael A. Olivas at the University of Houston Law Center and Professor William A. Kaplin at Catholic University of America School of Law for their helpful comments on earlier drafts of this Article, and for their support and encouragement.
Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination

I. Introduction

In modern American society, the government distributes benefits to its citizens in a multitude of ways. Need a doctor or a lawyer but can't afford one? You may qualify for government-subsidized medical or legal aid. Running for president on a major party ticket? You may be eligible for public funding of presidential election campaigns. Organizing a chapter of Amnesty International on your state university campus? You may be entitled to student activity funds collected by the university. Looking for a place to show a film about parenting from a Christian perspective? If a local public school lets outside groups use its premises after hours, you may have a right of access to those facilities, too.

Of course, it would be impossible to list all the government benefits or subsidies that affect our lives today. Government at all levels has expanded dramatically since the nation's founding, and the influence of government spending on most Americans, both rich and poor, is inescapable. As a consequence, much citizen speech occurs either in forums provided by the government or in connection with enterprises financed at least in part by government largesse. This creates a First Amendment dilemma. On one hand,

1 See, e.g., Public Health Service Act, 42 U.S.C. §§ 254b(c)(1)(A) (Supp. IV 1995-99) (authorizing federal grants to health centers that serve medically underserved populations); Legal Services Corporation Act, 42 U.S.C. §§ 2996b(a) (1994) (establishing Legal Services Corporation to support organizations offering free legal aid in noncriminal matters to those who cannot afford legal assistance).


3 See Board of Regents of the Univ. of Wis. Sys. v. Southworth, 120 S. Ct. 1346, 1350 (2000) (holding that public university may charge an activity fee to fund viewpoint neutral program of extracurricular student speech).

4 See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (finding school district violated the First Amendment by denying a church access to school premises to show film series dealing with child-rearing from a religious perspective).

5 See generally Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America (1983) (emphasizing both the powerful nature of government speech and the resultant public policy dangers that arise when the
the government naturally uses the power of the purse to discourage policies or behaviors with which it disagrees. This must be so: The budgeting of taxpayers' money--determining which programs to support and by how much, and which to abandon--constitutes in large part the very essence of government.

On the other hand, the state sometimes chooses not to discontinue a controversial initiative, but rather imposes conditions on the use of public funds to bring the program in line with particular governmental objectives. The First Amendment becomes implicated when the government attempts to restrict private speech as part of its benefit package. For example, the United States has historically granted the print media a subsidy in the form of second-class mailing privileges. Certainly, Congress is not obligated to grant this benefit to magazine and newspaper publishers. Having decided to provide the subsidy, however, may Congress deny it to publications that favor a particular political party, or to nonobscene publications that Congress nevertheless views as inappropriate? In other words, because the government pays the piper, may it call the tune?

The answer hinges on the venerable First Amendment concept of viewpoint discrimination. In the second-class mailing rate example, the Supreme Court held in 1946 that Congress may not limit the subsidy's application to only those periodicals the government finds inoffensive or that endorse a government-approved point of view. More recently, the Court has continued to recite that the government may determine what to subsidize and what not to subsidize as long as it does so in a viewpoint neutral

---


7  The Supreme Court has defined viewpoint discrimination as speech regulation based on "the specific motivating ideology or the opinion or perspective of the speaker," and as "an egregious form of content discrimination." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).


8  See Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946) (striking down postmaster general's revocation of second-class mailing privileges to magazine accused of being morally improper).
manner. According to the Court's rhetoric, the government is free to condition its subsidies as it chooses, forbidden only from "aim[ing] at the suppression of dangerous ideas."10

The prohibition against viewpoint discrimination, then, should play a major role in restraining government censorship of private speech activities within government-funded subsidy or benefit programs. Indeed, in the public forum context, viewpoint discrimination has been defined in such a way as to provide substantial protection to private actors' First Amendment rights.11 This has not always been the case in either the nonpublic forum or the subsidy arenas. For example, while ostensibly acknowledging that the government may not discriminate against disfavored views in allocating subsidies, the Court nevertheless has given the government great leeway to delineate the scope of its generosity. Sometimes the Court has achieved this result by deputizing private speakers as government agents to whom the government owes no duty of neutral treatment;12 other times, the Court has applied a toothless interpretation of viewpoint discrimination to overlook questionable subsidization distinctions.13

As applied by the Court during the last three decades, the rule against viewpoint discrimination no longer serves as a material check on the government's ability to censor subsidized speech outside the public forum. Even judges and commentators who disagree with this result tend to fall back on forum analysis to oppose viewpoint


11 See Rosenberger, 515 U.S. at 831 (overturning university's refusal to fund Christian-perspective student newspaper from student activity fees as viewpoint discriminatory).

12 See Rust at 194 (finding that regulation prohibiting federally funded family planning clinic employees from providing abortion counseling was not viewpoint discriminatory, but rather constituted a limitation on "a project grantee or its employees from engaging in activities outside the project's scope"); Rosenberger, 515 U.S. at 832 (distinguishing Rust as a situation where the government "disburse[d] public funds to private entities to convey a governmental message").

discrimination in government funding decisions. By doing so, they have implicitly recognized that only by forcing subsidized speech into a public forum mold will the rule against viewpoint discrimination be applied in a meaningful way.\textsuperscript{14}

This Article argues that the Court has erred in treating the First Amendment's viewpoint neutrality mandate as a dead letter in nonpublic forums and nonforum government funding allocations. Part II of this Article sets a baseline point of comparison by showing how the prohibition on viewpoint discrimination has been applied in a speech protective manner in the traditional public forum and the general speech domain. Part III contrasts how the Court has used an expansive definition of viewpoint discrimination in several limited public forum cases involving schools and universities, with how it has basically ignored the concept in nonpublic forum cases. Part IV of this Article demonstrates how the Court has failed to apply the rule against viewpoint discrimination in subsidy cases, including Rust v. Sullivan\textsuperscript{15} and National Endowment for the Arts v. Finley.\textsuperscript{16} It suggests how the concept can be revived with respect to government subsidized speech in a case the Court will decide this term, Velazquez v. Legal Services Corp.\textsuperscript{17}

The Article concludes by calling for the reanimation of viewpoint discrimination as a limit on the government's ability to censor private speech in nonpublic forums and selective subsidy programs. Whether the state promotes citizen speech activities through a government-financed initiative or a government-sponsored forum, the First Amendment requires that those funding decisions comport with substantive standards of viewpoint neutrality.

\textsuperscript{14} See, e.g., id. at 613 (Souter, J., dissenting) (comparing the NEA subsidy scheme to a limited public forum "created to encourage expression of a diversity of views from private speakers"); Steven G. Gey, Reopening the Public Forum: From Sidewalks to Cyberspace, 58 Ohio St. L. J. 1535, 1596-1610 (1998) (advocating the expansion of public forum doctrine to include government subsidy programs); Jessica A. Roth, It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation, 33 Harv. C.R.-C.L. L. Rev. 107, 139-142 (1998) (arguing that the Legal Services Corporation [LSC] constitutes a public forum in which federal restrictions on LSC lawyers are impermissibly viewpoint-based).


\textsuperscript{17} 164 F. 3d 757 (2d Cir. 1999), cert. granted, 120 S. Ct. 1553 (2000).
II. Viewpoint Neutrality in the Traditional Public Forum/General Speech Domain

To understand and apply the prohibition against viewpoint discrimination, the Supreme Court has had to address two linked and overlapping questions. The first concerns what qualifies as a "viewpoint"; the second relates to what constitutes "discrimination." Although these questions appear simplistic, the Justices have provided differing answers in various contexts, resulting in uncertainty about the meaning of viewpoint discrimination across the board. The Court has further complicated matters by using terms inexacty, sometimes referring to "viewpoint," "subject-matter," and "content" discrimination as though they were constitutionally indistinguishable. To create a point of reference, I begin by looking at the viewpoint neutrality mandate where it arose, in the traditional public forum18 and general speech domains. In these speech locales, fine distinctions between content and viewpoint have not been terribly important to the protection of First Amendment interests, and the Court has tended to reach the right result although not always for properly articulated reasons.19

18 The Court has analyzed speech that occurs on government-owned property as falling into three categories, each subject to its own set of First Amendment rules: the traditional public forum, the limited public forum, and the nonpublic forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

19 This assumes, of course, that the Court has agreed that the speech locale qualifies as a traditional public forum. Even a public sidewalk has been denied traditional public forum status by the Court. See United States v. Kokinda, 497 U.S. 720, 729-30 (1990) (holding that internal sidewalk leading to post office was not a traditional public forum).
A. The Early Cases: Establishing the Ban on Viewpoint Discrimination

In the span of five years around 1940, the Supreme Court decided two landmark cases that advanced First Amendment interests in two ways: both cases overturned speech restrictive precedents, and both cases struck blows against the government's ability to restrict speech based on viewpoint. The first case, Hague v. Committee for Industrial Organization,\(^\text{20}\) gave rise to the public forum doctrine, holding that the government, as landowner, could not completely forbid citizens from using public streets and parks for expressive purposes.\(^\text{21}\) The contrary rule had been in place for more than forty years, since the Court had held in Davis v. Massachusetts\(^\text{22}\) (the famous Boston Common case) that the government's greater power to close a park or roadway included the lesser power to control or deny access to those facilities in whatever manner the government saw fit.\(^\text{23}\)

Although the Court in Hague did not expressly overrule the Boston Common decision,\(^\text{24}\) Justice Roberts in his plurality opinion used a historical approach to recharacterize public streets and parks as public forums. "[F]rom ancient times," Justice Roberts said, streets and parks were places where citizens congregated to express their opinions.\(^\text{25}\) While these traditional forums might literally belong to the government, over time the public had accrued a guaranteed right of access to them that could be regulated, but not arbitrarily denied.\(^\text{26}\)

On its facts, Hague reeked of viewpoint discrimination to such an extent that it

\(^\text{20}\) 307 U.S. 496 (1939).

\(^\text{21}\) Id. at 516.

\(^\text{22}\) 167 U.S. 43 (1897). In Davis, the Court upheld the criminal conviction of a minister who tried to preach on the Boston Common without first obtaining the required city permit. Id. at 46-48.

\(^\text{23}\) Id. at 48.

\(^\text{24}\) The Boston Common case was not explicitly overruled until four years later, in Jamison v. Texas, 318 U.S. 413, 415-16 (1943).

\(^\text{25}\) Hague, 307 U.S. at 515.

\(^\text{26}\) See id. at 515-16 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions."). Harry Kalven aptly described this right of access as a "kind of First-Amendment easement." Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 13.
amounted to an arbitrary denial of access to a public forum. Jersey City Mayor Frank "I Am the Law" Hague had used a permit requirement to prevent labor organizers from meeting, speaking, or distributing literature within the city on the grounds that they were Communists or were affiliated with Communist organizations. Mayor Hague had literally evicted union speakers by having them arrested and forced aboard ferry boats headed for New York City. Because the permit ordinance gave municipal authorities unlimited discretion to control public communication within the city, the Court invalidated it as an "instrument of arbitrary suppression of free expression of views on national affairs." Subsequent decisions clarified that the state could regulate public access to traditional forums as long as it did so pursuant to reasonable, content-neutral time, place and manner restrictions.

The second landmark case, West Virginia State Board of Education v. Barnette, is probably the Court's best known and most eloquent expression of the First Amendment's prohibition on viewpoint discrimination. That case overruled a previous Court decision upholding public school regulations requiring school children to salute the flag and recite the pledge of allegiance. In Barnette, the Court invalidated West Virginia's compulsory flag salute requirement as unconstitutional viewpoint discrimination. Forcing schoolchildren to salute the flag was different only in degree, Justice Jackson wrote for a five-four majority, from the Roman persecution of Christians or other totalitarian efforts to eliminate dissent and, ultimately, dissenters. Lawmakers

---


29 Id.

30 Id. at 516.

31 See, e.g., Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding parade permit requirement that regulated only considerations of "time, place and manner so as to conserve the public convenience" and that was administered "without discrimination").

32 319 U.S. 624 (1943).


34 Barnette, 319 U.S. at 642.

35 See id. at 641. ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.").
in a democracy, by comparison, need not fear contrary views, even those that "touch the heart of the existing order."\textsuperscript{36} Only by respectfully tolerating diversity and dissent, the Court said, do we possess the true freedom of thought and belief that allows us to thrive both individually and collectively, as a nation.\textsuperscript{37} For these reasons, Justice Jackson concluded: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or confess by word or act their faith therein."\textsuperscript{38}

Although during the McCarthy era of the 1950's the Court sometimes paid no more than lip service--and at times not even that\textsuperscript{39}--to the idea that free speech includes the right to endorse nonconformist views, by the end of that decade the Court had returned to the First Amendment's viewpoint neutrality principle.\textsuperscript{40} In later cases in both the traditional public forums and the general speech domain, the Court prohibited speech restrictions based on content (sometimes also referred to as "subject matter") as well as the viewpoint of the speech.\textsuperscript{41} Perhaps because the distinction between content and viewpoint discrimination made little difference in speech locales where both were disallowed, the Court has tended to conflate the two concepts. Whatever the reason, this tendency has made it even more difficult to arrive at a precise understanding of viewpoint discrimination.

\textsuperscript{36} Id. at 642.

\textsuperscript{37} Id. at 640-42.

\textsuperscript{38} Id. at 642.


\textsuperscript{40} See, e.g., Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688 (1959) (holding that state could not ban a nonobscene film because it portrayed adultery in a positive light).

\textsuperscript{41} See, e.g., Erznoznik v. Jacksonville, 422 U.S. 205, 211 (1975) (invalidating ordinance prohibiting drive-in movie theaters from showing films containing nudity as content discriminatory); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94-95 (1972) (striking down anti-picketing ordinance as both content and viewpoint discriminatory).
B. Content v. Viewpoint: Defining a Point of View

Put simply, subject-matter or content discrimination exists when the state attempts to prevent discussion of entire topics, rather than just specific points of view. So, for example, in *Police Department of Chicago v. Mosley*, the Court struck down an ordinance that prohibited the picketing of schools during school hours but exempted peaceful picketing of schools embroiled in labor controversies. The Court first condemned the ordinance for making distinctions based on speech content: picketing about labor issues was allowed but picketing related to other concerns was not. Writing for the majority, Justice Marshall explained that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." However, Justice Marshall also relied on

---

42 Although outside the scope of this Article, the theoretical validity of the content distinction has been debated among both commentators and judges. See, e.g., Daniel A. Farber, The First Amendment 21 (1998) (stating that the content distinction "is the modern Supreme Court's closest approach to articulating a unified First Amendment doctrine"); Heins, *supra* note 7 at 115 (questioning need for content neutrality if prohibition against viewpoint discrimination is applied to offensive speech); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113, 113 (1981) (describing content distinction as "theoretically questionable and difficult to apply"); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 617 (arguing that the content distinction has not been applied broadly enough).

Justice Stevens, in particular, has objected to the Court's statement in *Mosley*, 408 U.S. at 99, that content-based regulations of speech are "never permitted." In his concurring opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420-22 (1992) (Stevens, J., concurring), Justice Stevens noted that the Court's entire First Amendment categorical approach to speech (whereby obscenity, for example, falls outside First Amendment protections) depends on speech content; see also John Paul Stevens, *The Freedom of Speech*, 102 Yale L. J. 1293, 1304 (1993) (describing *Mosley* quote as a goal or ideal rather than a true rule of law, because "the Court's decisions do, in actuality, tolerate quite a bit of content-based regulation").

43 408 U.S. 92 (1972).

44 *Id.* at 99-102.

45 *Id.* at 95.

46 *Id.* Justice Marshall used traditional First Amendment rationales to justify the result in *Mosley*; however, the decision technically rested on the equal protection clause of the Fourteenth Amendment. *Id.* at 94. Justice Marshall recognized, however, that "the equal protection claim in this case is closely intertwined with First Amendment interests." *Id.* at 95.
viewpoint discrimination in his holding, stating that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 47

One way the Court has defined "viewpoint," then, is as speech that contains offensive or controversial ideas that are deemed unacceptable by the state. Certainly, this definition would encompass Mayor Hague's dislike of union organizers, as well as West Virginia's legislative attempt to enforce patriotism. Another example of this approach involved a state's attempt to prevent a nonobscene film from being exhibited merely because the movie "approvingly portray[ed] an adulterous relationship." 48 Although it did not use the term "viewpoint discrimination," the Court made clear that the First Amendment would not allow the state to censor a film because of its unconventional stance on a morality issue. According to the Court, the First Amendment "protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." 49

The Court, however, has sometimes failed to differentiate carefully between viewpoint and content discrimination with respect to offensive or controversial speech. 50 For example, in Texas v. Johnson, 51 the Court overturned the defendant's conviction for flag burning and struck down the Texas flag desecration statute as a content-based restriction. 52 The statute defined "desecration" as actions that "deface, damage, or

47 *Id.* at 96.


49 Compare *id.* at 689 with Erznoznik v. Jacksonville; 422 U.S. 205 (1975), where the Court invalidated an ordinance preventing drive-in movie theaters with screens visible from public streets from showing nonobscene films that contained nudity. Although the city defended the ordinance as necessary to protect citizens from offensive materials, the Court found the ordinance to be impermissibly content based. *Id.* at 211-12. Because all nudity, "however innocent or even educational" was banned by the law, the Court treated nudity as a topic rather than as a viewpoint. *Id.* However, the idea that nudity should be allowed in films (contrasted with the city's position that nudity in films is offensive) should also qualify as a viewpoint if "viewpoint" is defined as unacceptable, controversial speech that violates a state-sanctioned norm of expression.

50 Although a discussion of obscenity law is beyond the scope of this Article, it has been argued that this understanding of viewpoint discrimination should also be applied to categorize pornography laws as viewpoint based. *See, e.g.*, Heins, *supra* note 7 at 103.


52 *Id.* at 411-12.
otherwise physically mistreat [a flag] in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action," and therefore penalized only those acts that communicated disrespect for the flag. By allowing dirty or torn flags to be lawfully destroyed, but criminalizing flag burning related to offensive political protests, the state promoted the flag as a symbol "only in one direction" -- a clear example of viewpoint discrimination as defined above.

The Court recognized that laws can have a viewpoint discriminatory effect on disfavored speech without facially referring to such speech as "offensive" in the follow-up flag burning case, United States v. Eichman. There, the Court invalidated the federal Flag Protection Act of 1989 even though it banned physical harm to the flag (other than when disposing of worn or soiled flags) in all circumstances, whether or not the conduct had an unpleasant effect on observers. The state argued that because the act criminalized flag desecration without regard to the actor's intended message, the statute was content neutral. The Court rejected this argument, noting that under the statute, respectful burning of an old flag would be allowed while mistreatment of a flag--defined by the act to include mutilation, defacement and physical defilement--would be illegal. "Each of [those] specified terms," wrote Justice Brennan for the majority, "unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value." Again, the Court rejected the statute as a content-based limitation on speech, but the act's real flaw appears to be that it prohibited unacceptable attitudes (viewpoints) towards the flag.

The Court has also had difficulty distinguishing between viewpoint and content

53 Id. at 400 n.1.

54 Id. at 416-17.

55 Note that although he couched the Court's objection to the statute in terms of content regulation, Justice Brennan apparently recognized the law's viewpoint implications, holding that the state could not "foster its own view of the flag by prohibiting expressive conduct relating to it." Id. at 415.


57 Id. at 314.

58 Id. at 315.

59 Id. at 317.

60 Id.

61 Id. at 315-16.
discrimination with regard to disfavored speech within traditional public forums. For example, in Boos v. Barry, the Court found that a provision of the District of Columbia code banning signs near foreign embassies that could bring those governments into "public odium" or "public disrepute" was not viewpoint based. Justice O'Connor, writing for the plurality, justified this surprising conclusion by stating that the foreign governments themselves, by virtue of their policies, determined acceptable viewpoints under the law--not the District of Columbia. Pursuant to this reasoning, then, a sign placed in front of the Russian Embassy today reading "Putin Should be Imprisoned" could be either a lawful or illegal message, depending not on the state's discretion but on Russia's prevailing political winds.

Nevertheless, the Court in Boos voided the law as unconstitutional content discrimination, categorizing signs critical of a foreign government as a category of speech rather than a viewpoint. Although the Court reached the right result, its analysis is troubling. On its face, the law allowed the state to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." By denying that political criticism concerning foreign policy matters constituted a viewpoint, the Court demonstrated in a frightening way how semantics can be used to manipulate constitutional concepts and entrench the status quo.

A second way that the Court has interpreted "viewpoint" is to mean expression representing a particular perspective by a speaker or class of speakers. Once again, the Court has freely confused viewpoint with content regulation in this scenario, and perhaps understandably so. If a law prohibits speech by a group that holds a particular position on an issue, it may not be immediately apparent whether the law discriminates solely on the basis of content (i.e. speech on a certain topic) or also by viewpoint (the views of the affected class).

Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York presented exactly this problem. In that case, the Court invalidated a public service

---


63 Id. at 315-19.

64 Id. at 319.

65 In Boos, one of the signs the petitioners wanted to display in front of the Soviet Embassy stated "Release Sakharov." Id. at 315.

66 Id. at 319.


commission order forbidding electric utilities from disseminating bill inserts that addressed political matters, specifically the "desirability of future development of nuclear power." The Court commended the commission's candor in arguing that the order was viewpoint neutral because it prohibited all political discussion, including speech that either favored or opposed nuclear power. However, the Court held that the order was illegitimate content regulation because it allowed bill inserts on innocuous topics such as energy conservation but forbid inserts addressing controversial policy issues. Writing for the Court, Justice Powell objected that "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." By looking to the language of the order, the Court determined that it proscribed all deliberation on political topics, and therefore discriminated on the basis of speech content.

Justice Stevens, on the other hand, looked to the order's practical effect to determine that it discriminated on the basis of viewpoint. He recognized that, as applied, the directive prevented expression on only one side of a debate between electric utilities and their critics. The order amounted to viewpoint discrimination, Justice Stevens concluded in his concurring opinion, because it stilled a distinct standpoint on important policy issues—that of the electric companies.

The analytical complexities inherent in the content/viewpoint distinction can also be seen in the "Son of Sam" case, Simon & Schuster, Inc. v. New York State Crime Victims Board. There, a publishing company challenged a New York statute that redistributed the profits earned by criminals from works in which they described their crimes. The Court unanimously nullified the law as a content-based restriction of speech that was not narrowly tailored to advance the state's interest in preventing

69 Id. at 532.

70 Id. at 537.

71 Id.

72 Id. at 538.

73 Id. at 546 (Stevens J., concurring).

74 Id.


76 Id. at 108, 115. Under the law, those profits were to be deposited in escrow accounts for five years as a compensation fund for crime victims. Id. at 109.
criminals from capitalizing on their misdeeds. However, Justice O'Connor indicated in her opinion for the Court that the potential for viewpoint discrimination created by the law was really the determinative factor. According to Justice O'Connor, "the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."  

As in Consolidated Edison, whether the Court properly classified the "Son of Sam" statute as content (as opposed to viewpoint) discrimination depends on how the borders of the applicable controversy are drawn. In the universe of books written by criminals, lawbreakers could make money by writing about any topic other than their offenses. Thus, the law discriminated on the basis of content. However, in the universe of all books, only criminals were prevented from profiting by peddling memoirs of their crimes. All others—including district attorneys, crime victims, and Supreme Court Justices—could financially benefit from retelling their experiences with the criminal justice system. Therefore, the statute also discriminated on the basis of viewpoint, because it handicapped one perspective in the debate about crime—that of the wrongdoers. This notion of viewpoint as a particular standpoint raises, and is commingled with, the second question faced by the Court in this area: what counts as viewpoint "discrimination"?

C. The Neutrality Mandate: Identifying Discriminatory Impact

Does viewpoint discrimination exist if all viewpoints are equally restricted? Is it possible for a law to regulate on the basis of viewpoint in a non-discriminatory way? Again, whether a law applies in a neutral manner depends on how the underlying controversy is defined. Here, the concurring and dissenting opinions of Justice Stevens in some of the cases already discussed are illuminating.

77 Id. at 116, 123. 

78 Id. at 116. 

79 See text accompanying notes 68-74. 

80 One scholar has concluded that a risk of viewpoint discrimination may have existed in Simon & Schuster because "[b]ooks by criminals are probably more likely than other works to attempt to justify or explain away the crime." See Farber, supra note 42 at 25. This rationale presupposes a narrow understanding of viewpoint discrimination. Using a broader formula, a finding of viewpoint discrimination should not depend solely on what the speaker says or is likely to say. Criminals might just as easily express remorse for their crimes as defend their actions in their writings. The Son of Sam statute created a risk of viewpoint discrimination because it discouraged a particular class of speakers—criminals—from participating in public debate about crime, regardless of the manifold views those individual speakers might wish to express.
Consistently, Justice Stevens has argued that a law is viewpoint neutral if it applies equally to both sides of a narrowly defined debate, and viewpoint discriminatory if it penalizes only one side. So, for example, in Consolidated Edison,\textsuperscript{81} Justice Stevens argued that the commission's order discriminated on the basis of viewpoint because it suppressed speech by supporters of nuclear power but did not suppress speech by its opponents.\textsuperscript{82} The law, therefore, did not apply in an even-handed way.

In the flag-burning cases, by comparison, Justice Stevens would have upheld both the state and federal flag desecration laws because he believed they applied to all physical assaults on the flag regardless of the actor's intended purpose.\textsuperscript{83} In a footnote his dissenting opinion in Texas v. Johnson,\textsuperscript{84} Justice Stevens explained his point as follows:

It seems obvious that a prohibition against the desecration of a gravesite is content neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President.\textsuperscript{85}

According to Justice Stevens, the law applied uniformly to all flag-burners and therefore was viewpoint neutral. In contrast, the majority defined the debate more broadly as between patriots and protesters. The law discriminated on the basis of viewpoint because it criminalized the actions of one group (flag desecrators) while it condoned the actions of the other (respectful burners of soiled flags).\textsuperscript{86} The majority has the stronger argument here. While it is theoretically possible that a person would burn a flag to show her love of country, this would be a most unusual occurrence. In almost all cases, the law would have just the effect that the state intended: it would punish a class

\textsuperscript{81} See text accompanying notes 68-74.


\textsuperscript{84} 491 U.S. 397 (1989). See text accompanying notes 51-55.

\textsuperscript{85} 491 U.S. at 439 n.1 (Stevens, J., dissenting).

\textsuperscript{86} Id. at 416-17. See text accompanying notes 51-55.
of people who dared to show disrespect for the flag.\textsuperscript{87}

Both the content/viewpoint and discrimination/neutrality dichotomies took center stage in the Court's 1992 hate-speech decision, \textit{R.A.V. v. City of St. Paul},\textsuperscript{88} a case where the Court used "viewpoint discrimination" to mean state censorship of speech by a class of speakers opposed by the status quo. In that case, a teenager who burned a cross inside an African-American family's yard had been charged under St. Paul's Bias-Motivated Crime Ordinance.\textsuperscript{89} The law made it a crime to place on public or private property any object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."\textsuperscript{90} Although serious overbreadth problems were evident on the law's face, the state supreme court had construed the ordinance to prohibit only "fighting words."\textsuperscript{91}

All members of the Court agreed that the hate-speech ordinance was unconstitutional; however, the Justices were badly split as to their reasoning. Four of the Justices believed that, despite the Minnesota high court's attempt to salvage the law, it remained fatally overbroad because it still punished speech that caused "hurt feelings, offense, or resentment."\textsuperscript{92} The rest of the Court accepted for the sake of argument that the ordinance reached only speech that met the constitutional definition of fighting words.\textsuperscript{93} Because the fighting words doctrine provides that the state may outlaw all fighting words if it so chooses,\textsuperscript{94} the question before these five Justices concerned the constitutionality of St. Paul's partial ban. Could St. Paul criminalize only those fighting words that dealt with race, color, creed, religion or gender?


\textsuperscript{88} 505 U.S. 377 (1992).

\textsuperscript{89} \textit{Id.} at 379-80.

\textsuperscript{90} \textit{Id.} at 380.

\textsuperscript{91} \textit{Id.} at 380-81.

\textsuperscript{92} \textit{Id.} at 414 (White, J., concurring). Although three of the concurring Justices wrote separately, all four agreed with Justice White on this point. See \textit{id.} at 413-17.

\textsuperscript{93} \textit{Id.} at 381.

\textsuperscript{94} Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that fighting words fall outside the protections of the First Amendment). In \textit{Chaplinsky}, the Court defined "fighting words" as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." \textit{Id.} at 572.
Justice Scalia, writing for the majority, concluded that it could not. He began by admitting that not all content regulations of speech are unconstitutional, as evidenced by the Court's categorical approach to the First Amendment (whereby obscenity and libel, for example, can be restricted by the state). However, melding content with viewpoint one more time, Justice Scalia argued that the government may not make "content" distinctions within these lower classes of speech solely because of official disapproval of the ideas expressed. He buttressed his argument with unmistakable examples of viewpoint discrimination, similar to the signs criticizing foreign governments at issue in Boos. "Thus," Justice Scalia wrote, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." Applying this mislabeled analysis to the facts before the Court, Justice Scalia first faulted the St. Paul ordinance for discriminating on the basis of content. Under the law, fighting words were acceptable unless they related to the "specified disfavored topics" of race, color, creed, religion or gender. Abusive speech concerning political views, union affiliation, or sexual orientation, Justice Scalia noted, would not be punishable. Despite his content rhetoric, Justice Scalia's explanation of why content discrimination is unconstitutional shows that viewpoint discrimination, or at least the threat of viewpoint discrimination, was his real concern: It "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." Content discrimination survives First Amendment scrutiny, Justice Scalia wrote, only when "there is no realistic possibility that official suppression of ideas is afoot." And whereas

---

95 *R.A.V.*, 505 U.S. at 381.

96 *Id.* at 382-83.

97 *Id.* at 384.

98 *See* text accompanying notes 62-67.

99 *R.A.V.*, 505 U.S. at 384. As another example, Justice Scalia argued that a city council could not prohibit "only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government." *Id.*

100 *Id.* at 391

101 *Id.*


103 *Id.* at 390.
Justice Scalia focused on the topic of the speech to conclude that by criminalizing fighting words pertaining to "specific disfavored topics" the ordinance was content discriminatory,104 the key word in his phrase was really "disfavored." When the government disfavors speech, it signals the real possibility of official suppression.

Even though Justice Scalia thought the law prohibited speech topics rather than viewpoints, he went on to find that the ordinance rose to the level of viewpoint discrimination. This was so, he said, because the law allowed fighting words to be used indiscriminately by a certain class of speakers—proponents of racial, religious or sexual tolerance—but not by opponents of those causes.105 Justice Scalia reasoned that the city could not allow "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules"106—indicating that he saw the relevant "viewpoints" in this conflict to consist of racial, religious, and sexual bigots on one hand, and all other St. Paul citizens (i.e. nonbigots and city officials) on the other.

Not surprisingly, this comprehensive understanding of the affected parties-in-interest was not shared by Justice Stevens, who applied a much narrower conception of the relevant controversy in his concurring opinion. According to Justice Stevens, the ordinance was "even-handed" and did not regulate speech on the basis of either its subject matter or its viewpoint.107 This was so, Justice Stevens determined, because it applied equally to prohibit hate speech referring to all races, religions and genders. Most significant to Justice Stevens was that "just as the ordinance would prohibit a Muslim from hoisting a sign claiming that all Catholics were misbegotten, so the ordinance would bar a Catholic from hoisting a similar sign attacking Muslims."108 To use racist speech as an example, the debate as Justice Stevens saw it was not the tolerant status quo versus local bigots of all stripes (as Justice Scalia envisioned), but rather racists from various racial groups pitted against one another. Had the ordinance not been overbroad, Justice Stevens would have upheld it as a legitimate response to the invidious personal and societal harms inflicted by hate speech.109

104 Id. at 391.

105 Id. This assumes that advocates of tolerance would not use racial, religious, or gender-based epithets in their verbal attacks. For example, Justice Scalia reasoned that the ordinance would allow someone to display a sign casting aspersions on the mothers of "anti-Catholic bigots", but not of "papists" because only the latter would involve the expression of religious hostility. Id. at 391-92.

106 Id. at 392.

107 Id. at 435 (Stevens, J., concurring).

108 Id.

109 Id. at 436.
Regardless of how the relevant stakeholders in St. Paul's debate about bigotry are defined, Justice Scalia's result, rather than Justice Stevens', is more in keeping with the First Amendment ideal expressed in *Barnette*, the flag salute case.\(^{110}\) There, the Court held that the First Amendment prohibits the government from establishing norms of acceptability in "politics, nationalism, religion, or other matters of opinion."\(^{111}\) A majority of the *R.A.V.* Court correctly saw the ordinance as just that—an attempt to engineer conformity with state-approved standards of expression.\(^{112}\) The city government found hate speech to be despicable, and by criminalizing it, tried to eliminate the bigoted viewpoint from the universe of fighting words.

In sum, the Court has been quite vigilant in the traditional public forum and general speech domains to invalidate government regulation of speech that expresses a disfavored viewpoint or, alternatively, that eliminates a particular perspective. What counts as a viewpoint, however, has not always been easy for the Court to identify, and it has muddied the water by applying the terms "content," "subject-matter," and "viewpoint" almost interchangeably. In *R.A.V.*, the Court used a broad understanding of viewpoint discrimination to hold that the First Amendment prohibits official attempts to drive unpopular or offensive messages from the marketplace of ideas, even when done in an arguably impartial way. As will be seen below, the Court has carried forward this capacious interpretation of viewpoint discrimination in limited public forum cases involving educational institutions, but not to the nonpublic forum or subsidy contexts.

\(^{110}\) *See* text accompanying notes 32-38.


\(^{112}\) St Paul's suppressive act was unjustified, Justice Scalia concluded, because the ordinance served no interest other than "displaying the city council's special hostility towards the particular biases thus singled out." *R.A.V.*, 505 U.S. at 396. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 421-22 (1996) (concluding that improper government motive was determinative in *R.A.V.*).
III. Now You See It, Now You Don't: Viewpoint Discrimination in the Limited Public Forum and Nonpublic Forum Contexts

The Supreme Court has analyzed speech that occurs on government-owned property or within government facilities as falling into three categories, each subject to its own set of First Amendment rules: the traditional public forum, the limited public forum, and the nonpublic forum. In all three forum types, the government is supposed to honor the ban against viewpoint discrimination; however, in practice, this has not been the case. Within traditional forums, as shown in Part II, the Court has required access restrictions to be content (and therefore also viewpoint) neutral. In cases involving public schools and universities, the Court has ensured wide-open access to limited public forums by applying the expansive definition of viewpoint discrimination used in R.A.V. However, the Court has used the opposite approach in nonpublic forum situations, making the question of viewpoint discrimination essentially a superfluous inquiry once a location has been designated as a nonpublic forum.

A. The Education Cases: Recognizing Viewpoint Discrimination in Limited Public Forums

Although traditional public forums are finite in number and type in accordance

---


114 Id.

115 See text accompanying notes 105-09.

116 That the government is generally free under modern forum analysis to restrict speech in the nonpublic forum category is not a new observation. See, e.g., Lillian BeVier, Rehabilitating Public Forum Doctrine: In Defense of Categories, 1992 Sup. Ct. Rev. 79, 109-10 (noting that the Supreme Court has adopted a "highly deferential stance" to government regulation of speech in nonpublic forums); Daniel A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1234-35 (1984) (stating that although the public forum doctrine may be a "useful heuristic device," the Court wrongly has allowed the existence or nonexistence of a public forum to become the determinative factor in its First Amendment analysis); Gey, supra note 14, at 1547-48 (concluding that "the government will almost always win disputes over access to a non-public forum"); Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1766 (1987) (describing the nonpublic forum category as "a class of government property in which the First Amendment claims of the public are radically devalued and immune from independent judicial scrutiny").
with historical practice, "limited" (or "designated") public forums actually may consist of any public facilities earmarked by the state as available for expressive activity. Although the state has no obligation to either create or maintain a limited public forum, should it do so, any content regulations imposed on speech within that forum must be narrowly drawn to achieve a compelling state interest. However, in spelling out its three-part forum analysis in 1983, the Court placed a major qualification on this content-neutrality requirement, noting that the state was free to create designated public forums "for a limited purpose such as use by certain groups..., or for the discussion of certain subjects." Thus, the government may exclude a particular class of speakers or a specified subject matter from a limited public forum provided the exclusion is both reasonable to maintain the forum boundaries and viewpoint neutral.

Notice that if viewpoint neutrality serves as the only real check on the government's discretion to choose speakers or topics allowed in a limited public forum, the meaning of "viewpoint" becomes critical in protecting First Amendment interests. Moreover, exclusions from a limited public forum based on viewpoint as defined by the Court in other locales—speech expressing a disfavored attitude and speech representing a particular perspective—can easily be recast by the state as innocent boundary-drawing necessary to preserve the forum for its intended purpose. So, for example, the state could exclude disfavored speech from a limited public forum by reclassifying it as an undesirable speech topic, while expression reflecting a particular standpoint could be excluded as speech coming from an ineligible speaker. As will be shown in Part B, this is exactly what the Court has allowed to happen in the nonpublic forum context. However, in a group of cases involving access to school facilities or student fees, the Court has demonstrated a sharp eye for uncovering viewpoint discrimination in the admittedly rare event it determines that a limited public forum has been created.

In the first of those decisions, *Widmar v. Vincent*, the Court invalidated a state university's policy disallowing religious student groups to conduct meetings in school

117 See text accompanying notes 24-26.


119 Id. at 46.

120 Id. at 46 n.7.

121 See id. at 46; Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

122 See text accompanying notes 47-68.

facilities. Because the university had created an "open" forum by allowing other student groups to meet on campus, the Court said the ban on religious worship and discussion constituted unconstitutional content discrimination.

Apparently concerned that the Court's reliance on content (as opposed to viewpoint) discrimination could be extended to interfere with the university's right of academic freedom, Justice Stevens in his Widmar concurrence took pains to characterize the policy as viewpoint based. He reasoned that universities necessarily pick and choose based on speech content--by selecting books for the library, for example, or providing students with extracurricular activities. Here, however, Justice Stevens felt the university's exclusion of religious groups from school facilities went well beyond this routine type of content regulation. Just as he did in the traditional forum/general speech domain cases, Justice Stevens identified government even-handedness as the key to viewpoint discrimination. The university would have allowed atheists to meet on school property to discuss their disbelief; therefore, Justice Stevens argued, the university must also grant the same opportunity to those students who wanted to share thoughts about their faith.

The Court unanimously adopted Justice Stevens' position that the exclusion of religious speech from public school property amounts to viewpoint--not just content--discrimination in a second school case, Lamb's Chapel v. Center Moriches Union Free School District. There, a school district had authorized public, after-hours use of school facilities for civic, social, and entertainment, but not religious, purposes. A

124 Id. at 277.

125 Id. at 267. Widmar was decided before the Court set out the three categories of public forums in Perry; however, in that case the Court indicated that Widmar was an example of a limited public forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

126 See Widmar, 454 U.S. at 277. The Court applied the strict scrutiny test, and determined that the selective exclusion from the forum was not justified by the state's interest in avoiding an establishment of religion. Id. at 273.

127 Id. at 281 (Stevens, J., concurring)

128 Id. at 278.

129 See text accompanying notes 81-87, 107-09.

130 Widmar, 454 U.S. at 281 (Stevens, J., concurring).


132 Id. at 386.
local church challenged the policy on free speech grounds after being denied access to school property to show a Christian film series about parenting and family values.\textsuperscript{133} The church argued that the school district created a limited public forum by allowing public use of school premises; however, the Court did not find it necessary to reach this question.\textsuperscript{134} Even assuming that the district had not opened a limited forum, and even though the district excluded all religious groups, the Court held that the policy as applied to the film series was unconstitutional viewpoint discrimination.\textsuperscript{135} Broadly defining viewpoint as a perspective on a topic, the Court found that child rearing, not religion, was the content at issue here and the religious approach to parenting was the excluded viewpoint.\textsuperscript{136} Justice White’s opinion for the Court concluded that the school district could not allow “school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.”\textsuperscript{137}

The Court stretched the definition of viewpoint even farther in the landmark limited public forum decision of \textit{Rosenberger v. Rector \& Visitors of the University of Virginia}.\textsuperscript{138} Relying on \textit{Lamb’s Chapel} as the “most apposite case,”\textsuperscript{139} the Court in \textit{Rosenberger} determined that the University’s of Virginia’s student activity fee fund constituted a “metaphysical”\textsuperscript{140} limited forum created to encourage diverse student expression.\textsuperscript{141} University guidelines provided that qualified student organizations could use fee monies to pay printing costs for student publications that did not “primarily

\textsuperscript{133} \textit{Id.} at 387-89.

\textsuperscript{134} \textit{Id.} at 391-92. Note, however, that the Court referred to the church’s public forum argument as having “considerable force.” \textit{Id.} at 391. Furthermore, the \textit{Rosenberger} Court cited \textit{Lamb’s Chapel} as a limited public forum case. \textit{See } \textit{Rosenberger v. Rector \& Visitors of the Univ. of Va.}, 515 U.S. 819, 829 (1995). For these reasons, in this Article I treat \textit{Lamb’s Chapel} as a limited public forum case.

\textsuperscript{135} \textit{See Lamb’s Chapel}, 508 U.S. at 392-94.

\textsuperscript{136} \textit{Id.} at 388, 393-94.

\textsuperscript{137} \textit{Id.} at 393.

\textsuperscript{138} 515 U.S. 819 (1995).

\textsuperscript{139} \textit{Id.} at 830.

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{Id.} at 834.
promote[] or manifest[] a particular belief[] in or about a deity or an ultimate reality." When the University refused to pay printing expenses for a student newspaper titled "Wide Awake: A Christian Perspective at the University of Virginia," the student publishers challenged the decision as unconstitutional viewpoint discrimination.\textsuperscript{143}

The Court, in a five-to-four decision, agreed with the Christian students. Here, the University had not just eliminated religion as a subject matter for student publications, but rather, the Court said, had refused to fund "religious editorial viewpoints."\textsuperscript{144} Writing for the majority, Justice Kennedy observed that "[r]eligion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed or considered."\textsuperscript{145}

This far Justice Stevens could not go. Although he had originally conceived of religion as a viewpoint in \textit{Widmar},\textsuperscript{146} Justice Stevens here joined Justice Souter's dissent. The University guidelines were viewpoint neutral content limitations, according to the dissent, because they applied equally to publications of both Christian and non-Christian religions\textsuperscript{147}--the same "even-handed" argument Justice Stevens had used before, notably in his \textit{R.A.V.} dissent.\textsuperscript{148} That the University regulations treated religion as a subject matter, not a viewpoint, was evident to the dissenters because atheistic and agnostic journals theoretically would also be denied funding.\textsuperscript{149} \textit{Lamb's Chapel}, on the other hand, was distinguished as a case where anti-religious speech was allowed to participate in the forum while religious speech could not.\textsuperscript{150} In \textit{Rosenberger}, by contrast, both anti-religious and religious publications were equally enjoined; therefore, the dissent concluded that the University had treated the universe of religious speech in a viewpoint neutral manner.\textsuperscript{151}

\begin{enumerate}
  \item 142 \textit{Id.} at 825.
  \item 143 \textit{Id.} at 826-27.
  \item 144 \textit{Id.} at 831.
  \item 145 \textit{Id.}
  \item 146 See text accompanying notes 127-30.
  \item 147 See \textit{Rosenberger}, 515 U.S. at 895-96 (Souter, J., dissenting).
  \item 148 See text accompanying notes 107-09.
  \item 149 See \textit{Rosenberger}, 515 U.S. at 896 (Souter, J., dissenting).
  \item 150 \textit{Id.} at 897-98.
  \item 151 \textit{Id.} at 898-99.
\end{enumerate}
Responding to the dissent's argument, Justice Kennedy indicated that the Court took a wider view of the underlying controversy. According to Justice Kennedy, all debate is not "bipolar," and the opposite of religious was not just antireligious, but also secular.\textsuperscript{152} An echo of the Court's opinion in \textit{R.A.V.} can be heard in the following passage from Justice Kennedy:

If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.\textsuperscript{153}

In \textit{R.A.V.}, Justice Scalia invalidated the hate speech law because it penalized bigots but not the tolerant status quo; in \textit{Rosenberger}, Justice Kennedy voided the funding limit because it disfavored religious theorists but not the worldly status quo.

Yet Justice Kennedy's argument seems less convincing, if only for the reason that the University guidelines appeared on their face to be a well-meaning attempt to comply with the Establishment Clause by removing religion as a subject matter for subsidized debate.\textsuperscript{154} The hate speech law at issue in \textit{R.A.V.} clearly was based on the city's official disapproval of certain ideas, and so falls more easily into the viewpoint category.\textsuperscript{155} If, in fact, the University in \textit{Rosenberger} denied funding to speech about all religious faiths as well as agnostic and atheistic expression, it is hard to see how any perspective concerning religion could be either penalized or favored.

But would the University have withheld funding to speech concerning all religious or anti-religious thought? According to the petitioner's brief, both the Jewish Law Students Association and the Muslim Students Association received student fee funds because the University classified them as cultural, rather than religious, organizations.\textsuperscript{156} With those funds, the Muslim Students Association published "Al-

\textsuperscript{152} \textit{Id.} at 831.

\textsuperscript{153} \textit{Id.} at 831-32.

\textsuperscript{154} For a thorough criticism of Justice Kennedy's conclusion that the University guidelines in \textit{Rosenberger} were viewpoint based, see Wojciech Sadurski, \textit{Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech}, 15 Cardozo Arts & Ent. L.J. 315, 320-27 (1997).

\textsuperscript{155} \textit{See} text accompanying notes 97-104.

Salam," a magazine that afforded an Islamic perspective on world affairs and included articles about Islamic doctrine.\textsuperscript{157} (By the same token, Wide Awake apparently did not qualify as a cultural newspaper.) Or consider a hypothetical magazine by the an existentialist student association, "Will to Power: A Journal of Nietzschean Thought." Would it be denied fee support as a publication expressing an opinion about the existence of a deity, or would it receive funding as a philosophy journal? We cannot be sure how the University would apply its guideline in this instance, whereas we have no doubt how Wide Awake was treated.

Cast in this light, the University's regulation appears to carry a significant risk of viewpoint discrimination in that it raises the "realistic possibility that official suppression of ideas is afoot."\textsuperscript{158} The regulation's potential for viewpoint discriminatory impact, coupled with examples of how Jewish or Muslim groups were granted a "cultural" status that Christian organizations were unlikely to achieve, establishes a surer foundation for the Court's decision than its argument that a facially neutral restriction on both religious and anti-religious speech constitutes viewpoint discrimination.\textsuperscript{159}

That school-related religious expression will not be treated as private speech for purposes of the Establishment Clause unless it occurs in a true public forum--as opposed to a sham forum--was demonstrated in the recent case of Santa Fe Independent School District v. Doe.\textsuperscript{160} There, the Court held that a school district policy allowing student-initiated, student-led prayer at football games did not turn the district's public address system into a public forum for private, student speech.\textsuperscript{161} The policy authorized a two-step process whereby students first voted on whether invocations should be given at games, and then elected one student per season to deliver those invocations.\textsuperscript{162} According to the Court, the school district exercised too much control over both the student election process and the pregame message content for the prayers to retain their private character.

\textsuperscript{157} Id. at 5 n.2. Copies of Al-Salam were filed with the Court. Id.


\textsuperscript{159} Arguing to the contrary, Professor Sadurski concludes that the Rosenberger regulation should not be classified as viewpoint discrimination in disguise because Christianity is not an unpopular or vulnerable religion in the United States. See Sadurski, supra note 154 at 362-63. However, by treating Jewish and Muslim groups as "cultural" organizations, the University quite easily could have disfavored the Christian perspective.

\textsuperscript{160} 120 S. Ct. 2266 (2000).

\textsuperscript{161} Id. at 2275-76.

\textsuperscript{162} Id. at 2273.
The elections were held at the behest, and under the direction, of both the district and the school principal.\textsuperscript{163} Allowable messages were limited to those that served "to solemnize the event' . . . 'to promote good citizenship' and 'establish the appropriate environment for the competition."\textsuperscript{164} As Justice Stevens noted in his majority opinion, the policy would prohibit "a solemn, yet nonreligious message, such as commentary on United States foreign policy."\textsuperscript{165}

Furthermore, by relying on student elections to authorize the invocations, the district ensured that only majority perspectives, rather than the diversity of viewpoints typical of a public forum, would be heard.\textsuperscript{166} The Court also recognized the district's long-standing tradition of prayer at athletic contests, and inferred that the two-step policy was an attempt to preserve this custom rather than to create a forum.\textsuperscript{167} Finally, the Court considered the context of where and how the pregame prayers were to be delivered—"to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property."\textsuperscript{168} Given all these factors, the Court concluded that the prayers were not private speech, but rather constituted an official endorsement of religion.\textsuperscript{169} Santa Fe serves to warn educators that, Rosenberger notwithstanding, not all official support of facially "private," religious speech will fall outside the scope of the Establishment Clause.

After Rosenberger, the next logical question was whether the Court would consider political speech, as well as religious speech, to be a viewpoint. The issue was raised but not addressed by the Court in another recent education case, Board of Regents of the University of Wisconsin System v. Southworth.\textsuperscript{170} There, state university students were required to contribute to an activity fee fund that was used to support expressive activities, including political and ideological speech, by diverse student organizations.\textsuperscript{171}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{163} Id. at 2277.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id. at 2276. ("[T]he majoritarian process implemented by the district guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.").
\item \textsuperscript{167} Id. at 2279.
\item \textsuperscript{168} Id. at 2278.
\item \textsuperscript{169} Id. at 2279.
\item \textsuperscript{170} 120 S.Ct. 1346 (2000).
\item \textsuperscript{171} Id. at 1349, 1351.
\end{enumerate}
\end{footnotesize}
Certain students objected that the policy forced them to support student organizations with which they disagreed, implicating their First Amendment right to be free from compelled speech. Fee funds were allocated to the various student groups either by the student government or pursuant to a student referendum. All parties stipulated that those fee monies distributed by the student government had been allocated in a viewpoint neutral manner.

Although the Court did not explicitly rule that the fee fund constituted a limited public forum, the Court found the "standard of viewpoint neutrality found in the public forum cases" to control the case. Citing *Rosenberger*, the Court held that a state university may require its students to support the speech of other students as long as in allocating those funds, the university does not "prefer some viewpoints to others." Fee monies distributed by the student government met this test; however, the Court cast serious doubt on the validity of the referendum procedure, stating that "[a]ccess to a public forum ... does not depend upon majoritarian consent."

The objecting students had argued that because university regulations prohibited fee funds to be used for "politically partisan" speech, the funding system was not

---

172 *Id.* at 1353. During the 1995-96 academic year, 623 fee-eligible, registered student groups existed on the University of Wisconsin-Madison campus. *Id.* at 1351.

173 *Id.* at 1350-51. In fact, most public colleges and universities use similar mandatory fee systems to support extracurricular student speech, and lawsuits challenging those systems had been filed at several universities. See Rounds v. Oregon, 166 F. 3d 1032, 1033 (9th Cir. 1999) (upholding student fee allocation to the University of Oregon's campus Public Interest Research Group); Douglas Lederman, *Conservative Legal Groups Take Aim at Mandatory Student Fees*, Chron. of Higher Educ., March 6, 1998, at A32 (describing lawsuits filed by conservative students against mandatory fee systems); Marc Levin, *Closing the Pocketbook: Eliminating Mandatory Fees for Political Groups*, Campus, Spring 1999, at 3 (detailing litigation aimed at preventing student governments from using mandatory fees to advance "liberal" causes); Janette Rodrigues, *College Officials Support Ruling*, Houston Chronicle, Sept. 23, 2000, at A9 (quoting higher education law expert estimating that 95 percent of public colleges and universities use mandatory fee funding to finance diverse student organizations).

174 *Southworth*, 120 S. Ct. at 1351.

175 *Id.* at 1354.

176 *Id.* at 1356.

177 *Id.* at 1357. The Court remanded the case to determine this point. *Id.*
viewpoint neutral.\textsuperscript{178} The Court relied on the parties' stipulation to the contrary to avoid answering the question and to uphold the allocation scheme.\textsuperscript{179} If the Court had addressed the issue, we can predict that Justice Stevens would have argued that the restriction did not discriminate on the basis of viewpoint as long as it applied evenhandedly to all partisan speech (i.e. both the Young Democrats and the Campus Republicans) and perhaps all straightforwardly political speech (such as lobbying) as well.\textsuperscript{180} Under Rosenberger's announced, more inclusive framework, the debate would be viewed as partisan student groups versus nonpartisan campus organizations. By funding one but not the other, the limitation would amount to viewpoint discrimination. As a result, politics could never be restricted as a subject matter in a limited public forum, because speech that is not political is by definition apolitical. By funding the Chess Club, therefore, the University could be seen as favoring a nonpartisan world view.

Again, this formulation of viewpoint is so far-reaching as to be almost ludicrous. A more productive analysis would look at the facts in context to see if the restriction posed a serious danger of viewpoint discriminatory application. In Southworth, the University policy stated that student organizations could not receive funding if they had "a primarily political orientation," nor could they be reimbursed for "politically partisan" or lobbying activities.\textsuperscript{181} Nevertheless, the Court noted that partisan organizations such as the College Democrats and College Republicans, as well as the International Socialist Organization, qualified to receive student fee monies, and the University admitted that qualified organizations engaged in political and ideological expression, including lobbying, with fee funds.\textsuperscript{182} Had it been shown that "nonpartisan" student groups, such as the Chess Club or the National Honor Society, were reimbursed for lobbying expenses while "partisan" groups such as the College Republicans were not, then the policy clearly would have been applied in a viewpoint discriminatory manner. Granted, examples involving the Chess Club and the National Honor Society are easy cases, and political speech is impossible to define in a universal way. My point, however, is that any definition of viewpoint that simply encompasses all speech appears too broad to be taken seriously.\textsuperscript{183}

\textsuperscript{178} Id. at 1352.

\textsuperscript{179} Id.

\textsuperscript{180} See text accompanying notes 146-51.

\textsuperscript{181} 120 S.Ct. at 1352.

\textsuperscript{182} Id. at 1351.

\textsuperscript{183} For the argument that political speech should not be treated as a viewpoint, even though after Rosenberger it would mean that political speech receives less First Amendment protection than religious speech, see Saks, supra note 154, at 327 & n.39. But see Heins, supra note 7, at 103 (stating that after Rosenberger, limitations on political speech are properly classified as viewpoint discrimination).
All this discussion fails to mention that the Court already decided, long before *Rosenberger*, that a restriction on political speech does not amount to viewpoint discrimination.\(^{184}\) These cases, however, involved neither a traditional nor a limited public forum, but rather speech in a nonpublic forum, where viewpoint discrimination is often invoked but rarely found.

### B. In the Nonpublic Forum: Looking in Vain for Viewpoint Discrimination

Pursuant to the Supreme Court's three-tiered forum doctrine, public property that does not meet the historical test of a traditional forum, nor that has been expressly designated by the state as a limited public forum, falls into the third category: the nonpublic forum.\(^{185}\) In the nonpublic locale, the government may regulate speech pursuant to valid time, place, and manner restrictions, and may impose other limitations reasonably necessary to maintain the forum's intended purposes as long as those limitations are "not an effort to suppress expression merely because public officials oppose the speaker's view."\(^{186}\) Similarly, in a limited public forum, the state may employ subject matter or speaker-based access restrictions to delineate the forum's boundaries, contingent only on the prohibition against viewpoint discrimination.\(^{187}\) Therefore,

---


\(^{185}\) *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 46 (1983).

\(^{186}\) *Id.*

\(^{187}\) Although the Court in *Perry* asserted that the state must comply with the same standards of content neutrality in limited public forums that are applicable to traditional public forums, *id.*, the Court then proceeded to give the government an escape hatch. In a footnote, the Court stated that the government may restrict access to a limited public forum by topic or speaker identity as needed to preserve the intended purpose of the forum. *Id.* at 46 n.7. *See* text accompanying notes 120-21.

In a later case, the Court specified that "[t]he government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985). This reliance on government intent to create a limited public forum has been severely criticized as, in effect, doing away with the limited public forum category altogether. *See*, e.g., *id.* at 815 (Blackmun, J., dissenting) (stating that the Court's focus on government intent "empties the limited-public-forum concept of meaning" and "makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum"); BeVier, *supra* note 116 at 95
government discretion to limit speech in either a limited public forum or a nonpublic forum should be reviewed under what amounts to the same standard. Viewpoint discrimination is prohibited in either case.

Yet even before the Court announced its categorical approach in *Perry Education Ass'n v. Perry Local Educator's Ass'n*, it had applied a much narrower concept of viewpoint discrimination in the nonpublic forum context than it would use in the limited public forum cases described above. For example, the Court held that a city could refuse to sell advertising space on city buses to political candidates, while at the same time displaying other types of advertisements. Only the dissenters foreshadowed the broad, *Rosenberger* understanding of viewpoint discrimination, objecting that the city's policy would permit an advertisement for an environmentally unfriendly product but prohibit a political plea calling for tougher environmental protection laws.

*Lehman*, of course, presented the debatable question of whether a restriction on political speech should properly be considered viewpoint or subject matter discrimination. There could be no doubt about the existence of viewpoint discrimination in *Perry* itself, however, where a school board policy permitted the incumbent teacher's union, but not a rival union, to communicate with teachers through the school's internal mail system. Significantly, the school had historically allowed civic and church groups to use the mail system, and had even granted unlimited access to

(noting that Cornelius "is widely regarded as having substantially eviscerated" the limited public forum category); David S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L. Rev. 143, 167 (1992) (asserting that government intent standard lets government officials set the limits of judicial review); Gey, *supra* note 14 at 1549 (arguing that government's right to deny forum access based on subject matter and speaker identity makes limited public forum category "virtually useless").


189 *Lehman*, 418 U.S. at 303-04. Although Justice Douglas agreed that the transit system was not a public forum, he concurred in the result based on a captive audience rationale. Justice Douglas believed that the city had the right to protect commuters from exposure to commercial advertising. *Id.* at 307 (Douglas, J., concurring).

190 *Id.* at 303-04.

191 *Id.* at 318 (Brennan, J., dissenting).

192 See text accompanying notes 178-83.

193 *Perry*, 460 U.S. at 40.
both unions before teachers elected one as their exclusive bargaining representative. Justice Brennan's dissenting opinion noted that, after the election, the unsuccessful union appeared to be the only group barred from using the mail system.

Nevertheless, the Court classified the mail facilities as a nonpublic forum with respect to the rival union, and denied its First Amendment claim to equal access. Because the mail system was a nonpublic forum, the government's exclusion of the competing union needed only to be reasonable and viewpoint neutral. According to the Court, the ban was eminently reasonable to preserve the property for business use by the teachers' official bargaining representative (apparently only use by the rival union, and not the YMCA or the Cub Scouts, would interfere with this business purpose). Furthermore, the exclusion did not amount to viewpoint discrimination, the Court said, for two reasons. First, the Court found no evidence to indicate that the school district intended to discourage the rival union's viewpoint by limiting access to the mailboxes. Second, the Court described the ban as one based on speaker identity rather than viewpoint.

The flaws in this reasoning are apparent. If discriminatory impact does not count as at least some evidence of discriminatory intent, then the government can avoid all scrutiny by simply disavowing any impermissible motives. Here, by granting only one of two unions a convenient method of communicating with teachers, the school district acted to skew the debate about collective bargaining issues. As the Perry dissenter

---

194 Id. at 39-40, 39 n.2.

195 Id. at 65 (Brennan, J., dissenting).

196 Id. at 46-47. The Court noted that the mail system might have constituted a limited public forum with respect to other community groups, but not for unions. Id. at 49. Therefore, by narrowly defining the speaker universe here as two unions, the Court could conclude the school district had not created a limited public forum by allowing mailbox access to only one.

197 Id. at 45-46.

198 Id. at 50-51.

199 Id. at 49.

200 Id.

201 Of course, there would be no viewpoint discrimination problem if the school district had implemented a discriminatory intent in a viewpoint neutral manner by excluding all union speech from the mailbox system. See text accompanying notes 412-14.
pointed out, the teachers would receive "self-laudatory" messages from the favored union without receiving the other union's critical rejoinders. Yet, because the school district did not admit to playing favorites, the disparate impact of the mailbox policy was irrelevant to the Court. Compare the facts in *Rosenberger*: The Court there did not base its holding on evidence that the university acted with malicious intent towards Wide Awake, but rather acknowledged the school's original argument that it was bound by the Establishment Clause to refrain from funding religious publications. Instead of insisting on proof of improper motives, the Court found that the funding denial constituted viewpoint discrimination because of its effect--it silenced religious editorial viewpoints.

Furthermore, the Perry Court erred in treating "speaker identity" as separate and distinguishable from "speaker perspective" in these circumstances. If the state can freely tailor speech restrictions on the basis of speaker status, then the state can eliminate unwanted points of view in nonpublic forums at will. People's perspectives are often inseparably intertwined with their identity, whether they be Communists or Republicans, incumbent politicians or challengers, racial bigots or flag-burners. Were Perry's logic to be applied in the traditional forum scenario, Mayor Hague could have lawfully silenced all labor organizers in Jersey City by pointing to their job description rather than their rhetoric. Combined with the policy's discriminatory impact on speech about labor issues, the school district's narrow definition of the excluded class in *Perry* should have raised a presumption of viewpoint discrimination. Justice Brennan rightly objected that

---

202 460 U.S. at 65 (Brennan, J., dissenting).

203 *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837-38 (1995). Although the university relied on the Establishment Clause argument in the lower courts, at the Supreme Court level the University instead advanced an academic freedom claim. *Id.*

204 *Id.* at 831. See text accompanying notes 138-45.

205 On this point, it is useful to contrast the Court's decision in *Perry* with City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm., 429 U.S. 167, 175-76 (1976). In that case, the Court held that a school board engaged in unconstitutional viewpoint discrimination by refusing to allow a nonunion teacher to speak at a meeting where certified union representatives could participate. *Id.*

206 Admittedly, speaker characteristics do not always correlate with viewpoint. For example, it was not viewpoint discriminatory in *Rosenberger* for the university to limit participation in its activity fee forum to student groups. See Sadurski, *supra* note 154 at 364-65. Nevertheless, speech regulations based on a speaker's identity create a risk of viewpoint discrimination and should not be presumed to be viewpoint neutral.

207 See text accompanying notes 27-31.
the Court in *Perry* used the public forum issue to sidestep "the First Amendment's central proscription of censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic."  

Defending the Court's *Perry* decision, Professor Post has argued that speech within nonpublic forums falls into the government's managerial realm, where the state can regulate speech as needed to achieve its instrumental objectives. According to Post's theory, the government should be allowed to discriminate by viewpoint in nonpublic forum governmental enterprises to ensure their proper functioning to achieve institutional ends. Applying this rationale, Post concluded that the *Perry* Court properly deferred to the school board's mailbox limit because it preserved the managerial relationship between the district and its teachers. Noting that the rival union was most certainly excluded as one of the certified union's labor demands, Post argued that the school board's ability to control access to its mail system gave it the leverage necessary to negotiate labor contracts.

Post's theory assumes that the government's organizational goals in nonpublic forums are established beyond debate, so much so that judicial review might skew the outcome more than judicial deference. But were the school board's institutional objectives so settled as to be universally accepted under *Perry* 's facts? Whereas the school board might contend that flexibility in labor negotiations was the preeminent institutional end, the teachers might argue that full access to information concerning labor issues from competing unions would best effectuate the contract negotiation process. Allowing the government to discriminate by viewpoint in nonpublic forums even when such discrimination is arguably necessary for institutional ends will often accord too much judicial deference to government forum managers, especially considering that the

---


209 *See* Post, *supra* note 116, at 1717.

210 *Id.* at 1829-30.

211 *Id.* at 1821-23.

212 *Id.* at 1823.

213 *Id.* at 1789, 1827-28. According to Post, "If government action is viewed as a matter of internal management, the attainment of institutional ends is taken as an unquestioned priority. But if it is instead viewed as a matter of governance, the significance and force of all potential objectives are taken as a legitimate subject of inquiry." *Id.* at 1789 (footnote omitted). For Post, the "line between governance and management corresponds to the distinction between the public and nonpublic forum." *Id.* at 1833.
state already has complete discretion to designate forums as "limited" or "nonpublic."

Post's managerial theory works better, it seems, to identify compelling state interests that could uphold the government's managerial policies under a strict scrutiny test than it does to justify dropping the viewpoint discrimination inquiry in nonpublic forums.

Two years after Perry, in *Cornelius v. NAACP Legal Defense and Education Fund*, a plurality of the Court again demonstrated a less stringent understanding of viewpoint discrimination in the nonpublic forum context. *Cornelius* upheld a Presidential order that excluded certain "legal defense and political advocacy" organizations from a federal workplace charity drive, but included charitable organizations that provided individuals and families with direct health and welfare services. The plurality characterized the campaign as a nonpublic forum, stating that the government had not intentionally opened the drive to all tax-exempt groups. Rather, the government had reasonably restricted access on the basis of speaker identity by limiting participation to "appropriate," noncontroversial groups that provided food and shelter to the needy. Although the plurality characterized the government's asserted interest in eliminating controversial groups from the campaign as "facially neutral," Justice O'Connor's plurality opinion admitted that this justification could harbor a viewpoint bias. Consequently, the exclusion would stand unless the plaintiffs could demonstrate on remand that the eligibility criteria constituted a government attempt "to suppress a particular point of view."

The three dissenting Justices would have invalidated the exclusion as viewpoint discrimination, pure and simple. Using an argument that would prevail in *R.A.V.* and *Rosenberger*, Justice Blackmun maintained that by excluding advocacy groups, the government supported the status quo and penalized charities that worked for social change. Writing separately, Justice Stevens noted that viewpoint bias need not stem

---

214 See note 187 and accompanying text.


216 Id. at 790, 794-95.

217 Id. at 805.

218 Id. at 804, 807, 809.

219 Id. at 812.

220 Id. at 813.

221 Justices Blackmun, Brennan and Stevens dissented. Id. at 813, 833. Neither Justice Marshall nor Justice Powell participated in the case. Id. at 813.

222 Id. at 832-33.
from a conscious prejudice, but could result from "a habitual attitude of disfavor." Because he believed the government had not established any valid justification for the exclusion, Justice Stevens could not agree that it was viewpoint neutral.

One need not adopt Justice Blackmun's broader outline of the underlying debate as being between social change agents and representatives of the status quo to see the inherent viewpoint discrimination in the government's eligibility criteria. Evidence on the record showed that only twenty-six percent of the organizations participating in the campaign actually distributed either food or health benefits directly to clients, a fact that undercut the government's asserted viewpoint-neutral reason to exclude the plaintiffs from the fund drive. When the U.S. Olympic Committee and the World Wildlife Fund, neither of which provided health services, could participate in the campaign while the Sierra Club Legal Defense Fund could not, it begins to look like the government was playing favorites. Neither was the supposedly contentious nature of the groups a valid reason for their exclusion. To use Justice Stevens' analogy, if the government can promote workplace harmony by eliminating controversial participants from a federal fund drive, why not let it abolish controversial opinions from the workplace as well? "Controversial" is too often synonymous with "offensive," and our system of First Amendment jurisprudence is centered on the idea that government suppression of offensive messages is inimical to a vigorous system of free expression.

That the Court has continued to apply a "light" version of the viewpoint discrimination test in nonpublic forum cases is apparent from its more recent decision in Arkansas Education Television Commission v. Forbes. There, the Court held that a state-owned public television broadcaster had no First Amendment obligation to include a non-major party candidate in a televised debate, even though the candidate had collected

223  Id. at 835 n. 3 (Stevens, J., dissenting).

224  Id. at 836.

225  Id. at 828 (Blackmun, J., dissenting).

226  Id. at 793, 812.

227  Id. at 836 (Stevens, J., dissenting).

228  See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) (noting that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) (stating that the "Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer").

enough signatures to be listed on the ballot. Justice Kennedy's opinion for the Court equated public broadcasting with private journalism, relying on notions of objectivity and journalistic freedom to classify public broadcasting as generally outside the forum doctrine altogether. Neither public nor private broadcasters could fulfill their mandate to serve the public interest without making programming decisions that necessarily prefer some viewpoints to others. Therefore, Justice Kennedy concluded, "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination."

Had Justice Kennedy stopped there, the plaintiff could have been denied access to the debate as part of what Professor Schauer has described as an institutional approach to the First Amendment. The decision would have reflected more honestly that the Court attached greater First Amendment significance to public broadcasters' journalistic autonomy than to an independent candidate's access claim. However, Justice Kennedy complicated matters by describing candidate debates (but not public broadcasting in general) as nonpublic forums because of their "exceptional significance in the electoral process." With respect to candidate debates, then, Justice Kennedy traveled back to the

230 Id. at 669-70, 682.

231 Id. at 673-74. The Court cited Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973) for the proposition that "television broadcasters enjoy the 'widest journalistic freedom' consistent with their public responsibilities." Forbes, 523 U.S. at 673.

232 Id. at 674-75.

233 Id. at 673. In his dissent, Justice Stevens noted, however, that if a privately owned network scheduled a political debate, the network would be required to use "pre-established objective criteria to determine which candidates may participate in [the] debate." Id. at 685 (Stevens, J., dissenting) (quoting 11 C.F.R. § 110.13(c)(1997)). Justice Stevens argued that the public broadcaster's decision in Forbes to exclude the independent candidate was too subjective to have satisfied this test. Id. at 685-86.


235 For an example of such an institutional approach, see Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F. 3d 1085 (8th Cir. 2000). In that case, the Eighth Circuit held that a public radio station's decision not to accept program sponsorship from the Ku Klux Klan did not trigger forum analysis, but rather was a justifiable exercise of the station's editorial discretion. Id. at 1093-95.

236 Forbes, 523 U.S. at 675.
starting point: public broadcasters could not exclude candidates from televised debates unless the exclusion was reasonable and viewpoint neutral.\textsuperscript{237} Citing \textit{Cornelius} for the proposition that access to nonpublic forums can be denied on the basis of speaker status, Justice Kennedy reasoned that the minor party candidate was excluded because he fell into a class of candidates with "no appreciable public interest."\textsuperscript{238} Thus, Justice Kennedy concluded, the denial of access was not based on the speaker's objectionable views but rather on his "own lack of objective support."\textsuperscript{239} Again, under the \textit{Rosenberger} understanding of viewpoint discrimination, the broadcaster's viability standard clearly prefers status quo political stances to less popular, minority positions. Justice Stevens, again dissenting, noted that the broadcaster equated "viable" candidates with "major party" candidates, including those Democratic or Republican hopefuls who had not raised as much money or generated as much support as the excluded independent candidate.\textsuperscript{240} Apparently, Justice Kennedy--the author of the \textit{Rosenberger} opinion--saw no need for more than bipolar debate in a nonpublic forum context, even one involving questions of self-governance in a democratic society.

To summarize, the distinction between a limited public forum and a nonpublic forum is almost impossible to pinpoint. According to the Court, the government is free to restrict participation in a limited public forum with respect to subject matter or speaker class--but by doing so, the state creates grounds for arguing that it intended instead to create a nonpublic forum. In terms of the prohibition on viewpoint discrimination, the distinction is not supposed to matter because, technically, the government may not discriminate by viewpoint in either type of forum. In practice, the Court has been much more sensitive to claims of viewpoint discrimination in the few cases where it has found that limited public forums have been created. The \textit{Rosenberger} decision, in particular, showed the Court applying such a careful sense of neutrality that religious speech qualified as not just a speech topic, but also a particular point of view. \textit{Rosenberger} provides a vivid contrast to the Court's nonpublic forum cases, where viewpoint discriminatory impact of a forum restriction has not even been considered as evidence of improper government motivations. The notion of viewpoint discrimination essentially plays no part in protecting First Amendment interests in nonpublic forum decisions, a result that repeats itself when the government subsidizes private speech.

\begin{flushleft}
\textsuperscript{237} \textit{Id.} at 676.
\textsuperscript{238} \textit{Id.} at 683.
\textsuperscript{239} \textit{Id.} at 682.
\textsuperscript{240} \textit{Id.} at 692 nn. 14-15 (Stevens, J., dissenting).
\end{flushleft}
IV. Viewpoint Discrimination and Government Subsidies

Common sense dictates that the government must be allowed to use its resources to promote its own policies and objectives. In pursuing those policies, government officials speak on behalf of the state and may be required to "toe the party line." So, for example, the President will not have engaged in unconstitutional viewpoint discrimination by dismissing a surgeon general who advocates expanding the school sex education curriculum in a way that proves politically embarrassing to the administration. Additionally, the government may hire outside representatives to help present its message without incurring an obligation to finance opposing views. If the federal government hires an advertising agency to design a series of anti-drug public service announcements, the government need not employ an advertising agency to prepare messages advocating the legalization of marijuana. The government can control its own speech, which would necessarily include expression by appointed officials, government employees and government agents, at least in their official capacities and with respect to speech that relates to their employment itself.

The notion of "government speech" becomes murky, however, when the state finances expressive activities by implementing a selective subsidy, such as providing grants for art or legal counseling for the poor. Two related questions arise: First, do otherwise private speakers become state actors by virtue of the subsidy? If so, then the state would be free to restrict those private speakers' program-related speech with little regard for First Amendment viewpoint neutrality concerns. Second, is the government

---

241 See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (stating that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").


243 "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." Rosenberger, 515 U.S. at 833.

244 The government may not control speech of an employee or independent contractor if it relates to a matter of public concern and does not impede proper performance of his or her official job responsibilities. See Board of County Comm'r's v. Umbhr, 518 U.S. 668, 673 (1996) (extending First Amendment speech protections belonging to government employees to independent contractors); Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) (holding that dismissal of teacher for writing critical letter to newspaper about school board violated First Amendment); but see Connick v. Myers, 461 U.S. 138, 154 (1983) (holding that dismissal of assistant district attorney for circulating questionnaire about workplace grievances was justified).

245 If the government were to exercise control over the grantee's non-program speech,
free to select subsidy recipients in what otherwise might be a viewpoint discriminatory manner, by arguing that it is merely setting program boundaries? As shown by the following discussion, the answers to these questions are not immediately apparent.

A. The Press is Special: Distinguishing Between Penalties and Nonsubsidies

In a series of cases dating from the 1940s, the Court has held that private and publicly supported press entities do not become government agents simply by receiving a subsidy, nor may the government distribute subsidies to the press in a viewpoint discriminatory way. For example, the Court held in 1946 that the postmaster general could not revoke Esquire's second-class mail status because of the magazine's sexual content.246 Recognizing that second class mailing privileges were a "form of subsidy," the Court said that although the state need not provide that benefit to all publications, it could not withhold the subsidy in an attempt to censor speech.247 The Court explicitly rejected the argument that use of the mail system is a privilege that can be conditioned in whatever manner the government chooses.248 Revocation of Esquire's mailing privileges was seen by the Court as a penalty and not just a governmental decision to deny a benefit.

The Court has also struck down selective tax exemptions for the press in instances where the Court feared the exemptions might be used to punish disfavored media outlets. In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,249 the Court invalidated a state law that exempted from the state's use tax the first $100,000 spent by publications on paper and ink. As a result of the exemption, only a few newspaper publishers paid any tax.250 Noting that the threat of burdensome taxes can act to censor critical commentary, the Court said that the law's differential treatment of news publications "suggests that the goal of the regulation is not unrelated to the suppression of

this would raise an unconstitutional conditions problem. See Rust v. Sullivan, 500 U.S. 173, 197 (1991) (explaining that unconstitutional conditions cases arise when the government prohibits a subsidy recipient "from engaging in the protected conduct outside the scope of the federally funded program"); Speiser v. Randall, 357 U.S. 513, 529 (1958) (holding that veterans' tax exemption could not be conditioned on signing of loyalty oath).


247 Id. at 151-55.

248 Id. at 156 (explaining that Congress did not intend to give the Postmaster General the authority to "supervise the tastes of the reading public of the country.").


250 Id. at 578-79.
expression, and such a goal is presumptively unconstitutional. In his dissenting opinion, Justice Rehnquist argued that the tax exemption did not penalize selected media, but rather granted an equal benefit in the form of a tax credit to all newspapers, large or small. While the Court in *Minneapolis Star* showed itself so sensitive to media autonomy that it invalidated the statute for posing an unreasonable risk of future abuse, Justice Rehnquist was unwilling to override the legislature's discretion without any direct evidence of immediate "improper motive."

This question of whether selective government funding should be viewed as a discretionary benefit or an unconstitutional penalty divided the Court in a number of cases decided in the 1980s. In those cases involving the press, differential tax treatment or conditional funding was consistently placed by the Court on the penalty side of the equation; those involving non-media entities were generally upheld as permissible nonsubsidies. As with the limited/nonpublic forum dichotomy, the Court's choice of labels often determined its result.

For example, in *FCC v. League of Women Voters*, the Court by a five-to-four vote struck down a federal statute disallowing noncommercial broadcasting stations that received grants from the Corporation for Public Broadcasting from "editorializing." While recognizing that broadcasters are subject to more government regulation than their print counterparts, the Court put greater emphasis on the First Amendment interest in protecting broadcasting's independent nature, and on editorial opinion's crucial role as a

---

251 *Id.* at 585.

252 *Id.* at 603 (Rehnquist, J., dissenting).

253 *Id.*


256 *Id.* at 366, 402. Congress created the Corporation for Public Broadcasting to distribute federal funds to support noncommercial educational television and radio stations with regard to operations and educational programming. *Id.* at 366.

257 *Id.* at 380.
mechanism for achieving social and political change.\textsuperscript{258} Justice Brennan, writing for the Court, looked at editorial speech as a subject matter to describe the statute as impermissibly content-based.\textsuperscript{259} In his analysis, however, Justice Brennan focused on the dangers associated with viewpoint discrimination--state control of offensive or controversial ideas, and state suppression of speech representing a particular perspective--to describe the statute as an attempt to "single[] out noncommercial broadcasters" and to "limit discussion of controversial topics and thus to shape the agenda for public debate."\textsuperscript{260} Even under the less-exacting intermediate scrutiny test applied to broadcasting regulations, the Court found that the statute was an unjustified penalty imposed on federal grantees.\textsuperscript{261}

Dissenting, Justice Rehnquist saw the statute not as a penalty but rather as a simple decision by Congress not to fund public broadcasting stations that editorialized. Justice Rehnquist would have relied on \textit{Regan v. Taxation With Representation},\textsuperscript{262} decided the previous year, as the controlling precedent.\textsuperscript{263} In \textit{Regan}, the Court upheld a tax code provision that disallowed nonprofit organizations from receiving tax deductible contributions if they engaged in lobbying.\textsuperscript{264} Writing for a unanimous Court, Justice Rehnquist reasoned that Congress had every right to allocate its funds as it saw fit, even if that meant denying a subsidy to certain First Amendment activities.\textsuperscript{265} A decision not to subsidize, Justice Rehnquist held, was subject only to the rational basis test.\textsuperscript{266} This test was met, according to the Court, even though a separate tax code section provided that

\textsuperscript{258} \textit{Id.} at 378-82.

\textsuperscript{259} \textit{Id.} at 383.

\textsuperscript{260} \textit{League of Women Voters}, 468 U.S. at 384.

\textsuperscript{261} \textit{Id.} at 380, 402 ("[S]pecific interests sought to be advanced by [the] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedom, which the First Amendment jealously protects.").

\textsuperscript{262} 461 U.S. 540 (1983).

\textsuperscript{263} \textit{League of Women Voters}, 468 U.S. at 405 (Rehnquist, J., dissenting).

\textsuperscript{264} \textit{Regan}, 461 U.S. at 543-44, 551.

\textsuperscript{265} \textit{Id.} at 544-45.

\textsuperscript{266} See \textit{id.} at 549 ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.").
veterans' organizations that lobbied would still be eligible for tax-deductible donations. Under the Court's Minneapolis Star logic, this differential treatment of veterans' groups should at least have raised a question of viewpoint discrimination and been subject to strict scrutiny analysis. Despite his caution that "the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas,'" Justice Rehnquist applied only minimal scrutiny to find the veterans' exemption reasonably related to the government's interest in compensating veterans for their service.

Justice Brennan distinguished Regan from League of Women Voters in the latter case with an unconstitutional conditions argument. In Regan, nonprofit organizations could still receive tax deductible contributions for their nonlobbying activities, and could form taxable affiliated entities to engage in lobbying. Therefore, Congress could choose not to finance nonprofit lobbying without forcing those organizations to lose their tax exempt status with respect to qualifying activities. On the other hand, by accepting a CPB grant, the broadcasting stations in League of Women Voters were completely forbidden from editorializing even with nonfederal funds. This granted the government too much control over the broadcasters' expressive activities, and created what Professor Smolla has aptly called "a free speech leveraged buy-out." Had Congress permitted the

267 See Laurence H. Tribe, Constitutional Choices 209 (1985) (noting that Congress' intent in exempting veterans' groups was most likely "grounded in a desire to increase [their] . . . influence in the legislature, to the relative detriment of other groups"); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582, 592-93 (1983) (holding that Minnesota's ink and paper use tax imposed on publishers required strict scrutiny analysis because the tax "singled out the press for special treatment" and specifically "target[ed] individual publications" because the tax exempted the first $100,000 spent on paper and ink).


269 Id. at 547-49.


272 League of Women Voters, 468 U.S. at 399-400.

273 Id. at 400.

broadcasting stations to create affiliated entities that could use nonfederal funds for editorializing. Justice Brennan said the First Amendment problem would be solved.275

Later cases showed the Court's continued reluctance to enforce selective subsidies directed at the press. For example, a sales tax system that exempted all newspapers but only certain types of magazines was found to be unconstitutional content regulation in *Arkansas Writers' Project, Inc. v. Ragland.*276 The Court emphasized that the state could not single out a small group within the press for discriminatory treatment, even when no viewpoint discrimination was alleged.277 This time Justice Scalia, joined by Justice Rehnquist, wrote the dissent, in which he characterized the exemption as a permissible nonsubsidy that infringed no one's rights.278 Although the Court in *Ragland* faulted the tax exemption for being content-based, the Court in a later case pinpointed the risk of viewpoint discrimination as its real objection.279 According to the Court in *Leathers v. Medlock,* "[t]he danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views."280

As these cases show, the Court has refused to treat media speakers (including public broadcasters) as state actors just because the government has provided them with some type of subsidy. Furthermore, the Court has been sensitive to the danger of viewpoint discrimination that selective subsidization of the press can present.281 This deference to the press as an independent actor flows logically from the press' crucial role as government watchdog. The Court specifically recognized this role in *Minneapolis

275 *League of Women Voters,* 468 U.S. at 400.


277 *Id.* at 229-30.

278 *Id.* at 236-37 (Scalia, J., dissenting).

279 *Leathers v. Medlock,* 499 U.S. 439, 446-47 (1991). In *Leathers,* the Court upheld a state sales tax system that applied to cable television operators, but exempted the print media and direct satellite broadcasters. *Id.* at 453. The Court rejected the cable operators' argument that the system's differential treatment of various types of media was discriminatory, stating that the tax structure did not "resemble[] a penalty for particular speakers or particular ideas." *Id.* at 449.

280 *Id.* at 448.

281 Professor Cole has described the Court as having created a "sphere of neutrality" with respect to its deferential treatment of the press in the subsidized speech area. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech,* 67 N.Y.U. L. Rev. 675, 731 (1992).
Star, stating that the "basic assumption of our political system [is] that the press will often serve as an important restraint on government." The Court has been unwilling to let the government compromise--or even appear to compromise--this checking function of the press by attaching conditions to state benefit programs or engaging in viewpoint discrimination. However, in subsidy situations such as Regan that involve nonmedia grantees, the Court has taken a far different approach.

B. Abortion and Offensive Art: Justice Rehnquist Wins Point, Set, and Match

Two of the most controversial cases decided by the Court in the last decade, Rust v. Sullivan and National Endowment for the Arts v. Finley, involved the uncertain constitutional relationship between government-subsidized speech and viewpoint discrimination. Both cases asked whether the First Amendment puts any limits on the government's ability to use its spending power to influence private speech. If the state has no obligation to fund either family planning counselors or art projects, may it choose to finance only those reproductive counselors who refrain from mentioning abortion, or may it support only inoffensive art? The press cases discussed above appear to say no. Clearly, Minneapolis Star and Arkansas Writers would hold that the government could not grant a tax exemption to only those newspapers that excised all favorable speech about abortion, or ran only tasteful editorial cartoons, even though the government has no obligation to grant the media any tax exemption whatsoever. Justice Rehnquist disagreed with the result in these cases, arguing that the government should be free to tailor its subsidy programs however it wants, but with respect to the media, at least, he was unable to carry the day.

Outside the press context, however, Justice Rehnquist's "greater-includes-the-less-er" argument found support in the Regan case described above, where a differential


285 See text accompanying notes 249-53.

286 See text accompanying notes 276-80.

287 See text accompanying notes 252-53, 276-78.

288 Justice Rehnquist has also applied a "greater-includes-the-less-er" rationale in the commercial speech context, where it was soundly criticized and eventually repudiated by
tax provision that benefited veterans' groups but not other nonprofits was upheld pursuant to a rational basis test with barely a mention of viewpoint discrimination. A majority of the Court again aligned itself with Justice Rehnquist in Rust, where the Court upheld Title X regulations specifying that federally funded family planning clinics could not provide abortion counseling or referrals, but were required to refer pregnant clients for prenatal care. The regulations also prevented Title X grantees from acting in any way to "encourage, promote or advocate" abortion as a family planning method, while imposing no restrictions on grantees' ability to speak against abortion as an alternative. Writing for the Court, Justice Rehnquist rejected the Title X grantees' argument that the regulations unconstitutionally discriminated on the basis of viewpoint by prohibiting them from disseminating factual information about abortion as a lawful choice, while compelling them to provide information about carrying a pregnancy to term.

Justice Rehnquist began his Rust analysis with the Court's holding in Maher v. Roe that the government need not fund abortions even if it subsidizes childbirth.

the Court. Justice Rehnquist argued that the state's power to forbid products or activities gave it the lesser power to prohibit advertising of such products or activities in his opinion for the Court in Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 346 (1986). A plurality of the Court rejected that reasoning in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510-13 (1996) (plurality opinion), where Justice Rehnquist joined Justice O'Connor's concurring opinion that also rejected the approach. Id. at 531-32 (O'Connor, J. concurring). For critical commentary, see Philip B. Kurland, Posadas de Puerto Rico v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wonderous Pitiful," 1986 Sup. Ct. Rev. 1, 12-13 (stating that if the "greater-includes-the-less" rationale was applied, no advertising would be free from government censorship).

In another context, the argument that a city could enact a partial ban on fighting words because it could constitutionally prohibit all fighting words did not save the viewpoint discriminatory ordinance in R.A.V. v. St. Paul, 505 U.S. 377 (1992) See text accompanying notes 88-99.

289 See text accompanying notes 262-70.


291 See id. at 180 (noting a permissible response to an inquiry about abortion services from a pregnant woman was that "'the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.'") (quoting 42 C.F.R. §59.8(b)(5) (1999)).

292 See id. at 192-93 ("There is no question but that the statutory prohibition . . . is constitutional. . . . [w]e [have] held that the government may make a value judgment by the allocation of public funds." (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

expenses. He then described abortion counseling and referral as "activities" to fit the Title X regulations into the *Maher* precedent:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

A few paragraphs later, Justice Rehnquist conceded that the forbidden activities in *Rust* included speech, but by this time, it made no difference to his rationale. The government here was not "suppressing a dangerous idea" (which Justice Rehnquist still, apparently, believed would be unconstitutional), but rather imposing boundaries on the scope of a federally funded project. "[W]hen the Government appropriates public funds to establish a program," Justice Rehnquist wrote, "it is entitled to define the limits of that program." The grantees could not expect the government to subsidize counseling and referrals for abortion services just because it had subsidized counseling and referrals for prenatal care. Otherwise, Justice Rehnquist argued, Congress could not create the National Endowment for Democracy to advocate the foreign advancement of democratic principles without concurrently funding a program "to encourage competing lines of political philosophy such as communism and fascism."

Even though federal funds did not provide the clinics' entire budgets, Justice Rehnquist was unconcerned that the regulations also restricted the recipients' use of

---

294 *Rust*, 500 U.S. 192-93.

295 *Id.* at 193.

296 *Id.* at 194-95.

297 *Id.* at 194.

298 *Id.*

299 *Id.* Justice Rehnquist understood the grantees' argument "to boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights." *Id.*

300 *Id.*
nonfederal monies.\textsuperscript{301} No constitutional conditions problem was presented, according to Justice Rehnquist, for two reasons. First, although the grantees were restricted as to their advocacy within the Title X project, they could engage in abortion counseling through physically and financially separate entities that used no federal money.\textsuperscript{302} Second, Justice Rehnquist said that the grantees were not truly being prevented from using the private-money component of Title X clinics’ budgets for abortion counseling. His reasoning here sounded almost flippant: If Title X grantees really objected to having their hands tied with respect to private funds, Justice Rehnquist posited, they could “simply decline the subsidy.”\textsuperscript{303} This response would effectively do away with the unconstitutional conditions doctrine even in cases where the condition applied to conduct outside of the subsidy’s scope. Obviously, declining the proffered benefit is a universally available alternative.

Evidently realizing that he had just given the government carte blanche to control speech in any government-funded endeavor, Justice Rehnquist tried to trim back the scope of his pronouncements. First, he noted that the government could not restrict speech in traditional or designated public forums just because by providing the forum, the government had in effect granted a kind of subsidy.\textsuperscript{304} Second, academic freedom considerations forced Justice Rehnquist to admit that the government could not attach speech conditions on the use of grant money in the university setting.\textsuperscript{305} Finally, Justice Rehnquist suggested that “traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government.”\textsuperscript{306} However, the Court found that no "traditional relationship" existed here between Title X clients and their physicians because patients could not expect their Title X doctors to provide comprehensive medical care.\textsuperscript{307} The Court did not explain the basis for its assumption that women who relied on Title X clinics for reproductive services would have the resources to go elsewhere for "comprehensive" medical advice.\textsuperscript{308}

\textsuperscript{301} Title X clinics were required to procure matching private funds to be eligible for the federal grant money. \textit{Id.} at 199 n. 5.

\textsuperscript{302} \textit{Id.} at 196.

\textsuperscript{303} \textit{Id.} at 199 n. 5.

\textsuperscript{304} \textit{Id.} at 199-200.

\textsuperscript{305} \textit{Id.} at 200.

\textsuperscript{306} \textit{Id.}

\textsuperscript{307} \textit{Id.}

\textsuperscript{308} \textit{Id.} See also Robert C. Post, \textit{Subsidized Speech}, 106 Yale L.J. 151, 173-74 n.127 (1996) (stating that Court's conclusion regarding the doctor-patient relationship in Title X
Justice Rehnquist's opinion in *Rust* has been rightly criticized for turning the First Amendment prohibition on viewpoint discrimination into "gibberish." By treating prenatal counseling and referrals as one activity and abortion counseling and referrals as another, Justice Rehnquist rationalized that the government did not favor a viewpoint when it funded the former but not the latter. However, the Title X clinics were not "prenatal clinics", they were family planning clinics. As such, the federal grantees were not greedily trying to force Congress to expand the scope of the Title X program (as Justice Rehnquist described it); instead, they were attempting to provide their patients with full information about the complete range of family planning choices. As long as abortion remained legal, it was a legitimate family planning alternative. Unquestionably, the government's true reason for the regulations was not to save tax dollars by cutting back overbroad federal projects, but to "reduce the incidence of abortion." By requiring Title X workers to provide information regarding one family planning option--the one favored by Congress--but not the disfavored alternative, the regulations amounted to blatant viewpoint discrimination.

The issue in *Rust* was not, as Justice Rehnquist claimed, whether the government must subsidize analogous rights if it chooses to subsidize one protected right. Rather, the real question boiled down to whether the government, by its power of the purse, can force private speakers to advance a state-sanctioned view on a controversial topic of public concern. While Justice Rehnquist's National Endowment for Democracy analogy has a superficial appeal, Professor Cole has convincingly demonstrated that it is an inapprise comparison. As Cole observed, the National Endowment for Democracy is a propaganda program that is directed not at U.S. citizens who possess First Amendment rights, but at the world outside our borders. If the Endowment's funded projects were aimed at a domestic audience and were limited by terms of its federal grant to publishing materials glorifying whichever party controlled the Congress, the resulting First

---

309 See Smolla, *supra* note 274, at 217 (contending that the government, via Title X, was intruding upon "the very heart of the doctor-patient relationship," and "micro-managing decisions over the most intimate aspects of human life"). For a listing of other critical commentary, see Post, *supra* note 308, at 168 n.103.

310 *Rust*, 500 U.S. at 193-94.

311 See id. at 213-14 (Blackmun, J., dissenting).

312 Id. at 216 (citing 42 CFR § 59.2 (1990) definition of "family planning").

313 See id. at 194.

Amendment problems would be indisputable. As Justice Blackmun pointed out in his dissent, by referring pregnant women for prenatal care in all circumstances, providing information pertaining only to childbirth, and refusing to answer direct questions about abortion if asked, the Title X workers conveyed the message that abortion was inappropriate regardless of the individual patient's medical condition. Despite Justice Rehnquist’s assurances that Title X workers could continue to advocate a woman's right to choose on their own time or in separately constructed private facilities, Rust ensured that those patients who relied on federally funded clinics for reproductive services would hear only one side of the abortion debate. Perhaps most disturbing of all, these predominantly lower-income women would hear this state-dictated information from those whom they were most likely to trust—their doctors and health service providers. This disparate impact on the rights of poor women did not go unnoticed by Justice Blackmun. For those women who needed and qualified for Title X care, Justice Blackmun concluded that the government may as well have outlawed abortions altogether. "The denial of this freedom is not a consequence of poverty," he wrote, "but of the Government's ill-intentioned distortion of information it has chosen to provide."

No wonder Justice Kennedy in his opinion for the Court in Rosenberger had to distinguish Rust as a case dealing with government speech, rather than a case that did not involve viewpoint discrimination. If the regulations upheld in Rust were not viewpoint discriminatory, then certainly the university's denial of funding to religious, agnostic and atheistic publications could scarcely be considered unconstitutional. The crucial difference in the cases, according to Justice Kennedy, was that the university in Rosenberger used student activity fees to encourage private speech; the Title X program in Rust "used private speakers to transmit specific information pertaining to its own

315 Id.

316 See Rust, 500 U.S. 173, 217 (Blackmun, J., dissenting) (stating that "[b]oth the purpose and result of the challenged regulations are to deny women the ability voluntarily to decide their procreative destiny").

317 Id. at 216-17.

318 Id.


program. Because the Title X grantees were actually serving as government agents, Justice Kennedy said, the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."

This distinction is less than satisfactory for a number of reasons. First, the Rosenberger Court gave no criteria for determining when private speakers have crossed the line to become government functionaries such that they forfeit their First Amendment right not to be used as unwilling couriers of a governmental message. Receipt of a government subsidy was determinative in Rust but not sufficient in the press cases or in Rosenberger itself, where the fee funds received by student organizations looked as least as much like a subsidy as they did like a public forum. Furthermore, the medical profession requires doctors to exercise independent and autonomous judgment to act in the best interests of their patients, in much the same way that effective journalism depends on objectivity and editorial discretion free from corrupting political influences. Any rationale to explain why the press remains private after benefiting from a government subsidy would therefore seem to apply to physicians or other professionals, as well. Second, viewpoint discrimination disguised as private speech is especially

320 Rosenberger, 515 U.S. at 833.

321 Id.

322 See Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding state could not force citizens to display state motto on their license plates, stating "where the State's interest is to disseminate an ideology . . . such interest cannot outweigh an individual's First Amendment rights to avoid becoming the courier for such message").

323 That doctors have an ethical duty to inform patients fully about medical choices is uncontroversial. See Council on Ethical and Judicial Affairs, Am. Med. Ass'n, Code of Medical Ethics: Current Opinions with Annotations ¶8.08 (1998-99) ("The physician's obligation is to present the medical facts accurately to the patient . . . The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.")

Justice Blackmun made this argument in his Rust dissent, to no avail. 500 U.S. 173, 213-14 (Blackmun, J., dissenting).

324 Of course, the medical and legal professions are subject to reasonable regulation by the state to protect its citizens. See Barsky v. Board of Regents, 347 U.S. 442, 451 (1954); Dent v. West Virginia, 129 U.S. 114, 122 (1889). State licensing and other supervisory regulations will be upheld if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. Schware v. Board of Bar Exam'rs, 353 U.S. 232, 239 (1957).

For the position that the state can control speech by state-employed physicians or state-subsidized professionals if the government removes them from their traditional roles such that it is clear that they are not speaking in their normal, professional capacities, see Daniel Halberstam, Commercial Speech, Professional Speech, and the Constitutional
injurious to First Amendment values because listeners cannot evaluate the speech in light of its true source.\textsuperscript{325} For example, most people, I think, would trust a private historian's account regarding the incidence of American soldiers killed by "friendly fire" in the 1989 Panamanian invasion more than they would a Defense Department press release.\textsuperscript{326} When the government purchases private voices to convey its messages, possible self-serving governmental motives attached to the speech are hidden behind a false front. As a result, the manipulative power of any resulting viewpoint discrimination is increased. This distortion of public debate in favor of state-approved speakers or views is exactly what the First Amendment's prohibition on viewpoint discrimination is intended to prevent.

That \emph{Rust} was not an aberration was demonstrated in the next major subsidized speech case to reach the Court, \emph{National Endowment of the Arts v. Finley}.\textsuperscript{327} Three years after it applied a broad definition of viewpoint discrimination to mandate university funding for religious viewpoints in \emph{Rosenberger}, the Court in \emph{Finley} retreated back to the insubstantial understanding of the concept it had demonstrated in \emph{Regan} and \emph{Rust}. In \emph{Finley}, the Court voted eight to one to uphold federal regulations requiring the National Endowment for the Arts ("NEA") to consider "general standards of decency and respect for the diverse beliefs and values of the American people" in awarding artistic grants.\textsuperscript{328} Four individual artists and an artists' organization filed a facial challenge to the law as unconstitutional viewpoint discrimination, arguing that it denied funding to nonobscene art deemed by the state to be offensive or outside mainstream values.\textsuperscript{329}

Writing for the Court, Justice O'Connor relied on three main arguments to deny that the law violated the First Amendment's neutrality principle. (Significantly, Justice O'Connor did not contend that, like the clinic workers in \emph{Rust}, artists became government agents upon their acceptance of a subsidy--perhaps because she could not imagine that anyone would believe that performance artists who smeared chocolate on their breasts or urinated on-stage really represented the government.\textsuperscript{330}) First, Justice O'Connor reasoned

\begin{flushleft}
\end{flushleft}

\textsuperscript{325} See Kagan, \textit{supra} note 254, at 55-56.

\textsuperscript{326} See Charles B. Rangel, \textit{The Pentagon Pictures}, The New York Times, Dec. 20, 1990, at A19 (stating that as many as 60 percent of the 347 American casualties in Panama could have been caused by "friendly fire").

\textsuperscript{327} 524 U.S. 569 (1998).

\textsuperscript{328} \textit{Id.} at 572-73 (quoting 20 U.S.C. \textsection 954(d)(1)(1994)).

\textsuperscript{329} \textit{Id.} at 577-80.

\textsuperscript{330} Justice Scalia described the individual plaintiffs' performance art in his concurring opinion. \textit{Id.} at 596 n. 2 (Scalia, J., concurring) (\textit{citing} Julie Ann Alagna, \textit{Note, 1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left With An "Indecent" Compromise}, 48 Wash. & Lee L. Rev. 1545, 1546 n. 2 (1991)).
that the decency clause as interpreted by the NEA was merely advisory.\textsuperscript{331} Because Congress did not impose a "categorical requirement" that the NEA fund only decent art, Justice O'Connor said no viewpoints technically were disallowed.\textsuperscript{332} It was possible (although certainly not likely) that indecent art could continue to be funded. Justice O'Connor did not address why a viewpoint discriminatory law is any less so because the state may occasionally apply it in a viewpoint neutral manner. As observed by Professor Schauer, the result in \textit{Texas v. Johnson}\textsuperscript{333} would surely be the same even if "showing respect for the diverse beliefs and values of the American people" had been only a factor in the state's decision to criminalize flag-burning.\textsuperscript{334}

Second, Justice O'Connor claimed that the decency clause did not discriminate by viewpoint because Congress enacted it with what the Court considered to be, in a relative sense, speech-protective motives.\textsuperscript{335} Justice O'Connor recited the decency provision's history as a bipartisan compromise enacted to preserve the NEA and its grant-making authority after it was attacked for financing a controversial work by artist Andres Serrano and an exhibit of homoerotic photographs by Robert Mapplethorpe.\textsuperscript{336} The clause was not meant to preclude speech, Justice O'Connor said, but to save arts funding through reform of the NEA's internal procedures.\textsuperscript{337} A variant of the "greater-includes-the lesser" argument, this rationale makes the (at least) arguable and, to my mind, insupportable assumption that the First Amendment prefers viewpoint discriminatory funding of inoffensive art to the elimination of government support for all art.\textsuperscript{338} Justice Souter, writing in dissent, was certainly correct that the Court should not overlook obvious

\textsuperscript{331} \textit{Id.} at 580-81.

\textsuperscript{332} \textit{Id.} at 581.


\textsuperscript{334} Schauer, \textit{supra} note 234, at 95.

\textsuperscript{335} \textit{See} Finley, 524 U.S. at 581-82 (noting the decency clause was "aimed at reforming procedures rather than precluding speech;" in support of the Court's holding, O'Connor quoted one of the bill's sponsors as proclaiming, "[w]e have maintained the integrity of freedom of expression in the United States").

\textsuperscript{336} \textit{Id.} at 574-75, 581-82.

\textsuperscript{337} \textit{Id.} at 582.

\textsuperscript{338} For a contrary view, see Post, \textit{supra} note 308, at 194 (stating that the decency clause should be upheld at least in part to avoid the drastic consequences the opposite result could have on arts funding).
constitutional flaws in a viewpoint discriminatory statute just because it appeared to be less unconstitutional, or have a milder effect on artistic expression, than other Congressional choices. 339 Justice Souter also took issue with Justice O'Connor's salutary portrayal of the Congressional motives behind the decency clause, quoting various representatives who quite openly admitted that the enactment's purpose was to cut off funding for offensive art. 340

Finally, Justice O'Connor argued that the decency clause did not amount to viewpoint discrimination because it was "inconceivable" that the government could administer its competitive grant programs in a neutral way. 341 The NEA must allocate its limited resources in some content-based manner, and distributing grants on the basis of "decency" was no more disturbing to Justice O'Connor than awarding them on the basis of "artistic excellence." 342 Citing Regan and Rust for support, Justice O'Connor concluded that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake," and that "Congress has wide latitude to set spending priorities." 343 Justice O'Connor did hold out some hope for as-applied challenges to the decency provision, trotting out the familiar old quote that even in providing subsidies, the government "may not ai[m] at the suppression of dangerous ideas" 344—a limitation that, following Rust and Finley, appeared virtually meaningless in the subsidized speech context.

Justice Scalia, joined in a concurrence by Justice Thomas, was at least intellectually honest in admitting that the decency provision was viewpoint based, and that factors like "decency" need not be conclusive to be discriminatory. 345 Nevertheless, Justice Scalia found that viewpoint discrimination in funding decisions did not violate the constitution. 346 Remaining true to Justice Rehnquist's original thesis about permissive

339 See Finley, 524 U.S. at 604 n. 3 (Souter, J., dissenting).

340 Id. at 603.

341 Id. at 585.

342 Id. at 585-86.

343 Id. at 587-88.

344 Id. at 587 (citing Regan v. Taxation With Representation, 461 U.S. 540, 550 (1983)).

345 See id. at 591-93 (Scalia, J., concurring) (recognizing that the decency clause acts in the same manner as would a "provision imposing a five-point handicap on all black applicants for civil service jobs"—neither provision "compel[s] rejection, yet each is viewpoint discriminatory.

346 Id. at 590.
non-subsidies, Justice Scalia wrote that "the Government may earmark NEA funds for projects it deems to be in the public interest without thereby abridging speech."\textsuperscript{347}

Given the \textit{Regan} and \textit{Rust} precedents regarding subsidized speech, it is no wonder that, in his dissent, Justice Souter tried to analogize the NEA grant program to the student activity fee system in \textit{Rosenberger}.\textsuperscript{348} According to Justice Souter, the NEA was "a subsidy scheme created to encourage expression of a diversity of views from private speakers"\textsuperscript{349}--in other words, a sort of public forum. Not so, replied the majority, distinguishing \textit{Rosenberger} on the grounds that the NEA involved a competitive grant allocation process, while the university-created forum was generally open to all who applied.\textsuperscript{350}

Drawing a distinction between viewpoint discrimination that occurs in a public forum from viewpoint discrimination imposed in the subsidized speech arena, however, fails to answer why the First Amendment should tolerate different standards of viewpoint discrimination in the first place. The Rehnquist/Scalia argument that the government can spend its money however it wants, with no constitutional limits, does not hold up.\textsuperscript{351} If it were so, then nothing would prevent Congress from deciding to fund only patriotic art, or art that glorified the state similar to the propagandistic works created by Soviet artists at Joseph Stalin's direction in the 1930s. I assume that even Justice Scalia and Justice Rehnquist would be troubled by such a pattern of enforced orthodoxy.

Furthermore, the twin evils associated with viewpoint discrimination--government suppression of disfavored ideas, and government elimination of controversial perspectives--\textsuperscript{352} are present at least as much in the government subsidy context as they are in the public forum context. For example, there can be no doubt that the Court's \textit{Finley} decision will affect American art in two viewpoint discriminatory ways. First, the decision will mean that some artistically excellent works that would otherwise have been exhibited pursuant to NEA funding will now not be seen by the American public because of their indecent or offensive nature. Second, the decency clause will have a chilling

\textsuperscript{347} \textit{Id.} at 597.

\textsuperscript{348} \textit{Id.} at 613 (Souter, J., dissenting).

\textsuperscript{349} \textit{Id.}

\textsuperscript{350} \textit{Id.} at 586.

\textsuperscript{351} Professor Fiss has described the Rehnquist/Scalia approach as based in the capitalist ethos that personifies the state and gives it "ownership" of public money. Fiss observed that, under this view, we run the risk of allowing the First Amendment to "bec[o]me captured by the economic system." Owen Fiss, \textit{State Activism and State Censorship}, 100 Yale L.J. 2087, 2105-06 (1991).

\textsuperscript{352} \textit{See supra} notes 47-68 and accompanying text.
effect on art yet to be created, as artists who depend on, or simply desire to procure, NEA grants try to maximize their chance of success by self-censoring their artistic content. Justice Scalia's claim that these effects do not necessarily flow from the decency clause because artists can always create controversial works with their own or private funds again misses the point. The Christian students in Rosenberger also could have financed their religious newspaper with their own funds, thereby avoiding the undeniable risk that Wide Awake would be identified as a university endorsement of religion. However, in that case, the students' potential ability to equalize debate on their own nickel was irrelevant to the Court's determination that the university had a First Amendment obligation to avoid lop-sided debate in the first place. Neither should the artists' possible response to viewpoint discriminatory funding in Finley work to justify unconstitutional treatment by the state.

How, then, may the NEA choose among competing grant applicants without offending the First Amendment? Obviously, this question is far too complex for this Article to treat in more than a cursory fashion. However, I believe that the Court was incorrect in concluding that as criteria, "artistic excellence" and "artistic merit" are just as constitutionally unsound as "indecent" or "disrespectful." While merit-based criteria may be impossible to define with specificity and, as Justice Souter noted, may be used in certain instances to mask viewpoint discrimination, they are not viewpoint discriminatory on their face. Content-based notions of artistic worth, when applied by advisory panels of art experts as in the NEA context, should satisfy the First Amendment's neutrality principle by imposing a level of objectivity between the state and the arts applicant.

---

353 524 U.S. at 595-96.

354 Many other commentators have addressed this issue. See, e.g., Fiss, supra note 351, at 2100-06 (advocating that merit-based criteria in arts funding be abandoned and replaced with "effects" approach to ensure that underrepresented points of view are heard); Thomas P. Leff, The Arts: a Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan, 45 Am. U.L.Rev. 353, 407-08 (1995) (suggesting that the government subsidize the arts through tax exemptions rather than direct federal subsidies); Schauer, supra note 234 at 115-16 (proposing that institution-specific First Amendment principles be developed in arts funding context); Cleary, Eric J., Note, In Finley's Wake: Forging a Viable First Amendment Approach to the Government's Subsidization of the Arts, 68 Fordham L. Rev. 965, 1007-1010 (arguing that the NEA should be given the same First Amendment protection from state interference with its decision making as the Court has granted to schools).

355 Finley, 524 U.S. at 583-84.

356 Id. at 614 (Souter, J., dissenting).

357 For an approach to arts funding that rejects merit-based criteria to focus instead on the effect that certain grants would have on the overall breadth of public debate, see Fiss,
This comports with what Professor Smolla has called the "professionalism principle," which holds that "[d]ecisions over which arts projects to fund...are best left to the judgment of professionals in the field, and not to the micro-management of legislatures." 358 Despite the combined precedential weight of Regan, Rust and Finley, lower courts have occasionally been sensitive to claims of viewpoint discrimination in government subsidized speech outside the public forum or press contexts. 359 Recently, the Supreme Court heard oral arguments in a case involving federal limitations on the expressive activities of government-funded Legal Service Corporation lawyers, Velazquez v. Legal Services Corp. 360 The next section of the Article presents a suggested approach to Velazquez by which the Court would return some substance to the concept of viewpoint discrimination in the subsidized speech arena.

C. Legal Services Corp. v. Velazquez: Is There a Role for Viewpoint Discrimination in Government-Subsidized Speech?

Just as Congress appropriates funds to support Title X family planning clinics that provide certain medical services to the needy, Congress also supports the Legal Services Corporation ("LSC"). The LSC is a private, non-profit corporation that distributes federal funds to independent legal aid programs, which in turn supply legal assistance to the poor. 361 And just as the family planning clinics are limited regarding the types of medical care they can provide with federal monies, so, too, LSC grantees have always been constrained regarding their use of LSC funds. 362 In 1996, Congress passed a series of further restrictions, 363 which prohibited LSC lawyers from engaging in political behavior

---

358 Smolla, supra note 351, at 195-96.

359 See, e.g., The Brooklyn Inst. of Arts & Sciences v. The City of New York, 64 F. Supp. 2d 184, 205 (E.D.N.Y. 1999) (holding that mayor's decision to withhold funds appropriated to private museum after museum refused to cancel "offensive" exhibit was unconstitutional viewpoint discrimination).

360 164 F.3d 757 (2d Cir. 1999), cert. granted, 120 S. Ct. 1553 (2000).


362 See id. §§2996f(b)(1)-(10) (restricting use of LSC funds in most criminal proceedings and political activities, and prohibiting LSC grantees from engaging in litigation with respect to nontherapeutic abortion, desegregation, selective service, and military desertion).

363 The restrictions were passed as part of the appropriations bill, the Omnibus
such as lobbying,\textsuperscript{364} or representing clients in class actions,\textsuperscript{365} or engaging in litigation

Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub. L. No. 104-134 § 504, 110 Stat. 1321, 1321-53-56 (1996), which reads, in pertinent part, as follows:

None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . .
(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;
(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;
(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress of a State or local legislative body;
(5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation; . . .
(7) that initiates or participates in a class action suit; . . .
(11) that provides legal assistance for or on behalf of [certain] aliens[s];
(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . ; . . .
(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;
(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;
(17) that defends a person in a proceeding to evict the person from a public housing project if-
(A) the person has been charged with the illegal sale or distribution of a controlled substance; and
(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant.

\textsuperscript{364} See id. ¶ 504(a)(2)-(4).

\textsuperscript{365} See id. ¶ 504(a)(7).
Concerning welfare reform. Congressional debate on LSC funding made plain that certain members were outraged at the types of "liberal" cases brought by LSC lawyers and financed, at least in part, by Congress. According to Representative Dornan, it was "time to defund the left." Much the way Congress passed the decency clause to limit, rather than do away with, the NEA following the Mapplethorpe controversy, Congress enacted the LSC funding restrictions as a compromise between liberal representatives who favored continued support of the corporation, and conservative members who wanted to eliminate it because of its perceived liberal agenda. The LSC survived, but Representative Dornan's goal was widely, if not totally, achieved.

Litigation followed, as LSC-funded organizations and lawyers brave enough to risk another bite at the hand that fed them challenged the restrictions as unconstitutional violations of their First Amendment rights. LSC grantees in Legal Aid Society of Hawaii v. Legal Services Corp. argued that the restrictions were unconstitutional conditions on their right to receive federal funds. In an opinion by Justice White

---

366 See id. ¶ 504(a)(16).


369 See text accompanying note 367.

370 See David E. Rovella, Legal Aid Lawyers Roll Dice with New Lawsuit, Nat'l L. J., Feb. 10, 1997, at A6 (quoting former LSC board counsel that the funding restrictions were a "quid pro quo" with moderate Republicans in return for less substantial LSC budget cuts).


In Legal Aid Soc'y, the plaintiffs also contested the LSC restrictions as violating the equal protection and due process rights of LSC clients. 145 F. 3d at 1029.


373 Id. at 1024.
(sitting by designation), the Ninth Circuit upheld the restrictions, reasoning that they did not force the recipients to refrain from constitutionally protected speech because the forbidden activities could be pursued through unrelated affiliates.\textsuperscript{374} Justice White relied predominantly on \textit{Rust} for the proposition that when the government subsidizes an activity in furtherance of a particular policy objective, the government may insist that the funds not be used for speech that falls outside the scope of that objective.\textsuperscript{375} No unconstitutional conditions issue was presented, Justice White emphasized, because the restrictions did not limit the grantees' non-program-related speech.\textsuperscript{376}

On the opposite side of the country, LSC grantees and their clients objected to the lobbying provisions\textsuperscript{377} and the welfare reform provision\textsuperscript{378} of the funding restrictions as impermissibly viewpoint based.\textsuperscript{379} In \textit{Velazquez v. Legal Services Corp.},\textsuperscript{380} the Second Circuit upheld the lobbying provisions as subject-based limitations, because they restricted LSC grantees from lobbying to "attempt to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure . . .".\textsuperscript{381} The fact that the provisions favored "neither speech in support of legislative action nor speech opposed" to it rendered them viewpoint neutral, according to the court.\textsuperscript{382} The Second Circuit's holding on this point was firmly in line with \textit{Cammarano v. United States},\textsuperscript{383} where the Supreme Court upheld a tax code regulation

\textsuperscript{374} \textit{Id.} at 1025. Pursuant to LSC regulations implementing the restrictions, an LSC recipient could use non-federal monies for the prohibited activities only if it created a separate legal entity that was kept financially and physically apart from the recipient's federally funded operations. \textit{See} 45 C.F.R. \textsection 1610.8 (1999).

\textsuperscript{375} \textit{Legal Aid Soc'y}, 145 F. 3d at 1025.

\textsuperscript{376} \textit{Id.} at 1026.

\textsuperscript{377} OCRAA, \textsection 504(a)(2)-(4). For the text of the lobbying provisions, see \textit{supra} note 363.

\textsuperscript{378} OCRAA, \textsection 504(a)(16). For the text of the welfare reform provision, see \textit{supra} note 363.

\textsuperscript{379} \textit{Velazquez}, 164 F.3d at 767.

\textsuperscript{380} 164 F. 3d 757 (2d Cir. 1999), \textit{cert. granted} 120 S. Ct. 1553 (2000).

\textsuperscript{381} \textit{Id.} at 768 (\textit{quoting} OCRAA \textsection 504(a)(4) (emphasis added)).

\textsuperscript{382} \textit{Id.}

\textsuperscript{383} 358 U.S. 498 (1959).
that disallowed business expense deductions for lobbying expenses for the "promotion or defeat of legislation." In reaching this conclusion, the Court expressly denied that the regulation discriminated on the basis of viewpoint. According to the Court, "[n]ondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not 'aimed at the suppression of dangerous ideas.'"

With respect to the welfare reform provision, the Second Circuit determined that its prohibition on the use of LSC funds for litigation, lobbying or rulemaking "involving an effort to reform a ... welfare system" was also viewpoint neutral because it applied equally to prevent LSC participation either in support of, or in opposition to, changes in the welfare law. In his majority opinion, Judge Leval struggled a bit regarding the statutory language forbidding LSC grantees from initiating lawsuits "involving an effort to reform a... welfare system," noting that this could be interpreted to apply only to those who were trying to achieve welfare reform. However, to preserve the provision's constitutionality, Judge Leval instead opted to construe this wording to cover litigation initiated both to oppose reform as well as effect it. This interpretation of the statute is questionable at best, and even Judge Leval admitted that it involved some "linguistic strain."

Finally, the Second Circuit overturned as violative of the First Amendment the LSC restriction prohibiting recipient attorneys from representing clients in suits challenging existing welfare programs. Under the "suit-for-benefits" exception, LSC lawyers could represent persons seeking welfare benefits but only if such representation

---

384 Id. at 499-500, 505, 513.

385 Id. at 513.

386 Id. (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)).

387 OCRAA, ¶ 504(16). For the text of ¶ 504(16), see supra note 363.

388 Velazquez, 164 F.3d at 768-69.

389 OCRAA, ¶ 504(16). For the text of ¶ 504(16), see supra note 363.

390 Velazquez, 164 F. 3d at 769.

391 Id.

392 Id.

393 Id. at 771-72.
would not question the validity of current rules. Judge Leval viewed the suit-for-benefits exception as impermissibly viewpoint based because it provided legal assistance for those persons who acquiesced to the status quo, while it denied representation to those who desired to challenge the existing law. Relying on the fact that the suit-for-benefits exception interfered with political speech--speech entitled to the highest level of First Amendment protection--to distinguish the case from Rust, Judge Leval applied a strict scrutiny analysis to invalidate the suit-for-benefits provision.

Dissenting with respect to the court's suit-for-benefits holding, Judge Jacobs applied Rust and Finley to conclude that the government may engage in viewpoint discrimination when making financial grants. Viewpoint discrimination is part and parcel, Judge Jacobs argued, of the government's right to determine the scope of its funded programs. According to Judge Jacobs, the First Amendment only prohibits viewpoint discrimination in funding decisions when the government creates a public forum for private speech, as it did in Rosenberger. Here, Judge Jacobs saw the LSC grantees as government contractors just as the Title X health workers in Rust were government agents; therefore, the statutory restrictions did not interfere with any private speech.

Given that the Supreme Court in Rust and Finley recited that when the government distributes its largesse, it "may not aim at the suppression of dangerous ideas," and then upheld statutes that did exactly that, it is understandable why Judge Jacobs concluded that the First Amendment viewpoint discrimination prohibition posed

394 OCRAA, ¶ 504(16). For the text of ¶ 504(16), see supra note 363.

395 See Velazquez, 164 F.3d at 769-70 ("It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules.").

396 Id. at 770-72. Judge Leval also distinguished Finley as involving a viewpoint discriminatory factor that the NEA was to "consider" in funding decisions. By comparison, the suit-for-benefits exception was an absolute prohibition on engaging in the forbidden speech activities. Id. at 772.

397 Id. at 774, 776 (Jacobs, J., dissenting).

398 Id. at 774.

399 Id. at 774, 776.

400 Id. at 774.

no bar in government funding decisions outside the public forum. Unfortunately, *Rust* stands for one extreme—that the government can discriminate by viewpoint when it subsidizes speech—and *Rosenberger* stands for the other—that the government cannot discriminate even by subject matter in a limited public forum. No wonder the Court tried to distance itself from the *Rust* holding by labeling it as a government speech case; and no wonder the Court has been unwilling to extend *Rosenberger* to other government subsidy situations.

Now that the Court will decide *Velazquez*, it has an opportunity to extricate itself from this predicament. To do so, the Court must face up to the question of whether the First Amendment imposes any limits on the government when it allocates selective subsidies. The answer should be that it does, otherwise nothing short of an election can prevent Congress from funding art only if it is patriotic, or financing historical studies only if they exalt the existing regime. The viewpoint neutrality principle can provide the proper First Amendment constraint on government in awarding selective subsidies, if that principle is applied in a substantive way.

The Court avoided meaningful inquiry regarding viewpoint discrimination in *Finley* by relying on an untenable "advisory factor" analysis, and in *Rust* by turning private speakers into government agents. In *Velazquez*, the LSC restrictions are absolute prohibitions against certain activities by LSC grantees, not mere admonishments; therefore, the Court's *Finley* approach is inapplicable. Neither should the Court convert the LSC grantees into government agents without First Amendment rights just because they receive federal funding. If every grantee becomes a government speaker upon being awarded a grant, viewpoint discrimination will remain an empty shell in the subsidy context. The "government speech" argument can be applied to all grant recipients, and so, by itself, will never serve as a limit to government discretion. Instead, the Court should presume that grantees retain their private identity, unless the government can show a true agency relationship (such as a subcontractor would have, for example) has been established. The burden of proof here should be placed on the government because of the serious, manipulatory effects that government speech can have on public discourse when it is disguised as private expression. In *Velazquez*, the Court faces no such difficult determination, because the Legal Services Act is plain on this point. It states that "officers and employees of the [LSC] shall not be considered officers or employees, and the [LSC] shall not be considered a department, agency or instrumentality, of the Federal Government." Accordingly, the Court should consider

---

402 164 F.3d 757 (2d Cir. 1999), *cert. granted* 120 S. Ct. 1553 (2000).


404 The Court clarified that *Rust* was a case involving government speech in its decision in *Rosenberger v. Rector & Visitors of the Univ. of Va.* 515 U.S. 819, 833 (1995). See text accompanying notes 319-21.

the LSC grantees to be private speakers.

Next, the Court in *Velazquez* will have to decide how to draw the boundaries of the controversy to which the LSC restrictions apply, so as to determine what it will recognize as a "viewpoint." The Court here has two choices. First, it could view each restriction as a distinct subject matter, to which the restriction must apply in a neutral way. This would resemble the Court's approach in the flag-burning cases, where treatment of the flag was seen as the operative subject category. Because the flag desecration laws allowed respectful treatment of the flag but criminalized disrespectful treatment, the laws discriminated by viewpoint.\(^{406}\) This is how the Second Circuit analyzed the lobbying provisions in *Velazquez*,\(^ {407}\) and how the Court reviewed the lobbying restrictions in *Cammarano*.\(^ {408}\) In both instances, the lobbying provisions were seen as viewpoint neutral because they applied to all lobbying on any side of an issue.

(For ease of reference, I will refer to this understanding of viewpoint discrimination as the "substantive" definition.)

The second way that the Court could delineate the underlying controversy in *Velazquez* would be to consider the LSC restrictions as limitations on political speech of the LSC grantees and their clients. In this case, the restrictions taken together could be described as suppressing the viewpoint of a particular speaker class--the poor--on issues of public concern.\(^ {409}\) Using this analysis, the fact that the lobbying exemptions prohibited lobbying both for and against all initiatives would be beside the point. In reality, the statute would prevent only the kind of lobbying that LSC grantees would desire to engage in to advance their particular perspective. This approach corresponds to the Court's expansive definition of viewpoint in *Rosenberger*,\(^ {410}\) where the Court held that the opposite of a religious viewpoint was not just an atheistic perspective, but also the world of secular speech.

The obvious drawback to the *Rosenberger* approach is that Congress would be unable to impose any limits on the spending of LSC funds, because all restrictions would necessarily work to undermine the perspective of the poor. For example, the statutory

---

\(^{406}\) See text accompanying notes 51-61.

\(^{407}\) See text accompanying notes 380-82.

\(^{408}\) See text accompanying notes 383-86.

\(^{409}\) For the argument that all LSC restrictions that can be considered "political" are viewpoint discriminatory because they suppress the perspective of the poor, see Roth, *supra* note 14, at 110, 119-21. Ms. Roth describes the political restrictions as those that prohibit class actions and political reform efforts. *Id.* at 110. However, she does not explain why the other restrictions would not also discriminate by viewpoint under this analysis.

restriction forbidding LSC lawyers from undertaking most criminal representation\textsuperscript{411} certainly could be seen as denying the needy the chance to present their views in the criminal justice system. This extensive reading of what constitutes a viewpoint fails to consider that Congress has a legitimate interest in designing assistance programs as part of the work of governing. Any definition of viewpoint discrimination that encompasses all the speech of the subject class is too broad to be given meaningful application. While the \textit{Rust} approach gives the government too much discretion to condition its subsidies, the broad, \textit{Rosenberger} understanding of viewpoint gives the state no ability to pursue legislative goals at all.

The Court in \textit{Velazquez}, then, should follow the substantive approach to viewpoint discrimination, and examine the lobbying provisions and the welfare reform provision to see if they apply neutrally to viewpoints related to those subject areas. Following the \textit{Cammarano}\textsuperscript{412} lead, the Court should uphold the lobbying restrictions because they apply to preclude lobbying on any side of any issue, as discussed above. Under this approach, the suit-for-benefits exception would be unconstitutional because it penalizes only those welfare recipients who voice dissatisfaction with the existing system. As a result, the government appears to be insulating itself from criticism while denying needy citizens access to the legal help they need to enforce their substantive rights.

What about the argument that the LSC restrictions should be invalidated as the result of invidious, viewpoint discriminatory Congressional motives to prevent LSC lawyers from advancing liberal causes?\textsuperscript{413} The crucial issue here, it seems to me, is whether Congress implemented its discriminatory intent in a viewpoint neutral or viewpoint discriminatory manner. Recall the school district in \textit{Perry}\textsuperscript{414} that allowed the official teachers' union, but not a competing union, access to the teachers' mailboxes. Had the school district decided to suppress the competing union's speech on labor issues by prohibiting all unions from the mailbox system, rather than just one, no viewpoint discrimination claim would have been proper. By the same token, if Congress wanted to eliminate NEA funding for offensive art, it could have decided to fund no art. Although this solution would have displeased arts supporters, it would have avoided the viewpoint discrimination problem. So, too, in \textit{R.A.V.},\textsuperscript{415} St. Paul could have enacted a law

\begin{itemize}
\item \textsuperscript{411} 42 U.S.C. \textsection 2996(f)(2)(1994).
\item \textsuperscript{412} Cammarano v. United States, 358 U.S. 498 (1959). \textit{See} text accompanying notes 383-86.
\item \textsuperscript{413} \textit{See} text accompanying notes 367-70.
\item \textsuperscript{414} Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983). \textit{See} text accompanying notes 193-200.
\end{itemize}
prohibiting all hate speech, rather than a law that criminalized only fighting words expressed by racial bigots. Invidious intent may be some evidence of viewpoint discrimination, but should not require such a finding without at least the threat of discriminatory application.

Nevertheless, viewpoint discrimination would exist if Congress phrased in a neutral manner a restriction that could only have a one-way effect. By this, I am not referring to a restriction that has merely a disparate impact on a viewpoint, because many LSC restrictions may affect certain points of view more than others by nature of the speaker class served by the LSC. Rather, I mean that the restriction would generally close off representation on one side of a debate despite the provision's universal appearance. An example will help clarify the point. In 1977, a bill was introduced in the House of Representatives that would have prohibited LSC grantees from providing legal assistance regarding "disputes or controversies on the issue of homosexuality or 'so-called gay rights."[^416] The bill no doubt was the product of discriminatory intent; however, on its face it appeared to prevent LSC grantees from legal representation with either a pro- or anti-gay rights stance. However, had the provision been enacted, its likely effect would have been to eliminate only those causes of actions where LSC lawyers tried to enforce the rights of homosexuals. The "other side" in a gay rights case would not categorize the legal issue in those terms, but instead would describe it with respect to "ordinary" law. For example, if an LSC lawyer was asked to represent an entrepreneur who fired a gay employee, the entrepreneur's case would be considered as involving employment law and not gay rights. Only when the representation involves the dismissed employee's case does the issue become one of gay rights. If my analysis is correct, the restriction would have unlawfully discriminated on the basis of viewpoint.

In *Velazquez*, the welfare provision that forbids LSC grantees from initiating lawsuits "involving an effort to reform a ... welfare system"[^417] presents this question of neutral appearance versus one-way effect. Under the substantive viewpoint discrimination approach, the Court must determine whether the provision will work to close off legal representation only to those LSC clients who attempt to challenge the status quo. This appears to be the case, as Judge Leval's interpretation that someone who initiates a lawsuit to oppose welfare reform would be covered by the provision seems too labored to be reasonable.

Several commentators have suggested that the Court enlarge the public forum doctrine to include government subsidy programs in general, or the LSC or litigation in particular.[^418] The reason for this, of course, would be so that the Court would then apply


[^417]: OCRAA, ¶ 504(16).

[^418]: See, e.g., Gey, *supra* note 14, at 1596-1610 (suggesting that the public forum doctrine be extended to include government subsidy programs); Roth, *supra* note 14, at 139, 141 (arguing that the LSC itself is a public forum so that the LSC restrictions constitute viewpoint discrimination); Megan Elizabeth Lewis, Note, *Subsidized Speech*
its more stringent, public forum definition of viewpoint discrimination to the government subsidy context, rather than the ineffective Rust standard. However, as was demonstrated in Part III of this Article, the public forum doctrine involves complicated questions of forum categorization. The government has virtually complete discretion to determine whether a particular speech location is a limited forum, where the viewpoint-sensitive Rosenberger standard will be applied, or a nonpublic forum, where viewpoint discrimination is basically ignored. Consequently, I prefer a simpler, more direct approach that assures the desired result: the Court should forbid substantive viewpoint discrimination when the government subsidizes private speech.

In summary, the Court has had difficulty determining whether the First Amendment's prohibition on viewpoint discrimination should apply with full force when the government subsidizes private speech. In its decisions involving both private and public media outlets, the Court has held that the government may not distribute selective subsidies (often in the form of tax exemptions) in a viewpoint discriminatory way. However, in cases involving non-media grantees, the Court has applied a "greater-includes-the-less" rationale, reasoning that because the state has no obligation to fund any speech, it can limit its support of expressive activities in what otherwise would be a viewpoint discriminatory manner. Although the Court continues to recite that the government may not distribute its funds to "aim at the suppression of dangerous ideas," it has overlooked flagrant viewpoint discriminatory speech restrictions in government-funded health services and with respect to state-supported art. The Court will have an opportunity in Velazquez to reconsider whether the First Amendment should play any role in government allocation of selective subsidies. By applying a substantive viewpoint

---

*and the Legal Services Corporation: The Constitutionality of Defunding Constitutional Challenges to the Welfare System, 74 N.Y.U.L. Rev. 1178, 1205-08 (characterizing litigation as a public forum so that LSC restrictions on welfare reform litigation constitute viewpoint discrimination).*

419 See Gey, supra note 14, at 1604 (commenting that if a public subsidy program were deemed an instrumentality of communication, it would be subject to the "interference standard"; meaning the government would be prohibited from imposing any restrictions on the private expressive use of the public subsidy unless the expression would significantly and directly interfere with legitimate, nonexpressive governmental operation); Roth, supra note 14, at 141, (stating that in the event the LSC is recognized as a public forum, under Rosenberger, content-based restrictions will have to be consistent with the program's general purpose and "not represent[ative of] hidden viewpoint discrimination"); Lewis, supra note 418, at 1208 (arguing that welfare-related litigation should be considered similar to a public forum to prevent the government from both skewing debate and from selectively insulating itself from constitutionality challenges under Rosenberger).

V. Conclusion

In a nutshell, the Supreme Court's application of the First Amendment's long-standing prohibition on viewpoint discrimination can be summarized in terms of the three R's: R.A.V., Rosenberger, and Rust. Taken together, these cases establish that the Court will not tolerate viewpoint discrimination with respect to a direct restraint on speech, or in what it deems to be a limited public forum, but will overlook significant suppression of disfavored messages in nonpublic forums or selective subsidy programs. Ironically, the Court has applied significantly different standards of viewpoint discrimination in these various speech contexts, all the while protesting that the First Amendment never allows the government to squelch dangerous ideas.

The result of the Court's context-sensitive notions of viewpoint discrimination has not been benign. Consider the following hypothetical. Imagine that the government was ideologically opposed to divorce, and therefore (a) denied second-class mail privileges to publications that discussed divorce in a favorable manner; (b) refused activity fee funding to a divorced students association at the state university, while providing monetary support to the married students organization; (c) prohibited a divorced-parents support group from participating in a federal charity drive, while allowing access to an association devoted to strengthening the traditional family; (d) forbid federally funded mental health care professionals from discussing divorce as an option in marital counseling situations, even when those situations involved abusive relationships; and (e) rejected an NEA grant application from a performance artist whose work expressed the horror of her failed marriage in a way deemed offensive and disrespectful of American values.

Which of these listed speech restrictions will the government be free to implement? Under existing precedents, we can predict that only (a) and (b)--the mailing subsidy denial and the refusal to fund the divorced students association--would violate the First Amendment's viewpoint neutrality principle. Pursuant to the Court's nonpublic forum and subsidized speech cases, the other restrictions would likely be considered permissible exercises in government boundary drawing. According to those decisions, the government need not open its facilities or provide funding for any private speech; therefore, it may impose whatever limits it desires to restrict the scope of expressive activities to fit its policy objectives.

Which of the listed speech restrictions should the government be free to implement? This Article has argued that they would all violate the First Amendment.

---

421 This hypothetical was inspired by Professor Cole. See Cole, supra note 281 at 747.
The rule against viewpoint discrimination is intended to guard against government manipulation of public discourse, whether achieved through criminal sanctions, monetary inducements, or the elimination of a particular perspective from the marketplace. By skewing debate through the exercise of viewpoint preferences, the government encroaches on established First Amendment values regarding the search for truth, proper democratic functioning, and citizens' autonomy interests. These interests are affected whether the government restricts private speech negatively, through direct regulation, or affirmatively, through selective subsidies or selective access to discretionary forum categories. No strong constitutional distinction has been advanced by the Court to justify the differing standards of viewpoint discrimination that it currently applies.

The Court will have a chance either to resuscitate, or nail the coffin shut on, viewpoint discrimination in government subsidized speech when it decides Velazquez v. Legal Service Corp. If the viewpoint neutrality mandate is to retain any meaning in government funding decisions, the Court in that case must reject the Rust approach and apply what I have called a substantive definition of viewpoint discrimination. In the modern regulatory state, where the government governs as much by affirmatively implementing benefit programs as it does by negatively proscribing conduct, First Amendment interests would be fatally compromised by the opposite result.

---

422 Professor Karst has listed these three values as underlying purposes of the First Amendment. See Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L.Rev. 20, 23 (1975).

423 164 F.3d 757 (2d Cir. 1999), cert. granted, 120 S. Ct. 1553 (2000).

424 See Fiss, supra note 351, at 2087 (stating that government regulation in the twentieth century switched from "negative to affirmative modalities").