SUBSIDIZED SPEECH AND THE LEGAL SERVICES CORPORATION: THE CONSTITUTIONALITY OF DEFUNDING CONSTITUTIONAL CHALLENGES TO THE WELFARE SYSTEM

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In 1996, Congress passed legislation restricting lawyers receiving federal funds through the Legal Services Corporation from undertaking litigation challenging the constitutionality of welfare laws. Two circuits of the court of appeals have since rendered conflicting decisions on the constitutionality of this restriction. In this Note, Megan Lewis argues that this constraint on Legal Services grantees constitutes impermissible viewpoint discrimination under the First Amendment.

Lewis's argument is grounded on the principle that the Constitution limits the government's power to restrict speech that it subsidizes. She suggests that the public forum doctrine, when analyzed in light of the Supreme Court's decisions in Rosenberger v. Rector & Visitors of the University of Virginia *and* Rust v. Sullivan, *provides a framework for distinguishing between permissible and impermissible restrictions on Legal Services grantees. Building on the terminology of Professor Robert Post, Lewis asserts that Legal Services lawyers act independently when they serve their clients, rather than as instrumentalities of the state, and hence do not fall within the government's managerial control. Moreover, the restriction infringes on their clients' First Amendment right to participate in litigation, itself a protected public forum. Lewis concludes that the restriction impermissibly interferes with protected speech and skews the debate within the public forum created by the subsidy for Legal Services.*

INTRODUCTION

The Legal Services Corporation (LSC) is a private, nonprofit corporation that distributes federal funds to various independent legal programs providing legal services to the poor.[1] The purpose of LSC is to "provide equal access to the system of justice in our Nation for individuals who seek redress of grievances."[2]

Since LSC's inception, Congress has limited the scope of activities in which LSC grantees may participate.[3] In the Omnibus Consoli-

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1 Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996-2996(l) (1994).

2 Id. § 2996(1).

3 See id. § 2996f(b)(7)-(10) (prohibiting grantees from engaging in litigation relating to abortion, desegregation, selective service, and military desertion); see also Clifford M. Greene et al., Note, Depoliticizing Legal Aid: A Constitutional Analysis of the Legal

dated Rescissions and Appropriations Act of 1996 (OCRAA),[4] Congress reduced funding for LSC by thirty percent and substantially expanded the number of restrictions on grantees.[5] OCRAA imposed nineteen restrictions on recipients of LSC funds and mandated that "[n]one of the funds appropriated in the Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity" engaging in the restricted activities.[6]

LSC recipients have filed two lawsuits alleging that the new restrictions violate the First Amendment, and both the Second and Ninth Circuits have rendered opinions on their constitutionality.[7] In *Legal Aid Society v. Legal Services Corp.*, the Ninth Circuit rejected this challenge,[8] while in *Velazquez v. Legal Services Corp.*, the Second Circuit held that one of the new restrictions—prohibiting challenges to the validity of a welfare law—violates the First Amendment.[9]

This Note focuses on the constitutionality of the regulation restricting LSC involvement in welfare reform litigation, in particular

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Services Corporation Act, 61 Cornell L. Rev. 734, 736-39 (1976) (noting that 1974 statute forbade Legal Services Corporation (LSC) offices from becoming involved in any form of political organizing or lobbying).

4 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 [hereinafter OCRAA]. These restrictions are incorporated in the 1997 appropriations bill by reference. See Omnibus Consolidated Rescissions and Appropriations Act of 1997 § 502(a), Pub. L. 104-208, 110 Stat. 3009.

5 See OCRAA § 504. The restrictions prohibit: (1) advocating or opposing any reapportionment of a legislative, judicial or elective district, see id. § 504(a)(1); (2) influencing the "issuance, amendment, or revocation of any executive order," id. § 504(a)(2); (3) "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency," id. § 504(a)(3); (4) attempting "to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative . . . of the Congress or a State or local legislative body," id. § 504(a)(4); (5) initiating or participating in a class action lawsuit, see id. § 504(a)(7); (6) representing certain aliens, see id. § 504(a)(11); (7) "conduct[ing] a training program for the purpose of advocating a particular public policy or encouraging a political activity," id. § 504(a)(12); (8) claiming or collecting attorneys' fees, see id. § 504(a)(13); (9) "participat[ing] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison," id. § 504(a)(15); (10) representing individuals allegedly engaged in illegal drug activity in public housing eviction proceedings, see id. § 504(a)(16); and (11) litigating or lobbying in an effort to reform the federal or state welfare law or systems, see id. § 504(a)(16).

6 OCRAA § 504(a).

7 See Velazquez v. Legal Servs. Corp., 164 F.3d 757, 773 (2d Cir. 1999) (upholding constitutionality of restrictions except for restriction that does not permit grantee to represent clients seeking specific relief from welfare agency if relief involves effort to amend or otherwise challenge existing law); Legal Aid Soc'y v. Legal Servs. Corp., 145 F.3d 1017, 1031 (9th Cir. 1998) (upholding constitutionality of restrictions against First Amendment challenge); see also Varshavsky v. Geller, N.Y. L.J., Dec. 31, 1996, at 22 (N.Y. Sup. Ct. Dec. 31, 1996) (holding that restrictions are constitutionally invalid under First Amendment).

8 *Legal Aid Soc'y*, 145 F.2d at 1031.

9 *Velazquez*, 164 F.3d at 773.

the "suit-for-benefits" exception—the same exception held unconstitutional by the Second Circuit.[10] This restriction prohibits LSC recipients from participating in "[l]itigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system."[11] While LSC recipients are permitted to represent an individual "seeking specific relief from a welfare agency," such representation is permissible only where "relief does not involve an effort to amend or otherwise challenge existing law."[12] These regulations prohibit constitutional and statutory challenges by LSC recipients to the validity of the welfare system.

This Note argues that the prohibition on Legal Services lawyers' ability to bring constitutional challenges to the welfare system constitutes impermissible viewpoint discrimination in contravention of the First Amendment: While recent Supreme Court decisions have permitted the government to attach significant conditions to the receipt of government subsidies, there are nonetheless constitutional limitations on the state's power to restrict "subsidized speech."[13] This Note will present a framework for understanding these limitations and argue that the suit-for-benefits exception violates these constitutional principles.

Part I discusses the jurisprudence of subsidized speech. Part I.A demonstrates that the Court's subsidized speech jurisprudence is unclear and that restrictions on subsidized speech cannot be analyzed simply as if they were direct restraints on speech. Part I.B provides a doctrinal framework for understanding the jurisprudence of subsidized speech. This Part also argues that the *Velazquez* majority, despite reaching the correct result, did not provide a satisfactory account of the relationship between subsidized speech and the First Amendment's protection of expressive activity.

Part II applies the doctrinal analysis developed in Part I and argues that the suit-for-benefits exception is constitutionally invalid for two reasons. First, LSC lawyers and their clients share a relationship that, once formed, is constitutionally inappropriate for interference by the state.[14] Second, litigation is a public forum—a forum designated by the government for expressive activity—within which the state may

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[10] Id. at 769.

[11] 42 C.F.R. § 1639.3(a) (1997).

[12] Id. § 1639.4.

[13] "Subsidized speech" is a term coined by Professor Robert Post to describe speech that is actually subsidized by the state. See Robert C. Post, Subsidized Speech, 106 Yale L.J. 151, 152 (1996). Subsidized speech is distinct from speech by public employees or state-subsidized entities in their individual or personal capacity.

[14] See infra Part II.B.

not discriminate on the basis of viewpoint.[15] This Part argues that when the Court's jurisprudence is properly understood, the suit-for-benefits exception fits easily within a number of exceptions carved out for protecting subsidized speech.

I
UNDERSTANDING SUBSIDIZED SPEECH

Subsidized speech presents a paradox: If the government is not constitutionally obligated to provide a given subsidy, why should the First Amendment constrain the restrictions placed on the use of the subsidy? After all, the Constitution does not require the government to fund the exercise of constitutionally protected expression.[16] The government legitimately may wish to and is constitutionally permitted to control how government money is spent.[17] Yet in doing so the government may significantly interfere with the free expression of private citizens. State-subsidized speech—expressive activity funded by the government—often creates a conflict between the First Amendment's vigorous protection of private speech from state interference and the government's need to effectuate its goals via the subsidy. In order to consider whether the suit-for-benefits exception is constitutionally permissible, it is first necessary to assess how the Court resolves this paradox.

A. The Difficulties of Subsidized Speech and the First Amendment

Part A.1 argues that the unconstitutional conditions doctrine must be discarded as an analytic model for subsidized speech. Part A.2 presents the major cases constituting the Court's subsidized speech jurisprudence and demonstrates that the Court's jurisprudence is in disarray.

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[15] See infra Part II.C.

[16] For example, the Court has refused to require the government to provide funding for civil legal services for the indigent. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that there is no right to counsel except for first appeal as of right in criminal cases); cf. Maher v. Roe, 432 U.S. 464, 474 (1977) (refusing to require the government to provide funding for abortion even in context of government-funded medical services).

[17] See National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998) ("[A]lthough the First Amendment certainly has application in the subsidy context, we note 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.... Congress has wide latitude to set spending priorities."); see also Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (noting that state has interests in regulating speech of its employees that differ significantly from its interests in regulating speech of public at large).

1. *The Failure of the Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine provides that "even though a person has no 'right' to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[18] The plaintiffs in both *Legal Aid Society* and *Velazquez* relied, in part, on the unconstitutional conditions doctrine to argue that the new LSC restrictions, including the suit-for-benefits exception, are unconstitutional.[19] Yet this doctrine, a vague constitutional concept that has achieved little clarity since its inception,[20] provides no guidance to the controversies over subsidized speech. Both litigants[21] and commentators[22] have failed to recognize

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[18] Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that public school may not condition public employment on forfeiture of political expression).

[19] See Velazquez v. Legal Servs. Corp., 164 F.3d 757, 765-67 (2d Cir. 1999) (rejecting plaintiffs' argument that restrictions placed unconstitutional conditions on exercise of constitutionally protected activity); Legal Aid Soc'y v. Legal Servs. Corp., 145 F.3d 1017, 1027 (9th Cir. 1998) (rejecting unconstitutional conditions challenge despite fact that new regulations make it more difficult to engage in restricted activities). As discussed in further detail below, see infra text accompanying note 32, at an earlier stage of litigation the plaintiffs in *Legal Aid Society v. Legal Services Corp.* did successfully challenge the application of the restrictions to the use of nonfederal funds. 961 F. Supp. 1402, 1421 (D. Haw. 1997) (enjoining application of restrictions on this basis). In response to this decision, the LSC revised the regulations so that the restrictions no longer applied to the use of nonfederal funds, and the District Court upheld the revised regulations. See Legal Aid Soc'y v. Legal Servs. Corp., 981 F. Supp. 1288, 1294 (D. Haw. 1997), aff'd in relevant part in 145 F.3d 1017, 1020 (9th Cir. 1998).

[20] For critical commentary on the unconstitutional conditions doctrine, see Richard A. Epstein, The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 6-7 (1988) (arguing that unconstitutional conditions doctrine lacks coherence); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1416 (1989) (same); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 594-95 (1990) (arguing that unconstitutional conditions doctrine should be abandoned).

[21] See supra note 19.

[22] For examples of commentators seeking to understand the jurisprudence of subsidized speech with reference to the unconstitutional conditions doctrine, see Epstein, supra note 20, at 15 (suggesting that doctrine can work as second-best alternative); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1352 (1984) (attempting to reformulate doctrine by considering appropriate baseline from which to measure coercive effects of selective subsidization); Sullivan, supra note 20, at 1490 (reformulating doctrine to consider whether subsidy in question skews distribution of power between government and rights holders); see also Post, supra note 13, at 154-58, 169 (proposing alternative to doctrine but failing to recognize fundamental principle that doctrine does not protect subsidized speech). One student note has implicitly made this distinction, limiting its discussion of the doctrine to instances in which the state has sought to restrict the use of nonfederal funds. See Jessica A. Roth, Note, 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, 128 (1998).

that the Court's jurisprudence implicitly, but firmly, distinguishes between cases of subsidized speech and those in which the government conditions a benefit on the forfeiture of expression *unrelated* to the subsidy itself. The Court has never relied on this doctrine to invalidate restrictions on subsidized speech.

The unconstitutional conditions doctrine holds that the government may not indirectly proscribe the exercise of constitutional rights, or coerce the forfeiture of such rights, by conditioning a benefit on their relinquishment.[23] The doctrine prohibits the government from doing indirectly, via selective subsidization, what it could not do directly: prohibit the exercise of protected expression.[24] In *Speiser v. Randall*,[25] a paradigmatic unconstitutional conditions case, federal tax regulations required individuals seeking a veterans' tax exemption to sign an oath of loyalty to the government.[26] The Court found that the oath was an unconstitutional condition on the provision of a government subsidy.[27] Because the government could not directly require such an oath, it could not require the oath as a condition of receiving a benefit.[28]

In protecting the First Amendment rights of public employees, the Court has also relied on the unconstitutional conditions doctrine to invalidate restrictions on employee expression. In *Pickering v. Board of Education*,[29] the Court invalidated a school district's decision to fire a teacher who wrote a letter of complaint to the board of education, criticizing both the board and the district superintendent of

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[23] See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that government "may not deny a benefit . . . on a basis that infringes . . . constitutionally protected interests—especially, [the] interest in freedom of speech"); Speiser v. Randall, 357 U.S. 513, 526 (1958) (noting that allowing government to condition tax exemptions on loyalty oath would allow government to "produce a result which [it] could not command directly"); see also Epstein, supra note 20, at 6-7 (defining doctrine as holding "that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights").

[24] See Sullivan, supra note 20, at 1415 (arguing that unconstitutional conditions doctrine holds "that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether").

[25] 357 U.S. 513 (1958).

[26] See id. at 515 (detailing oath requirement).

[27] See id. at 529 (conceding validity of restraint on unlawful activity but finding that state could not require oath as condition for obtaining tax exemption).

[28] For examples of other similar cases see Keyishian v. Board of Regents, 385 U.S. 589, 605-10 (1967) (invalidating New York statutes barring state employment on basis of membership in "subversive" organizations); Wieman v. Updegraff, 344 U.S. 183, 190-92 (1952) (holding that state could not require employees to establish their loyalty by taking oath denying past affiliation with Communist Party).

[29] 391 U.S. 563 (1968).

schools.[30] The district had conditioned the teacher's employment on the forfeiture of his right to express this criticism, even outside of the classroom. The Court held that the First Amendment shielded the teacher's speech from this condition, noting that he spoke as a "member of the general public" and not as a public employee.[31]

Although the issues are often confused, neither *Speiser* and its progeny nor the public employee speech cases are cases of subsidized speech—that is, cases in which the speech itself is facilitated by government subsidy. Instead, the unconstitutional conditions doctrine protected the litigants as private citizens. Similarly, the unconstitutional conditions doctrine was used successfully in challenging the application of the LSC restrictions to the use of nonfederal funds.[32] Where the protected activity requires the use of government funds, the doctrine has provided no shelter whatsoever.

In *Regan v. Taxation with Representation*,[33] the Court upheld a law conditioning tax exemptions on a nonprofit organization's agreement not to use such funds for lobbying.[34] The government subsidy thus was conditioned on the recipient's forfeiture of a constitutionally protected expression—lobbying. While the government could not have required that the recipients forgo lobbying funded from other sources, the government was not obligated to fund lobbying activity.[35] Lobbying subsidized by federal funds is outside the purview of the unconstitutional conditions doctrine.[36]

Likewise, the Court only protects public employee speech when it occurs beyond the scope of the employee's official capacity. In *Rankin v. McPherson*,[37] the Court held that First Amendment analysis in public employee speech cases depends on whether the expression that led to the termination of the employee interfered with "the effective functioning of the public employer's enterprise."[38] In

30 See id. at 566 (describing letter and resulting dismissal).

31 Id. at 574; see also Perry v. Sindermann, 408 U.S. at 596, 597-98 (striking down restriction on professor's speech outside classroom where he spoke as private citizen and not as public employee).

32 See Legal Aid Society v. Legal Servs. Corp., 961 F. Supp. 1402, 1421 (D. Haw. 1997); see also Rust v. Sullivan, 500 U.S. 173, 197 (1991) (noting that "'unconstitutional conditions' cases" only arise where "[g]overnment has placed a condition on the *recipient* of the subsidy rather than on a particular program or service").

33 461 U.S. 540 (1983).

34 See id. at 550-51.

35 See id. at 551. Had the government conditioned the tax exemption on the forfeiture of lobbying activity altogether, the Court presumably would have viewed the case as one in which Congress conditioned a benefit on the forfeiture of expression unrelated to the subsidy itself.

36 See id. at 550-51 (noting power of Congress to withhold subsidy).

37 483 U.S. 378 (1987).

38 Id. at 388.

Rankin, the plaintiff was a government clerk whose duties entailed typing data from court papers into a computer.[39] Upon learning of the assassination attempt against President Reagan in 1981, she said to a coworker, "If they go for him again, I hope they get him."[40] The Court found that this statement in no way interfered with the "effective" functioning of the government and that Rankin's speech was protected by the First Amendment.[41]

By contrast, in *Connick v. Myers*,[42] the government was constitutionally permitted to terminate the plaintiff on the grounds that she circulated a questionnaire to her coworkers concerning office policy.[43] The Court found that her employer "reasonably believed [the questionnaire] would disrupt the office, undermine [the employer's] authority, and destroy close working relationships."[44] Restrictions on the state's ability to control expression do not extend to employees' speech in their capacity as public employees or within the scope of their employment.

This understanding of the limited function of the unconstitutional conditions doctrine accords with the Court's holding in *FCC v. League of Women Voters*,[45] one of the few recent cases in which the Court relied explicitly on the unconstitutional conditions doctrine to invalidate congressional legislation. In *FCC*, the Court struck down a federal law banning editorializing by noncommercial broadcasting stations that receive grants from the Corporation for Public Broadcasting, a federally funded entity.[46] The noncommercial broadcasting stations are largely funded by other sources, and the Court objected to the fact that the regulation would coerce the forfeiture of constitutionally protected expression subsidized by nonfederal funds.[47] Had Congress allowed federally funded broadcasters to editorialize with

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39 See id. at 380-81.

40 Id. at 381.

41 Id. at 391 (rejecting government's concern that employee's statement indicated that she was untrustworthy).

42 461 U.S. 138 (1983).

43 See id. at 141 (1983) (describing employer's view of plaintiff's questionnaire as "an act of insubordination").

44 Id. at 154.

45 468 U.S. 364 (1984).

46 See id. at 380-402 (finding interests asserted by government insufficient to support prohibition on editorializing).

47 See id. at 400-01 (noting that even stations receiving one percent of their overall income from federal grants would be "barred absolutely from all editorializing").

nonfederal funds, the regulation presumably would have been upheld as it applied to the use of federal funds.[48]

It is understandable that in seeking to limit the government's control over speech, litigants have turned to the unconstitutional conditions doctrine. While its boundaries have never been clearly delineated, its incantation that "government cannot do indirectly what it could not do directly" promises to offer more protection than it has ever delivered. In protecting subsidized speech, however, the Court has relied not on the unconstitutional conditions doctrine but on other aspects of First Amendment jurisprudence.

2. *The Confusion over Subsidized Speech*

Despite the fact that the unconstitutional conditions doctrine does not provide protection to subsidized speech, other constitutional principles do regulate the government's ability to control the speech it funds. The Court has repeatedly emphasized that the First Amendment's general prohibition on viewpoint discrimination[49] applies to subsidized speech: Where the government has chosen selectively to provide or withdraw funding in order to advance one viewpoint and silence competing views, the government has contravened the First Amendment.[50]

Viewpoint-based discrimination singles out particular ideas for suppression and disadvantages the speaker's substantive message. For example, in *Tinker v. Des Moines Independent Community School District*,[51] the Court held that under the First Amendment a school could not punish students who wore black armbands to publicize their objection to the Vietnam War.[52] The school's action against the students offended the First Amendment because it sought to suppress

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[48] See id. at 400 (explaining that revised version of statute that banned editorializing by federally funded broadcaster while permitting use of station for editorializing with nonfederal funds would be permitted).

[49] See infra notes 116-20 and accompanying text for discussion of content discrimination.

[50] See National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2178 (1998) (reiterating that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas'" (quoting Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983) (alteration in original) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958) (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)))))); Rust v. Sullivan, 500 U.S. 173, 192-94 (1991) (upholding principle that government may not place conditions on receipt of federal subsidies so as to suppress dangerous ideas).

[51] 393 U.S. 503 (1969).

[52] See id. at 514 (stating that "Constitution does not permit officials of the State to deny [this] form of expression").

one particular viewpoint.[53] Had the school acted pursuant to a dress code that applied equally to all students, for the purpose of maintaining decorum and discipline, the prohibition on armbands would not have constituted viewpoint discrimination.[54]

The First Amendment's prohibition against viewpoint discrimination likewise restricts the state's ability to control subsidized speech. In *Regan*, the Court explicitly held that the First Amendment forbids the state to "discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas."'"[55] The Court upheld a federal law banning tax exemptions for organizations engaged in lobbying and noted that Congress may exempt particular charitable groups from the lobbying ban.[56] But the Court found "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect."[57]

Despite such pronouncements, however, the Court does not always treat viewpoint-based discrimination in the context of subsidized speech the same as if it were a direct restraint on speech. Consider *Rosenberger v. Rector & Visitors of the University of Virginia*[58] and *Rust v. Sullivan*,[59] two recent cases demonstrating the confusion over the role of viewpoint discrimination in the jurisprudence of subsidized speech.

Rosenberger, decided in 1995, concerned a challenge to the University of Virginia's policy against selectively refusing to subsidize any student organization that "'promote[s] or manifest[s] a particular belie[f] in or about a deity or an ultimate reality.'"[60] A student group, seeking to publish a Christian magazine, challenged the validity of the policy under the First Amendment.[61] The Court held that the univer-

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53 See id. at 510-11 (noting that order prohibiting armbands did not extend to "all symbols of political or controversial significance").

54 See id. at 507-08 ("[T]his case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."); see also United States v. O'Brien, 391 U.S. 367, 377 (1968) (permitting Congress to ban burning of draft cards because "the governmental interest [was] unrelated to the suppression of free expression").

55 Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (alteration in original) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958) (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)))).

56 See id. at 548-49 (noting that veterans' organizations were entitled to exemptions under law "regardless of the content of any speech they may use").

57 Id. at 548.

58 515 U.S. 819 (1995).

59 500 U.S. 173 (1991).

60 515 U.S. at 827 (first two alterations added) (quoting University of Virginia's guidelines governing Student Activities Fund).

61 See id. (noting that students also relied on Virginia Constitution and Virginia religious freedom statute but did not pursue theories on appeal).

sity's policy constituted impermissible viewpoint discrimination.[62] The Court treated the university's refusal to fund Christian magazines as a direct restraint on speech and understood the restriction in question as an instance of prohibited viewpoint-based discrimination in a public forum.[63]

Yet, in *Rust*, decided in 1991, the Court did not treat restrictions on subsidized speech as direct regulations. *Rust* concerned a challenge to regulations implementing Title X of the Public Health Service Act.[64] Title X states that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[65] The regulations prohibited Title X clinics and their employees from engaging in activities that "encourage, promote or advocate abortion as a method of family planning."[66] The Court upheld the regulations and rejected the plaintiffs' argument that by refusing to fund abortion counseling, Congress had engaged in viewpoint-based discrimination in contravention of the First Amendment rights of doctors employed by Title X clinics.[67]

The *Rust* Court did not consider the regulations on Title X recipients to constitute viewpoint discrimination. Yet, the regulations clearly intended to promote one view (that family planning should not include abortion) at the expense of an alternative view (that abortion is an acceptable method of family planning).[68] However, the Court rejected the claim that the Title X restrictions constituted viewpoint discrimination[69] while upholding the First Amendment principle that, in the provision of government subsidies, viewpoint-based discrimination is impermissible.[70] As the Court explained, "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Gov-

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62 See id. at 830-31.

63 See id. at 831-32.

64 *Rust*, 500 U.S. at 178 (citing Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified at 42 U.S.C. §§ 300 to 300a-6 (1994)), amending Public Health Service Act of 1944, tit. X, 58 Stat. 682 (codified at 42 U.S.C. §§ 201 to 300aaa-17)).

65 42 U.S.C. § 300a-6 (1994).

66 Grants for Family Planning Services, 42 C.F.R. § 59.10(a) (1989).

67 See *Rust*, 500 U.S. at 192-95.

68 See id. at 209 (Blackmun, J., dissenting) (arguing that regulations are viewpoint-based because they encourage anti-abortion speech at expense of "speech favorable to abortion").

69 See id. at 194-95.

70 See id.

ernment programs constitutionally suspect."[71] If the Court were treating restrictions on subsidized speech as direct restraints on speech, the restriction on Title X recipients would have amounted to viewpoint discrimination.

Rust and *Rosenberger* seem to leave the Court's subsidized speech jurisprudence in need of a more sophisticated rationalization than the Court provides. In *Rosenberger*, subsidies that discriminate on the basis of viewpoint are clearly unconstitutional. In *Rust*, subsidies that discriminate on the basis of viewpoint are viewed as selective subsidization with no significant First Amendment implications. The central question is whether the Court's jurisprudence is able to reconcile these two decisions.

The *Velazquez* opinion further demonstrates the need for a sophisticated reconciliation of these two seemingly inconsistent holdings. *Velazquez* held that the suit-for-benefits exception discriminates on the basis of viewpoint.[72] Noting that the *Rust* Court stated that viewpoint discrimination in the provision of subsidies would simply amount to a decision to "'fund one activity to the exclusion of the other,'"[73] the court argued that this overly broad principle would permit selective subsidization striking at core First Amendment protections.[74] As such, the court determined that in this instance it was forced to disregard this statement[75] and instead consider the underlying principles guiding the Supreme Court's decisions in this area.[76]

The court found that the "resolution [of this question] lies in the fact that different types of speech enjoy different degrees of protection under the First Amendment."[77] The highest degree of protection is afforded to speech criticizing the government or advocating for change in government policy.[78] The suit-for-benefits exception runs afoul of this principle because it stands in the way of constitutional challenges to welfare laws.[79] The court found that because litigation is one of the only effective ways to challenge the government, "[t]o forbid a lawyer from articulating that idea in the court proceeding effec-

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71 Id. at 194.

72 See Velazquez v. Legal Servs. Corp., 164 F.3d 757, 769 (2d Cir. 1999).

73 Id. at 770 (quoting *Rust*, 500 U.S. at 193).

74 See id. at 771.

75 See id. at 770 (noting that "it is often more instructive to look at what the Court has done, rather than at what the Court has said").

76 See id.

77 Id.

78 See id. at 771-72.

79 See id.

tively drives the idea from the marketplace where it can be most effectively offered."[80]

As the discussion below will show, this simple schema does not account for the Court's complex understanding of subsidized speech.[81] This opinion leaves us with the unsatisfactory idea that the speech is protected only where it is important, which provides little principled guidance. A theory that treats discrimination in subsidies as direct restraints on speech will not provide any guidance in reconciling *Rust* and *Rosenberger*.

B. Making Sense of Subsidized Speech

The remainder of this section proposes a framework, building upon the work of Professor Robert Post, for understanding the jurisprudence of subsidized speech and provides an account of the reasoning underlying the Court's decisions in *Rust* and *Rosenberger*.[82]

Professor Post presents the idea of a "managerial" forum, in which the state may act in its managerial capacity to the effectuation of its own ends.[83] Post argues that the Court should and does consider the status of the speaker in order to assess the First Amendment rights at stake.[84] The Court's jurisprudence, he argues, "forces us to determine whether speakers should be characterized as independent participants . . . or instead as instrumentalities of the government."[85] Because independent participants engage in public discourse, their speech is protected; but where individuals speak as instrumentalities of the state, they are within the managerial domain in which "speech is necessarily and routinely constrained on the basis of both its content and viewpoint."[86] The public forum, in contrast, is a domain in which

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[80] Id. at 772.

[81] The principle presented by the *Velazquez* court may in fact be the animating force behind the Supreme Court's decisions. For example, in *Rosenberger*, the Court notes that selective subsidization is particularly offensive in the university context. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995). It is plausible that the framework presented below, which is based on the Court's presentation of its own jurisprudence, is subsidiary to the fact that *Rosenberger* concerned a university. However, this understanding ignores much of the Court's statement of its own jurisprudence, as the *Velazquez* majority felt compelled to do.

[82] This Note does not proceed from the assumption that *Rust* was correctly decided. Instead, this Note develops the argument that, even given *Rust*, the suit-for-benefits exception is unconstitutional.

[83] See Post, supra note 13, at 164. As the section below demonstrates, see infra Parts I.B.1 and I.B.2, I rely on Post's scheme because it accurately frames the jurisprudence of subsidized speech. This scheme is also ratified by the *Velazquez* dissent, see infra text accompanying notes 3-90.

[84] See Post, supra note 13, at 172.

[85] Id. at 152.

[86] Id. at 166.

the speaker maintains his or her independent status and wherein the state must respect the First Amendment. This concept indicates that in the managerial domain viewpoint restrictions are constitutional but that within a public forum such restrictions will be unconstitutional.[87] The key insight of Post's approach is to suggest that the Court makes a complex assessment of the status of the speaker in order to differentiate between when the First Amendment should protect subsidized speech and when it should not.

The *Velazquez* dissent presented a discussion of precedent that accords with this framework. The dissent distinguished *Rosenberger* from *Rust* on the grounds that in *Rosenberger* the government was seeking to promote a diversity of private speech.[88] The dissent noted that "[t]he holding of *Rosenberger* is that when government subsidizes private speakers to express their own viewpoints, it cannot discriminate among potential recipients on the basis of viewpoint."[89] In *Rust*, the *Velazquez* dissent pointed out, the Court approved selective funding in order to achieve specified ends.[90]

Building upon this methodological approach, this section demonstrates how these concepts are implicitly (and explicitly) operative in both *Rust* and *Rosenberger*. The intersection of the First Amendment with state-subsidized speech forces the Court to balance the managerial needs of the state with the quality and independence of public and private discourse.

1. Rust *and the Managerial Paradigm*

In *Rust*, the Court permitted the state to exercise considerable managerial control over the professional (and political) speech of doctors in Title X clinics. Instead of analyzing the restrictions on doctors' speech in terms of the First Amendment, the Court argued that the government is merely "encourag[ing] certain activities it believes to be in the public interest."[91] As the Court stated:

> 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

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87 See id. at 164-65.

88 See Velazquez v. Legal Servs. Corp., 164 F.3d 757, 776 (2d Cir. 1999) (Jacobs, J., concurring in part, dissenting in part).

89 Id.

90 See id. at 776.

91 Rust v. Sullivan, 500 U.S. 173, 193 (1991).

> viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[92]

As Post notes, the Court argued that the government is merely funding certain activities in an attempt to convey a governmental message and to achieve "specified ends."[93] According to the Court, the government is subcontracting out its work, and insuring that its goals are achieved.

In *Rosenberger*, the Court drew a dichotomy between speech within a government program and speech in a public forum. Reinterpreting *Rust* in *Rosenberger*, the Court argued that in *Rust*

> the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. . . . [*W*]*hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes*. . . . When the government disburses public funds to private entities to convey a governmental message, it may take . . . appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.[94]

The Court divided the status of the speaker into two categories. In the first category, speakers act as a conduit for government speech or a government message; within the context of a government program the government may set the limits of its own speech. The second category, discussed in Part I.B.2 below, is private speech.[95]

The Court, in both *Rust* and *Rosenberger*, conceives of the Title X clinics at issue in *Rust* as private entities subsidized to convey a governmental message. By accepting this subsidy, the Title X doctor loses his or her otherwise intact First Amendment rights and is transformed into an instrumentality of the state's managerial ends. "[T]he Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[96] The restrictions on abortion counseling are merely "prohibition[s] on a project grantee or its employees from engaging in activities outside of the project's scope."[97]

This same managerial idea defines the jurisprudence of public employee speech. In the public employee speech cases, the Court seeks to find a balance between the interests of the employee as a private citizen "commenting upon matters of public concern and the

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92 Id.; see also Post, supra note 13, at 164 (presenting idea that viewpoint discrimination is permitted within managerial paradigm).

93 Post, supra note 13, at 170.

94 515 U.S. 819, 833 (1995) (emphasis added) (citations omitted).

95 See infra Part I.B.2.

96 *Rust*, 500 U.S. at 196.

97 Id. at 194.

interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[98] The employee's status is critical in assessing his or her First Amendment rights: Where the employee speaks as a private citizen, the managerial hold of the state is broken and restrictions on or penalties for speech are treated like any other constraints on free expression, but when the same individual speaks as a government employee the state may exercise considerable managerial control over his or her speech.[99]

Despite its deference to the government's interest in *Rust*, the Court does recognize the limits of its holding even in a managerial context. After laying out the above analysis, the Court noted that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."[100] First Amendment rights may inhere even within a subsidized doctor-patient relationship if that relationship is "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[101] But in the highly managed sphere of a Title X clinic, provided for one purpose and one purpose only, the conversation between doctor and patient has already been shaped and limited by the government. A comprehensive relationship is a relationship whose content is structured and defined exclusively by those within it, not by the government. Subsidization of a comprehensive relationship, in a state-funded hospital, for example, would be held to the strictures of the First Amendment. A comprehensive relationship would be constitutionally inappropriate for managerial control.[102]

2. Rosenberger *and the Public Forum Doctrine*

The key difference between *Rust* and *Rosenberger* is the critical distinction between government speech and private speech. In *Rosenberger*, the Court maintained that whereas the university may govern

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98 Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (holding that dismissal of teacher for writing letter to newspaper about issue of school funding was invalid).

99 See id.

100 *Rust*, 500 U.S. at 199.

101 Id. at 200.

102 Some commentators have argued that a doctor-patient relationship should always be accorded status as a comprehensive relationship. See, e.g., David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 743-45 (1992) (arguing that state-funded fiduciary relationships—doctor-patient or lawyer-client—should be considered sphere of neutrality, wherein government's allocation of funds in viewpoint- or content-based discriminatory manner violates First Amendment).

"the content of the education it provides," it may not restrict speech once it has expended funds to "encourage a diversity of views from *private speakers*."[103] When determining the content of its educational services, the university itself is speaking, and hence different principles apply. This situation is analogous to that of the Title X clinics. However, when it seeks to encourage a "diversity of views from private speakers," the university is subsidizing private speech.[104]

The Court understood *Rosenberger* in terms of public forum jurisprudence, arguing that once the government opens a forum (agrees to subsidize expression) in order to encourage a diversity of views, the government cannot then selectively exclude (refuse to subsidize) on the basis of viewpoint.[105] Selective subsidization contravenes the First Amendment when the state seeks to control the speech of private individuals engaged in private speech.[106] The Court thus contrasts the public forum at issue in *Rosenberger* with the Title X clinics at issue in *Rust*.[107]

In *Widmar v. Vincent*,[108] a state university sought to exclude religious groups from the university's auditorium that was available to other groups. The Court held that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[109] Free speech concerns override the government's desire to condition its fora by excluding certain viewpoints. "[G]overnment 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."[110]

Public fora exist not only where free expression has traditionally occurred but also where the government has designated a forum for such expression. The Court analyzes the "policy and practice of the

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103 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (emphasis added).

104 Id.

105 See id. at 829-30 (discussing limits on state's ability to exclude speech in "limited public forum").

106 See id. at 834.

107 The Ninth Circuit implicitly recognized this dual scheme by contrasting the private speakers in *Rosenberger* with the speakers in the Title X context in which the government is using subsidization to promote a particular policy. See Legal Aid Soc'y v. Legal Servs. Corp., 145 F.3d 1017, 1028 (9th Cir. 1998).

108 454 U.S. 263 (1981) (holding that university's policy of excluding religious groups from generally open public forum was First Amendment violation).

109 Id. at 267-68.

110 Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (finding that ordinance exempting labor picketing from permissible public picketing activity constituted impermissible content discrimination).

government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[111] In *Perry Education Ass'n v. Perry Local Educators Ass'n*,[112] the Court held an intraschool mail system to be a nonpublic forum. In accord with the Court's analysis, "[i]f by policy or by practice" the school had opened its intraschool mail system for use by the public, the petitioners could justifiably claim unfair exclusion from a designated public forum.[113] Similarly, if the school had allowed certain types of groups access to the intraschool mail system, a "limited public forum" would have been created with respect to entities of a similar character.[114] "[T]he extent to which the Government can control access depends on the nature of the relevant forum,"[115] so that the government is bound by the limits it explicitly, or implicitly, sets.

In *Rosenberger*, the Court held that viewpoint-based discrimination in subsidies is prohibited, even within a "limited public forum" of the government's own creation.[116] The Court differentiated between "confining a forum to the limited and legitimate purposes for which it was created"—permissible content discrimination[117]—and restrictions "directed against speech otherwise within the forum's limitations"—impermissible viewpoint-based discrimination.[118] While the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups," the state must "respect the lawful boundaries it has itself set."[119] The government may discriminate to maintain the purposes of the forum through content discrimination, but may not discriminate so as to suppress certain ideas.[120] Having opened the forum to certain kinds of student groups, the university may not close the forum to other student groups merely because these groups intend to present a religious message.

On one level, the public forum doctrine, both in the public forum cases and in *Rosenberger*, is troubling in that it appears to provide

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111 Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985) (finding that charity fund drive among public employees, where government policy limited participation to certain charity organizations, is not public forum).

112 460 U.S. 37, 46 (1983) (holding that differential access to teacher mailboxes and mail system granted by school district to bargaining representative did not constitute impermissible content discrimination).

113 Id. at 47.

114 Id. at 48.

115 *Cornelius*, 473 U.S. at 801.

116 515 U.S. 819, 829 (1995).

117 Id. at 829.

118 Id. at 830.

119 Id. at 829.

120 See id. at 829-30.

heightened protection to speech in public fora. Heightened protection would be counterintuitive. How could expression in a public place warrant greater protection than, for example, expression that takes place within the privacy of one's own home? Why is an analogy to the public forum necessary at all?

The public forum doctrine does not provide greater protection to subsidized speech than is afforded speech generally. Rather, the public forum doctrine is intended to protect speech on government property, where the presumption is that the government can condition the boundaries of permissible expression. Indeed, in many instances, the government is allowed greater control over expression on its property—such as control over political expression on an army base[121]—than it would have over expression on property open to the public. Likewise, the government may restrict access to a forum of its own creation on the basis of content. In *Rosenberger*, the Court made this distinction clear: Content discrimination occurs when the government targets "subject matter."[122] Because the state may preserve a forum for the "'use to which it is dedicated,'"[123] the state may reserve the discussion in a forum to designated topics.[124] What is crucial, however, is that the state respect the lawful boundaries that it has set. This is precisely the difference between content discrimination, "permissible if it preserves the purposes of [the] limited forum," and viewpoint discrimination, "presumed impermissible when directed against speech otherwise within the forum's limitations."[125]

The public forum doctrine as developed in *Rosenberger* replaces, in a much more modest form, the role litigants often wish the unconstitutional conditions doctrine to play. Despite the fact that the government need not have created the limited public forum, once the forum exists the government cannot selectively subsidize so as to discriminate on the basis of viewpoint. The public forum can itself be conceptualized as a subsidy. As the Court noted in *Rust*, "the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity.'"[126]

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121 See, e.g., Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that there is no constitutional right to make political speeches or distribute leaflets on military base).

122 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (adding that "[v]iewpoint discrimination is an egregious form of content discrimination").

123 Id. (quoting Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993)).

124 See id.

125 Id. at 830.

126 500 U.S. 173, 200 (1991) (quoting United States v. Kokinda, 497 U.S. 720, 726 (1990)).

The religiously motivated student group at issue in *Rosenberger* could have participated in the intellectual life of the university and engaged in campus debate by continuing to publish a religious publication even without the aid of university subsidization. The group's exclusion from the Student Activities Fund did not preclude its members from participating in campus debate. Yet the Court found that refusal to subsidize participation in the forum is equivalent to restricting access to public debate, and that scarcity of funds does not justify the allocation of funds on a viewpoint discriminatory basis.[127]

Subsidization is of constitutional significance because unguarded it potentially would allow the government to interfere with conversation within the forum. At the heart of the Court's subsidized speech jurisprudence is a concern that the government will impermissibly misshape the content of public discourse. The Court's decision in *Rosenberger* rested on the judgment that the university's refusal to subsidize certain viewpoints dramatically "skewed" debate.[128]

As such, the public forum can be understood as an analogy to the subsidy itself: The state may not condition access to the public forum on the suppression of unpopular viewpoints, just as the state cannot condition access to the subsidy on the suppression of particular viewpoints. The Student Activities Fund in *Rosenberger* is a public forum in that subsidization creates its own forum for discourse. Part II demonstrates why analogy to the managerial forum does not adequately characterize the relevant speakers in the context of the suit-for-benefits exception. Part II also explains how the public forum doctrine should be understood to protect speech in this context.

II
THE WELFARE REFORM LITIGATION RESTRICTION AS SUBSIDIZED SPEECH

The government's power to regulate subsidized speech depends on its ability to analogize the subsidized arena in question to the managerial context. This Part will consider the extent to which the managerial framework legitimately can be thought to apply as neatly to the Legal Services restrictions on welfare reform litigation as the Court found it to apply in *Rust*.[129]

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127 See *Rosenberger*, 515 U.S. at 835.

128 Id. at 831-32.

129 Post persuasively argues that there are numerous aspects of the doctor-patient relationship in *Rust* rendering it inappropriate for managerial characterization. See Post, supra note 13, at 170-76. The task undertaken by this Note is not, however, to assess whether this argument is true. Instead, the task undertaken here is to argue that even in the wake of *Rust*, the Court can and should find that the suit-for-benefits exception is unconstitutional.

The suit-for-benefits exception, were it a direct restraint on speech, clearly would constitute viewpoint discrimination in contravention of the First Amendment. The government would have selected a certain idea for suppression—the viewpoint that the welfare laws are unconstitutional or illegal. This Part will consider whether the state's relationship to the Legal Services lawyer should be characterized as managerial or whether the lawyers and clients involved are independent, private speakers despite government regulation and funding. The argument presented is twofold. First, because the suit-for-benefits exception interferes with the relationship once it has already been formed, the relationship between lawyer and client is comprehensive, and hence not appropriate for managerial control. Second, the First Amendment rights of the client are at stake. The lawyer and client are participating in a public forum, within which the welfare reform litigation restriction will impermissibly skew debate.

As noted above, the *Velazquez* dissent presented an argument in accord with this schema.[130] Nonetheless, the discussion below presents a substantive disagreement with the dissent's characterization of the suit-for-benefits exception within this framework.

A. Why the Other Restrictions Are Constitutional

To understand why the suit-for-benefits exception is unconstitutional, it is crucial first to understand why the other restrictions do not run afoul of the First Amendment.[131] LSC is a program by which the government seeks to accomplish certain goals—namely, providing legal services to the indigent. As such, the government can define the contours of the services the grantee provides. The grantees could not, for example, decide to represent non-indigents. Imagine that every Legal Services office displays a sign in the window which says the following: "This office does not provide legal representation to drug dealers, prisoners, or undocumented aliens. Nor does this office provide legal representation in cases involving redistricting matters or abortion. This office will not participate in lobbying or any attempts to influence agency proceedings." Such a policy would merely reveal the grantee's compliance with the prohibition on "encouraging activities outside of the project's scope,"[132] and would pose no constitutional difficulty. It would be merely content discrimination akin to regulations intended to ensure that a public forum is maintained for

130 See supra text accompanying notes 3-90.

131 But see Roth, supra note 22, at 109-10 (arguing that restrictions on types of litigation in which LSC grantees may engage, such as class action and lobbying prohibitions, violate First Amendment).

132 See Rust v. Sullivan, 500 U.S. 173, 194 (1991).

the purposes for which it was established.[133] These types of restrictions are indistinguishable from the content discrimination expressly permitted in *Rosenberger*.[134] For example, had Congress chosen to provide legal services funding for representation in housing cases, such a decision would clearly have been permissible. Congress's decision to pick and choose among broad topics of litigation and legal activity falls easily within the limits of permissible content-based discrimination.

The *Velazquez* dissent argues that the suit-for-benefits exception is indistinguishable from the other regulations: The exception, the dissent argues, is no different from Congress outsourcing tax advice to outside contractors and preventing the contractors from expending grant resources on lobbying for tax reform.[135] This scenario accords with the discussion above: Restrictions are permissible when they limit according to content or subject matter. In the *Velazquez* scenario, Congress has provided funding for only the provision of tax advice. Using the grants to engage in political agitation would be using the funds for purposes for which they were not intended, which is exactly the kind of restriction that Congress may make. The discussion below demonstrates that the suit-for-benefits exception cannot be characterized in this manner.

B. The Comprehensive Relationship

In *Rust*, the Court noted that its holding would not necessarily apply to a doctor-patient relationship that was "sufficiently all encompassing so as to justify the expectation on the part of the patient of comprehensive medical advice."[136] *Rust* foreclosed the possibility that a doctor-client relationship would warrant First Amendment protection in all incarnations, but left open the possibility that an "all-encompassing," or comprehensive, relationship is protected by the First Amendment. In the Title X context considered by *Rust*, Congress provided funding for a particular purpose, with the specific agenda of addressing family planning needs in a particular way. Title X clinics were established and funded to serve as "family planning clinics" and to further a particular social agenda. *Rust*'s caveat concerning an "all-

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133 See supra text accompanying notes 116-20 for a discussion of content discrimination in public fora.

134 See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995) (noting that content discrimination is permissible if it serves purposes of limited public forum).

135 See Velazquez v. Legal Servs. Corp., 164 F.3d 757, 777 (2d Cir. 1999) (Jacobs, J., concurring in part, dissenting in part).

136 *Rust*, 500 U.S. at 200; see also supra text accompanying notes 100-02.

encompassing" relationship suggests that if the state-funded doctor were a general practitioner, the state constitutionally would be barred from suppressing certain viewpoints by excluding them from the permissible discourse between doctor and patient. This section will build on *Rust*'s discussion of the comprehensive relationship and argue that once a lawyer and client have formed a relationship, it is necessarily comprehensive and hence inappropriate for managerial direction.

1. *The Significance of the Statutory Relationship Between the State and the Legal Services Lawyer*

While the Court held in *Rust* that the ethical obligations of a doctor (or, in the LSC context, a lawyer) have no overriding constitutional significance,[137] the Court has held in other cases that the extent of managerial control over subsidized speakers depends heavily on the nature of the relationship between the subsidized entity and the government.[138] One of the ways in which the Court has sought to assess this relationship is by examining the statutory language that describes the government's relationship to the subsidized entities in question.

Rust and *Rosenberger* reveal that the nature of these regulations is of constitutional significance in determining the state's ability to exercise managerial control over speech. In *Rosenberger*, the Court accorded constitutional significance to the fact that the subsidized student groups were neither agents of, nor subject to the control of, the state-run University of Virginia.[139] By contrast, Title X authorizes the Secretary of Health and Human Services "to assist in the establishment and operation of voluntary family planning projects."[140] The regulations clearly state that the projects will be creatures of congressional direction and that contracts made under Title X must be "'made in accordance with such regulations as the Secretary may promulgate.'"[141] The *Rosenberger* Court contrasted the Title X arrangement with the University of Virginia's relationship to its subsidized speakers, asserting that Title X made funds available to clinics and doctors "to transmit specific information pertaining to [the government's] own program."[142] Because the Legal Services Act defines the relationship between the lawyers and the state as independent, it is constitutionally inappropriate for the Legal Services grantee to re-

137 See id. at 200-01.

138 See, e.g., *Rosenberger*, 515 U.S. at 835.

139 Id.

140 42 U.S.C. § 300(a) (1994).

141 *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6 (1970)).

142 *Rosenberger*, 515 U.S. at 833.

ceive managerial direction in the form of viewpoint discrimination, once the relationship is formed.

The Court has long recognized the independence of the government-funded lawyer from the state. In *Polk County v. Dodson*,[143] the Court held that a lawyer "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client."[144] Analyzing the relationship between a public defender and her client, the *Dodson* Court found that once a relationship was formed—"[f]rom the moment of [the] appointment"[145]—the relationship between the lawyer and the client "became identical to that existing between any other lawyer and client."[146] Despite subsidization, the lawyer is thus "not amenable to administrative direction"[147] and is bound by the ABA Code of Professional Responsibility, which requires that "'[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.'"[148] According to *Dodson*, the lawyer is autonomous in relation to the state; not only is the lawyer not amenable to administrative direction, she is bound by ethical codes that mandate her independence.

The autonomous status of the LSC lawyer is defined by the statute that establishes and regulates the LSC. The Legal Services Act states that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."[149] The statute explicitly maintains that "officers and employees of the Corporation shall not be considered a department, agency or instrumentality, of the Federal Government."[150]

Both *Dodson* and the LSC statute's definition of the LSC grantee's relationship to the state indicate that once a lawyer-client relationship is formed, the state may not invidiously discriminate on the basis of viewpoint. Because LSC-funded lawyers assume the obli-

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143 454 U.S. 312 (1981).

144 Id. at 321.

145 Id. at 318.

146 Id.

147 Id. at 321.

148 Id. (quoting Model Code of Professional Responsibility DR 5-107(B) (1976)); see also Model Rules of Professional Conduct Rule 5.4(c) (1995) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

149 42 U.S.C. § 2996(6) (1994).

150 Id. § 2996d(e)(1) (1994).

gation of making independent judgments once a relationship is formed, LSC grantees are not instrumentalities of the state. The statutory terms of this relationship serve to justify an expectation on behalf of a client of comprehensive service or advice. This does not mean that the government may not shape and form the terms of the relationship by content, but merely that once the relationship is formed, viewpoint discrimination that interferes with the relationship is impermissible.

2. *The Comprehensive Relationship Between Lawyer and Client: The Role of Claim Preclusion*

The doctrine of claim preclusion limits a litigant to one opportunity to bring any and all claims arising out of a particular transaction or set of facts.[151] Claim preclusion thus serves to further justify the client's expectation of comprehensive advice during litigation, making the lawyer-client relationship an all-encompassing one.

In accord with the suit-for-benefits restriction, a litigant whose benefits have been terminated may pursue a cause of action, with the aid of a Legal Services lawyer, challenging the termination of her welfare benefits.[152] The welfare recipient may bring a claim alleging that the termination was mistaken or in violation of a federal regulation.[153] However, the welfare recipient and her Legal Services lawyer may not pursue challenges to the constitutionality of the regulations themselves nor challenge the grounds upon which the termination was made.[154]

Because of claim preclusion, the litigant who takes advantage of the benefit conferred by the LSC is forced to forgo challenging the validity of the welfare system altogether. Claim preclusion requires a litigant to bring all claims arising from a given set of facts—in this instance the termination of benefits—or forever forfeit them.[155] If a Legal Services lawyer brings a claim on behalf of her client challenging the validity of her client's termination of benefits, this action would extinguish all other claims concerning the termination, including challenges to its constitutionality.

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151 See generally 18 Charles Alan Wright et al., Federal Practice and Procedure § 4402 (1981) (explaining that claim preclusion, or true res judicata, forecloses "litigation of matters that never have been litigated, because of a determination that they should have been advanced in an earlier suit").

152 See 45 C.F.R. § 1639.4 (1997).

153 See id.

154 See id. § 1639.3(a).

155 See 18 Wright et al., supra note 151, at § 4406.

The relationship between lawyer and client is thus necessarily comprehensive once litigation is commenced. As such, the government's directive to forgo certain types of claims impermissibly interferes with a relationship over which the state cannot exercise managerial control. As discussed above, in a managerial context the government may discriminate and subject certain viewpoints to a disadvantage.[156] In this context, however, such interference would be inappropriate, as the right to bring such a claim would be precluded forever. As the majority noted in *Velazquez*, a lawyer does not necessarily know in advance which claims he or she will need to argue.[157] Therefore, excluding such claims from the purview of services, even in advance, does not cure the infirmity.

This constitutional difficulty does not implicate the other restrictions that have been placed on the LSC. According to the Court's prior jurisprudence, the "comprehensive" nature of the lawyer-client relationship does not extend to those restrictions and exclusions that would prohibit a Legal Services office from accepting certain types of cases. While these restrictions will cause great practical difficulty for the excluded groups in procuring representation, the groups will have the opportunity to pursue these claims with another attorney. The client in that case lacks justified expectations of comprehensive advice. For example, the prohibition against representation of undocumented aliens would not place the client in a position that would require the forfeiture of his own claims. However, once the lawyer agrees to represent the client and brings a claim arising out of a given factual situation, claim preclusion forces the client to bring all the claims arising out of a given set of facts or forever forfeit those claims.

While the indigent client could certainly rely upon services provided by state or privately funded attorneys if they were available (or even represent himself or herself pro se), such options are not relevant. The relevant question is whether viewpoint discrimination is acceptable in the particular funding context. Because viewpoint discrimination in subsidization is permitted only in the managerial context, where the government does not have a managerial hold on a given speaker, First Amendment rights inhere.

C. *The Public Forum*

This section will show that litigation is a public forum, much like the forum protected in *Rosenberger*, and that the suit-for-benefits exception constitutes impermissible viewpoint discrimination in a public

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156 See supra text accompanying notes 91-92.

157 See Velazquez v. Legal Servs. Corp., 164 F.3d 757, 771 n.9 (2d Cir. 1999).

forum designated for free expression. The speakers in the LSC context are private individuals engaged in a public forum.

1. *The Rights of the Client: Building the Foundation for a Public Forum*

Analogies to *Rust* inadequately address the full panoply of First Amendment rights at stake in the Legal Services context. The welfare reform litigation restriction not only inhibits the speech of the Legal Services lawyer, it restricts the speech of her client as well. While *Rust* permitted the government to circumscribe the speech of the doctors who serve and direct Title X-funded clinics, the Court did not establish analogous control over those who use the program. The patient's First Amendment rights were not implicated. In this sense, the Legal Services client shares more in common with the individual student groups in *Rosenberger*'s "limited public forum." In exercising managerial control over a subsidized speaker, the government must be able to transform the speaker into a conduit for a government message or forfeit control over the viewpoint of the speech. But the government does not exercise such managerial control over the Legal Services client.

The law of agency governs the relationship between a lawyer and her client.[158] The LSC lawyer speaks neither for herself nor for the government. Rather, as established by agency law, the client is the principal and the lawyer is her agent. Therefore, the lawyer is essentially a conduit for the speech of the client.[159] While an attorney is authorized by virtue of her professional standing to bind the client in procedural matters arising during the course of litigation, she may not impair the client's substantial rights or the cause of action itself.[160] Indeed, the Court long has held that a lawyer may not impair her client's rights without her client's consent.[161] Thus, restricting a lawyer's

158 See, e.g., Fennell v. TLB Kent Co., 865 F.2d 498, 502 (2d Cir. 1989) (holding that counsel lacked authority to settle case without plaintiff's consent); State v. Barley, 81 S.E.2d 772, 773 (N.C. 1954) (invalidating lawyer's agreement to plea bargain obtained without client's consent). See generally Deborah A. DeMott, The Lawyer as Agent, 67 Fordham L. Rev. 301, 301 (1998) (noting that lawyer's authority to act arises from agency relationship with client); L. Ray Patterson, The Fundamentals of Professionalism, 45 S.C. L. Rev. 707, 719 (1994) (same).

159 See *Fennell*, 865 F.2d at 501 (noting that decision to settle is client's, not attorney's).

160 In *Linsk v. Linsk*, for example, the California Supreme Court invalidated a lawyer's stipulation without his client's agreement to allow the case to be decided by a different judge entirely on the basis of the record previously made. 449 P.2d 760, 765 (Cal. 1969).

161 See United States v. Beebe, 180 U.S. 343, 351-53 (1901) (holding that attorney may not bind United States without its consent); see also Graves v. P.J. Taggares Co., 616 P.2d 1223, 1226 (Wash. 1980) (invalidating attorney's stipulation to vicarious liability without client's permission); Olfe v. Gordon, 286 N.W.2d 573, 581 (Wis. 1980) (finding that attor-

speech (the speech of the agent) necessarily restricts the speech of her client (the principal).

The judicially recognized contours of the lawyer-client relationship reveal that *Rust* is inapposite in the lawyer-client context. In *Rust*, the Court was restricting the speech of those who had accepted funding—and employment—from Title X, so as "to transmit specific information pertaining to [the government's] own program."[162] While the lawyers in federally funded clinics bear certain constitutionally significant similarities to doctors in Title X clinics, the *clients* using the clinics pose an entirely separate set of constitutional questions. The clients using a Legal Services lawyer can be analogized more readily to individuals participating in other public fora; they are independent individuals engaged in traditionally expressive activity, pursuing "private speech."[163]

2. *Litigation as a Public Forum*

Recognizing that the client's First Amendment rights are at stake poses questions that *Rust* cannot adequately address. Unlike *Rust*, the Legal Services restrictions broadly interfere with a public forum of critical democratic importance and do so by restricting the speech not only of lawyers, but also of their clients who participate in the forum as private individuals. Once a lawyer and client have formed a relationship to which professional and ethical obligations attach, prohibiting the client from bringing certain challenges against the government is an unconstitutional restriction on protected expression in a public forum.

Litigation is a mode of expression protected by the First Amendment. In *NAACP v. Button*,[164] the Court invalidated a state law, as applied to the NAACP, prohibiting a private organization from promoting, encouraging, or directing litigation to which it was not a party.[165] The petitioners argued that this restriction on legal activity infringed upon the rights of lawyers "to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[166] Agreeing that the statute violated the First Amendment, the Court held that litigation is a

ney who failed to follow client's instructions in preparing document was potentially liable for breaching her agency duty).

162 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

163 Id.

164 371 U.S. 415 (1963) (holding that Virginia violated NAACP's First Amendment right to expression by prohibiting legal activity under law regulating improper solicitation of legal business).

165 See id. at 423, 428-29.

166 Id. at 428.

form of "political expression"[167] and is protected by the First Amendment's general protection of "vigorous advocacy . . . against governmental intrusion."[168] Even the dissent in *Button*, objecting on the grounds that such restrictions are within the state's regulatory power over the legal profession,[169] recognized that freedom of expression embraces the right to seek judicial redress.[170] Where certain core aspects of such expression—the right to petition the government or to seek the vindication of constitutional and statutory rights—are at stake, the Court will protect litigation directed to the effectuation of these ends. The welfare reform litigation restrictions, by prohibiting the vindication of certain constitutional and statutory rights, thereby implicate the First Amendment and contravene those core rights strongly protected by the Court.

The Court protects litigation as a mode of expression when it entails seeking redress from the government. In *California Motor Transport Co. v. Trucking Unlimited*,[171] the Court explicitly extended the First Amendment right to "petition for redress of grievances"[172] to seeking redress from the judicial branch, as it applies to seeking redress from other branches of government.[173] The Court held that access to the courts is a fundamental First Amendment right, reasoning that "it would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies . . . to advocate their causes and points of view respecting resolution of their business and economic interests."[174] Litigation, the Court argued in *Button*, is akin to voting, noting that "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."[175] The Court characterized the protected activity in *Button* as the exercise of "First Amendment rights to enforce constitutional rights through litigation."[176]

The Court seeks to protect litigation in order to preserve "meaningful access" to the courts[177] and to prevent the states from using

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167 Id. at 429.

168 Id.

169 See id. at 448 (Harlan, J., dissenting).

170 See id. at 452-53 (Harlan, J., dissenting).

171 404 U.S. 508 (1972) (finding that respondent used access to courts to deny other parties meaningful access to courts by bringing baseless claims).

172 U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

173 See *California Motor Transp. Co.*, 404 U.S. at 510-11.

174 Id.

175 *Button*, 371 U.S. at 429.

176 Id. at 440.

177 *California Motor Transp. Co.*, 404 U.S. at 512.

their regulatory power to chill litigation so as to prevent the ability of litigants to vindicate their constitutional and statutory rights.[178] In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,[179] for example, the Court noted that a "State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits . . . to effectuate a basic public interest."[180]

The speech at issue in the LSC context is private, political speech, protected as a critical means of dissent. Like the public forum created by the university in *Rosenberger*, litigation is also a public forum in which the government is obligated to permit a diversity of views from private speakers. As discussed above, a public forum exists where the government has intended to designate a forum as such, even one in which the forum is limited to particular purposes.[181] Once the forum is open to various types of speech, the government may condition access only on the basis of content (so as to ensure that the forum serves its designated purpose) but never on the basis of viewpoint.[182] While the government need not necessarily have opened the forum, once created, the conversation within may not be skewed or manipulated by the government to suppress certain ideas.[183] Just like the student groups in *Rosenberger*, free to publish and distribute their religious paper with their own resources, litigants could bring such claims with their own money and on their time. However, the Court firmly held in *Rosenberger* that refusal to subsidize participation in the forum is equivalent to restricting access to the forum.[184]

Litigation is a public forum in which the government provides the opportunity for meaningful access and redress. Like the university, the government may condition access to preserve the forum itself. The courts are, for example, permitted to prohibit frivolous and baseless claims.[185] But such restrictions are intended to maintain the effectiveness of the forum by facilitating meaningful access. The nature of the state's regulatory power over this public forum is such that the forum would cease to function in the manner intended by the state unless certain limits on speech necessarily and routinely occur, but those restrictions cannot discriminate on the basis of viewpoint.

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178 See *Button*, 371 U.S. at 434-38.

179 377 U.S. 1 (1964) (holding that state court injunction prohibiting union from recommending legal action violates First and Fourteenth Amendment rights).

180 Id. at 7.

181 See supra text accompanying notes 108-15.

182 See supra text accompanying notes 116-20.

183 See supra text accompanying notes 116-20.

184 See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

185 See Fed. R. Civ. P. 11.

Having established that litigation, in the welfare reform context, is not managerial but rather more akin to a public forum, questions as to restrictions on subsidized speech rest on the extent to which a given set of restrictions will skew debate in the forum. Indeed, in *Rosenberger*, the Court was protecting against this same danger. If the forum generally permits challenges to welfare decisions—that is, the termination of benefits—the government cannot selectively insulate itself from challenges to the constitutionality of the general regulation under which the termination decision was made. Alternately, if the government generally is subject to challenges to the constitutionality of its laws, regulations, and actions, it cannot selectively attempt to insulate itself from constitutional challenges in selected arenas. The litigation forum conceives of adjudicating challenges to the government as an integral part of its function; to fund selectively on the condition that individuals are prohibited from making these challenges skews the conversation within the forum.

The restrictions on welfare reform litigation implicate these First Amendment concerns and restrict the expression protected by the First Amendment in *Button* and its progeny.[186] The welfare reform litigation restriction would prohibit the lawyer and client from petitioning the government for redress of grievances through the courts, from vindicating constitutional and statutory rights, and from effectuating economic interests through the judicial system. Congress's attempt to insulate itself from such challenges is precisely the evil the Court seeks to deflect in recognizing litigation as a form of protected expression.

CONCLUSION

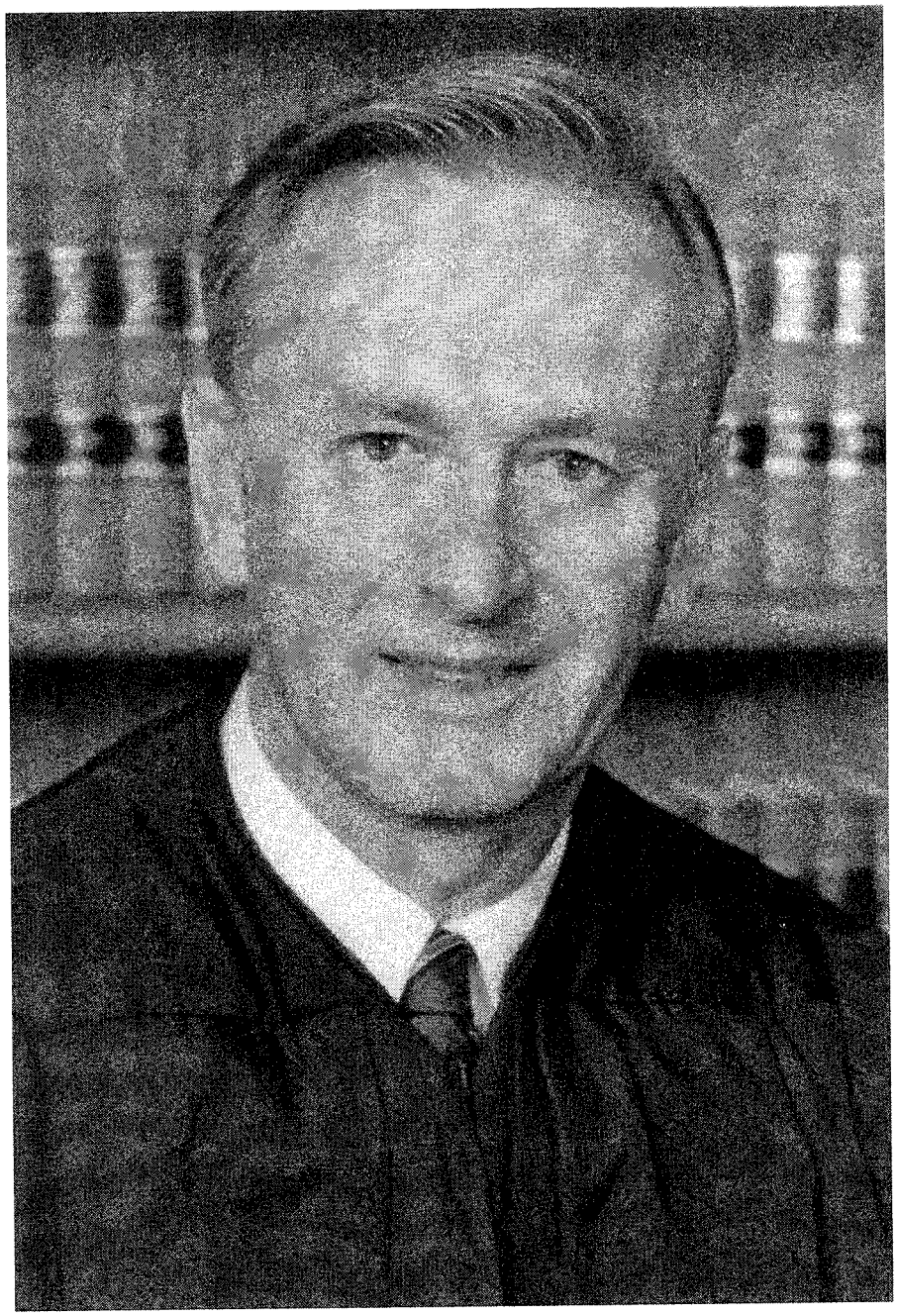
In light of the severity of the OCRAA restrictions and their potentially devastating impact on the quality of legal representation for the poor, it is tempting to argue that all of the restrictions are unconstitutional. The restrictions do violence to our normative intuition that the government should not have the power to tell lawyers whom they may or may not represent. But the jurisprudence of subsidized speech does not provide a doctrinal foundation upon which to build such a theory. Under the Supreme Court's First Amendment jurisprudence, the government may define the contours of the services it funds, protect the content of the messages it wishes to convey, and ensure that its ends are achieved. As such, the government may decide which services the Legal Services entities will provide, and it may

[186] See supra text accompanying notes 164-80.

exclude certain services, such as participation in abortion-related litigation or the representation of undocumented aliens.

However, the welfare reform litigation restriction is different from the other restrictions on Legal Services funding. The kind of direction from the government embodied in the welfare litigation restrictions—determining which causes of action the lawyer may bring and interfering with the lawyer-client relationship by extinguishing constitutional claims—is constitutionally permissible only where the state exercises managerial control over the speaker in question. Managerial control is inconsistent with the statute defining the independent relationship of the Legal Services lawyer to the government. Because claim preclusion forces the litigant to forego constitutional claims forever, the relationship between lawyer and client is necessarily comprehensive: A truncated relationship between lawyer and client is incompatible with the realities of preclusion.

Moreover, the welfare reform litigation restriction strikes at the core of democratic expression and the ability of litigants to seek redress from the government. While the government may exercise significant control over subsidized speech, these controls have constitutional limits. The welfare reform litigation restriction interferes with the speech of the client—that is, with the speech of a private individual. As such, litigation, and by analogy access to the subsidy itself, is a public forum, constituted by private litigants. The welfare reform litigation restriction strongly skews debate within the forum, silencing challenges to the constitutionality of the welfare system by refusing to subsidize them.



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