BEYOND UNCONSTITUTIONAL CONDITIONS
Charting Spheres of Neutrality in Government-Funded Speech*

by David Cole

BEYOND UNCONSTITUTIONAL CONDITIONS
Charting Spheres of Neutrality in Government-Funded Speech

by David Cole[1]

Nearly one hundred years ago, Oliver Wendell Holmes, the father of First Amendment jurisprudence, rejected a policeman's claim that he was unconstitutionally denied employment because of his political beliefs. "The petitioner may have a constitutional right to talk politics," Holmes wrote, "but he has no constitutional right to be a policeman."[2] Today, police officers have the right to talk politics and retain their jobs,[3] but it is less clear whether government-funded artists, counselors,

---

1 Associate Professor, Georgetown University Law Center. A revised version of this paper will be published in the June 1992 issue of the New York University Law Review. I would like to thank Beth Cook, David Chang, Bill Eskridge, Steve Goldberg, Nan Hunter, Seth Kreimer, Hans Linde, Jules Lobel, Carlin Meyer, Burt Neuborne, Gary Peller, Nina Pillard, Jamie Shapiro, Steve Shapiro, Steve Shiffrin, Mark Tushnet, and members of the Georgetown University Law Center and New York University Law School faculty workshops for their contributions and critiques.

I have been or am active in several of the lawsuits mentioned in this article. I was co-counsel in Massachusetts v. Sullivan, a parallel challenge to the Title X funding restrictions upheld in Rust v. Sullivan, and I wrote an amicus brief in the Supreme Court on behalf of the Commonwealth of Massachusetts and 58 organizations addressing First Amendment issues in Rust. I am also co-counsel in Finley v. National Endowment for the Arts, Gay Men's Health Crisis v. Sullivan, and Bullfrog Films v. Wick.

2 McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

3 See, e.g., Rankin v. McPherson, 483 U.S. 378 (1987) (county constable's office cannot terminate employee for expressing wish that President Reagan be killed); Connick v. Myers, 461 U.S. 138, 142 (1983) ("For at least fifteen years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally

and educators enjoy the right to speak freely and keep their funding. Last Term, the Supreme Court appeared to resurrect Justice Holmes's rationale, holding in Rust v. Sullivan[4] that while family planning counselors may have a constitutional right to talk to their clients about abortion, they have no constitutional right to do so while being funded by the government.[5] The Court's rationale echoed Justice Holmes: The First Amendment does not affirmatively entitle anyone to subsidies for their speech, and therefore the government may decline to pay for speech on content grounds without infringing speech rights.

The federal government greeted Rust as a license to impose content-based restrictions on a wide range of federally funded programs. Solicitor General Kenneth W. Starr said the Administration was "pleased" that the Court had ruled that "the government as financier ... is able to take sides; it is able to have viewpoints when it is funding."[6] In testimo-

---

protected freedom of expression"); Perry v. Sindermann, CITE (state university cannot fire teacher because of political content of his speech); but see McMullen v. Larson, 754 F.2d 936 (11th Cir. 1985) (upholding discharge of clerical employee from sheriff's office for stating on television news that he was sheriff's office employee and a recruiter for the Ku Klux Klan) (cited with approval in Rankin v. McPherson, 483 U.S. at 391 n.18).

4 111 S. Ct. 1759 (1991).

5 The Court in Rust upheld regulations that prohibit family planning clinics receiving federal funding from providing counseling or referrals for abortion, and simultaneously require the clinics to provide counseling and referrals with respect to prenatal care. See p. _-_ infra.

6 R. Marcus, Abortion-Advice Ban Upheld For Federally Funded Clinics, Wash. Post, May 24, 1991, at A1, A18.

ny to a congressional committee reviewing the impact of Rust, a Justice Department spokesperson interpreted the Court's decision to mean that "when the government funds a certain view, the government itself is speaking ... [and] therefore may constitutionally determine what is to be said."[7] In litigation, the Justice Department has advanced an equally

---

7 Statement of Leslie H. Southwick, Assistant Attorney General, Civil Division, Department of Justice, Before the Subcommittee on Constitution of the Senate Committee on the Judiciary Concerning the Implications of Rust v. Sullivan 5 (July 30, 1991). He specifically applied this principle to arts funding, maintaining that the National Endowment for the Arts (NEA) could constitutionally deny funding to art because its content was politically offensive, "even if 'artistically' presented." Id. at 5-7; see also id. at 7 ("when the government sponsors speech for certain purposes, it has the right to regulate the content of the government-funded portion of the message").

Even before Rust the federal government had increasingly attached explicit content restrictions to its funding of speech. Since 1984 the Agency for International Development has conditioned aid to U.S. family planning organizations supporting population planning abroad on a requirement that they not use grant funds to support a foreign organization that promotes abortion even with its own funds. DKT Memorial Fund, Ltd. v. Agency for International Development, 887 F.2d 275 (D.C. Cir. 1989); Planned Parenthood v. Agency for International Development, 915 F.2d 59 (2d Cir. 1990).

Since 1988 the government has restricted the content of federally funded AIDS education, requiring first that it not encourage homosexual sex, and later that it not be offensive to a majority of adults, whether or not those adults would ever see the materials. See Gay Men's Health Crisis, Inc. v. Sullivan, 733 F. Supp. 619 (S.D.N.Y. 1989).

More recently, Congress has imposed "decency" and "anti-obscenity" restrictions on NEA grants. Bella Lewitzky Dance Co. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991) (declaring unconstitutional NEA requirement that funded artists pledge not to create works that the NEA may consider obscene); Finley v. National Endowment for the Arts, No. CV 90-5236 AWT(Kx) (C.D. Cal.) (challenging constitutionality of NEA statute requiring

broad view of Rust, maintaining that it permits government to impose content restrictions on scientific research grants,[8] arts funding,[9] subsidies to documentary films,[10] and federally-funded AIDS education.[11]

At first reading, Rust appears to support the Justice Department's position that government is free to restrict speech whenever it is footing the bill.[12] If the government can bar federally funded family planning

---

grants to be made "taking into consideration general standards of decency"); see also Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U.Penn. L. Rev. 1293, 1295 and n.4 (1984) (listing examples of government conditions on funding, including Reagan Administration's "extracting promises of silence as a condition of government employment").

8 See Board of Trustees of Leland Stanford Junior University v. Sullivan, 1991 U.S. Dist. LEXIS 13217 (D.D.C. Sept. 26, 1991) (rejecting government's argument that Rust "is applicable to government grants and contracts generally, without substantial limitation").

9 Memorandum in Support of Defendants' Motion for Judgment on the Pleadings in Finley v. National Endowment for the Arts, No. CV 90-5236 AWT(Kx) (C.D. Cal.).

10 May 31, 1991 Letter of Wendy Keats to Clerk of Court in Bullfrog Films v. Wick, Nos. 88-6310 and 89-55945 (9th Cir.) (arguing that Rust permits government to impose content restrictions on certificates of eligibility for customs duty exemptions to documentary films).

11 Gay Men's Health Crisis, Inc. v. Sullivan, 733 F. Supp. 619 (S.D.N.Y. 1989). [cite govt reply memo].

12 This argument is often advanced by those who seek to restrict the content of NEA-supported art. Jesse Helms, the leading congressional proponent of content restrictions, has written: "The [NEA] legislation in no way 'censors' artists; it does not prevent artists from producing, creating, or displaying blasphemous or obscene 'art' at their own expense in the private sector." Helms, Tax-Paid Obscenity, 14 Nova L. Rev. 317, 318-19 (1990); see also [OTHER QUOTES].

counselors from mentioning abortion in pregnancy counseling, then surely it can require artists who receive federal grants to refrain from creating indecent art. If, as the Rust Court opined in dictum, the government can establish the National Endowment for Democracy to encourage democracy without being required to "encourage competing lines of political philosophy,"[13] why can't it require educators in public universities to teach only democracy in political philosophy classes?

Upon closer inspection, however, Rust is not so sweeping. At the close of its First Amendment discussion, the Court asserted that its reasoning does not mean that "funding by the Government ... is invariably sufficient to justify government control over the content of expression."[14] It noted that in public forums and public universities, First Amendment dictates restrict the government's ability to control expression even where it is subsidizing speech. Nor did the Court overrule prior decisions mandating strict content neutrality in government subsidies to the press.[15] Yet these principles are flatly inconsistent with the reasoning applied in Rust, for in each setting government content

---

13 Rust, 111 S. Ct. at 1773.

14 Rust, 111 S. Ct. at 1776.

15 Rust, 111 S. Ct. at 1773 (discussing Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987)).

restrictions would do no more than decline to subsidize speech. The Rust Court made little attempt to resolve the inconsistency.[16]

Generations of constitutional scholars have sought to resolve the problem of selective government funding of speech under the rubric of "unconstitutional conditions," which maintains that government may not condition benefits on the forfeiture of constitutional rights.[17] Both the majority and dissenting opinions in Rust are permeated by unconstitu-

---

16 See infra pp. __-__.

17 Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1415 (1989). Scholars have for the most part addressed the issue of unconstitutional conditions generically, seeking to develop a theory applicable to conditions affecting all constitutional rights, not just speech rights. See, e.g., McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv. L. Rev. 989 (1991); Baker, The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions, 75 Cornell L. Rev. 1185 (1990); Wald, Government Benefits: A New Look at an Old Gifthorse, 65 N.Y.U. L. Rev. 247 (1990); Epstein, The Supreme Court, 1987 Term – Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4 (1988); Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984); Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103 (1987); Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330 (1985); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935).

Others have criticized the usefulness of a general theory of unconstitutional conditions. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593 (1990); Sunstein, Is There an Unconstitutional Conditions Doctrine, 26 San Diego L. Rev. 337 (1989); Marshall, Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses, 26 San Diego L. Rev. 243 (1989).

tional conditions rhetoric and analysis.[18] Notwithstanding William Van Alstyne's proclamation in 1968 that the right-privilege distinction articulated by Justice Holmes had been laid to rest,[19] the distinction has continued to shape the development of constitutional doctrine and scholarship.[20] [DELETE ABOVE SENTENCE?]

This preoccupation with the unconstitutional conditions doctrine, however, misses a critical dimension of the constitutional problem raised by government-funded speech. Unconstitutional conditions doctrine seeks to identify those conditions on funding that have a coercive effect on the recipient's freedom to exercise her constitutional rights on her own time and with her own resources. The doctrinal focus is on the pressure that the dangling of the benefit places on the would-be recipient's freedoms outside of the funded program. The doctrine's corollary is that if the conditions do not restrict the recipient on her own

---

18 Rust, 111 S. Ct. at 1772-76; id. at 1780-84 (Blackmun, J., dissenting).

19 Van Alstyne, supra note ___ at ____.

20 As Rodney Smolla wrote:

> Like the prematurely rumored death of Mark Twain, ... reports of the demise of the [right-]privilege doctrine have been greatly exaggerated. Since the nineteenth century, the doctrine has shown an uncanny ability to reconstitute itself in spite of the best efforts of scholars and jurists to bury it.

Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 69 (1982) (detailing effect of right-privilege distinction on procedural due process dc ine).

time, no constitutional issue is raised. As the Court stated in Rust, "'[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.'"[21]

When the government funds speech, however, First Amendment concerns are not limited to potential coercion of the subsidized speaker, but extend also, and perhaps more importantly, to the audience's interest in a robust public debate. From the audience's perspective, the harm stems not from the coercive effect of the benefit on speakers, but from the ideological skewing of the public dialogue through official manipulation of information, or propaganda. For this reason, a public university directed to teach only ideas supportive of government policies would raise First Amendment concerns even (or indeed, especially) if it were staffed entirely by committed ideologues happy to teach within the government's directive, and free to engage in unrestricted speech off campus. Such a university would provide an impoverished speech forum for its students, and would be unable to play an independent role in the broader public dialogue. The unconstitutional conditions doctrine does not address these audience-based First Amendment concerns, and therefore provides an incomplete and often misleading standard for reviewing government funding of speech.

---

21 Rust v. Sullivan, 111 S. Ct. at 1772 (quoting Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)).

To correct or complete the picture another doctrinal approach is needed, tailored to the specific dangers posed by selective government funding of speech. Where the government seeks to proscribe speech directly, the First Amendment demands that it maintain neutrality toward content,[22] viewpoint,[23] and speaker identity.[24] This neutrality mandate is designed to curb government action that threatens to skew the marketplace of ideas or to indoctrinate the citizenry. Because government funding of speech raises the same concerns from a different angle, the neutrality mandate also has a role to play in reviewing government funding of speech.

At the same time, refusing to fund speech is clearly not identical to penalizing it. While non-neutral prohibitions on speech are only rarely justified, non-neutral government support of speech is often necessary in running a democratic government. The citizenry has a First Amendment interest in knowing the government's point of view; self-government requires non-neutral government speech, so that we know whether our representatives' ideas reflect our own. And as the NEA and

---

22 Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

23 Members of City Council v. Taxpayers for Vincent, 466 U.S. 719 (1984).

24 Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, ____ (1991) (holding that campaign finance statute that treated media and non-media corporations differently would violate the First Amendment unless justified by a compelling state interest); other S. Ct. cases on speaker identity discrimination?

public broadcasting demonstrate, government-supported speech at its best plays an important role in airing voices that would otherwise be overwhelmed by commercial domination of the cultural and intellectual marketplace. What makes regulation of government support for speech so difficult is its paradoxical nature: it is both necessary to and potentially subversive of democratic community.

In light of this paradox, First Amendment doctrine can neither insist on across-the-board government neutrality nor permit untrammelled content control over funded speech. We want the government to provide us with information but not to overwhelm us with propaganda. We want public education but not indoctrination. The doctrinal difficulty stems from the fact that it is virtually impossible to draw a line between information and propaganda or education and indoctrination in a specific case.

I therefore propose a structural accommodation of the competing values and dangers of government-funded speech. This view of the First Amendment recognizes the legitimacy of non-neutral government support of speech, but at the same time insists upon protecting certain spheres of independence and neutrality as institutional checks against the dangers of government propaganda and indoctrination. In these protected spheres, government must afford a degree of independence to institutions and speakers notwithstanding the presence of government

funding, toward the end of ensuring a vigorous public debate. In other funded settings, government would remain free to support specific viewpoints and dictate content.

A spheres of neutrality approach to First Amendment doctrine explains what the Rust Court acknowledged but left unexplained: that in spheres such as public forums, public universities, and the press, government cannot avoid First Amendment scrutiny by arguing that it is merely declining to subsidize the exercise of a constitutional right.[25] First Amendment strictures of neutrality and independence apply in these spheres of government-supported speech because each of these institutions plays a central role in shaping and contributing to public debate, and because the internal functioning of each institution demands insulation from government content control. A spheres of neutrality approach would require that all public institutions central to a system of free expression operate with a degree of independence from government control.

This structural approach conceives of the First Amendment as a mechanism for facilitating public dialogue. By insulating certain public institutions from direct political content control, the spheres of neutrality approach seeks to preserve an environment conducive to the airing of opposing points of view. At the same time, it recognizes the importance

---

25 Rust, 111 S. Ct. at 1776, 1773; see infra p.__-__.

of permitting government to participate in the ongoing process of communal self-definition, by permitting non-neutral support of speech in many other settings.

In suggesting this alternative approach, I do not propose to answer the full range of complicated questions that arise when government supports speech. Rather, I hope to redirect the inquiry away from an often unfruitful investigation of unconstitutional conditions and toward a speech-specific approach that directly addresses the role of particular public institutions in maintaining a rigorous and diverse public dialogue.

In Part I of this article, I will examine the Supreme Court's treatment of the First Amendment claims in Rust v. Sullivan, to demonstrate that the unconstitutional conditions doctrine, as the Court currently understands it, is insufficient to address the speech concerns raised when government selectively subsidizes speech. The Court's opinion in Rust speaks with two minds. On the one hand, it suggests that the unconstitutional conditions doctrine is the only limit on government-funded speech. But on the other hand, it explicitly points to distinct substantive First Amendment constraints on the content lines government can draw in allocating its funds even where no unconstitutional condition is present. The Court acknowledges but does not explain this inconsistency.

In Part II, I will show that the deficiency in the Rust Court's version of the unconstitutional conditions doctrine is shared by the Court's prior applications of the doctrine, and by commentators' alternative versions. Like the Rust opinion, the Court's prior decisions and the commentators' work leave unaddressed the audience-focused concern that government-funded speech will dominate the public dialogue or otherwise impinge on the listener's autonomy.

Part III suggests that the root of the problem lies in the paradoxical nature of government-funded speech, which at the same time creates possibilities for a more democratic and inclusive public debate, and threatens to dominate the market and overwhelm individual autonomy with its awesome resources. My analysis builds on insights of scholars who have addressed the problem not as one of unconstitutional conditions but as one of "government speech."[26] Recognizing the double-edged character of government-funded speech, I propose an institutional accommodation by mandating government neutrality only in certain funding contexts.

In Part IV I develop general principles for identifying spheres of independence or neutrality by examining three institutional contexts in which First Amendment dictates apply notwithstanding government

---

26 Shiffrin, Government Speech, 27 U.C.L.A. L. Rev. 565 (1980); Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863 (1979).

funding. The Court's approach to public forums, public universities, and subsidies to the press reveals an implicit commitment in existing doctrine to enforcing spheres of independence and neutrality in those institutional contexts where governmental content control would undermine public debate, and where neutrality is consistent with the purpose of the institution. Finally, I will apply the analysis to two other areas of current controversy, and argue that the rationales that require independence and neutrality in public forums, public universities, and the press also call for neutrality and independence in government funding of the arts and government-funded counseling programs.

I. RUST v. SULLIVAN -- A CASE STUDY IN THE LIMITS OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Rust v. Sullivan[27] involved a challenge to Health and Human Services (HHS) regulations governing family planning clinics that receive federal funds under Title X of the Public Health Services Act.[28] For nearly twenty years, the government interpreted Title X to allow non-directive counseling about and referral for abortions.[29] In 1988, however, the Secretary of HHS promulgated regulations that prohibited Title X programs from counseling about or making referrals for abortions and required them to counsel and refer for prenatal care for the "unborn child."[30] The regulations also barred Title X recipients from "encourag[ing], promot[ing], or advocat[ing] abortion as a method of family

---

27 111 S. Ct. 1759 (1991).

28 42 U.S.C. §300 et seq. (1982). The Title X program was designed to serve the "over five million American women [who] are denied access to modern, effective, medically safe family planning services due to financial need." 116 Cong. Rec. S24,093 (1970) (Statement of Sen. Yarborough).

29 See United States Dept. of HEW, Program Guidelines for Project Grant for Family Planning Services (Jan. 1976); Memorandum from Office of the General Counsel, Dept. of HEW (April 14, 1978). See also Rust, 111 S. Ct. at 1787-88 (Stevens, J., dissenting) (discussing history of Title X regulations). Non-directive counseling includes informing the patient that abortion and childbirth are her options, and providing information about the relative risks of abortion and childbirth in a particular case.

30 42 C.F.R. § 59.8(a)(1), (2).

planning," while imposing no restrictions on anti-abortion advocacy.[31] Federal funding generally makes up approximately 50% of a Title X clinic's budget, but the regulations apply to the program's entire budget, not just to the federal funds.[32]

The Supreme Court upheld the regulations by a 5-4 vote, with Chief Justice Rehnquist writing the majority opinion.[33] The Court's decision in Rust has come under fierce attack in the media and Congress,[34] but in at least one respect it is faithful to precedent; it reflects all the ambivalence and confusion that has characterized the Supreme Court's history of adjudicating challenges to selective government

---

31 42 C.F.R. § 59.10. HHS maintained that this provision bars Title X clinics even from providing the Yellow Pages to a client, since it lists abortion facilities. See New York v. Sullivan, 889 F.2d 401, 417 (2d Cir. 1989) (Kearse, J., dissenting); id. at 415 (Cardamone, J., concurring).

32 42 C.F.R. § 59.2. See Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 56 (1st Cir. 1990) (en banc), vacated in light of Rust v. Sullivan, CITE. In addition, the regulations require not only financial but also physical separation of the Title X program from activities deemed prohibited by §§ 59.8 and 59.10. 42 C.F.R. § 59.9. Even if a grantee can demonstrate that its federal funds are being used solely for Title X-approved activities, it must also physically separate its Title X project from other services provided with non-federal monies.

33 The Court found that the regulations are consistent with the Title X statute, and do not violate either the First Amendment or the right to privacy. This article will focus solely on the Court's treatment of plaintiffs' First Amendment claim.

34 cite to articles criticizing it; legislative history of bill to overturn Rust; "Policies vs. polls," N.Y. Times, Sept. 15, 1991 at E5 (71% of American public believes that federally funded clinics should be able to tell pregnant women about the availability of abortion).

funding of speech. Notwithstanding its broad dicta to the contrary, the decision implicitly acknowledges that the unconstitutional conditions doctrine is insufficient to address the full range of First Amendment concerns. At the same time, it demonstrates that the Court has no coherent concept of what doctrinal approach to take beyond the unconstitutional conditions doctrine.

A. Unconstitutional Conditions

The Rust Court explicitly framed the First Amendment issue in unconstitutional conditions terms. As the Court restated it, plaintiffs contended "that the restrictions on the subsidization of abortion-related speech ... are impermissible because they condition the receipt of a benefit, in this case Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling."[35] The Court rejected this claim because it found that the limitation on abortion-related speech governed only the Title X project, and did not dictate what the Title X grantee could say or do outside the funded project. Where a condition merely defines the scope of the government program, the Court reasoned, and leaves grantees free to engage in unfettered speech on their own time with their own resources, it is not

35 111 S. Ct. at 1773-74.

an unconstitutional condition.[36] "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights."[37] In contrast, a condition is unconstitutional where "the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected speech outside the scope of the federally funded program."[38]

This analysis limits unconstitutional conditions to situations where the condition on a benefit extends beyond the scope of the benefit itself. For example, a requirement that one not teach French with a grant awarded to teach English would not amount to an unconstitutional condition. However, if the government conditioned a grant to teach English on the recipient's pledge not to teach French even on her own time, the condition would be unconstitutional. In this view, the unconstitutional conditions doctrine serves a limited purpose: it sets a boundary on the reach of government funding restrictions. The boundary line is coextensive with the government grant. As long as the government limits its restriction to defining the scope of activities to be engaged in with the government grant, it has not imposed an unconstitutional

---

36 Id. at 1774-75.

37 Id. at 1775.

38 Id. at 1774 (original emphasis).

condition. Where, on the other hand, government seeks to leverage its grant-making power by imposing restrictions beyond the grant's scope, the unconstitutional conditions doctrine will be triggered.[39]

---

39 In one significant respect, the Title X regulations appear to violate the principle that the majority set forth. Title X provides only partial subsidization for family planning programs, generally 50%, see supra note ___, but the restrictions apply not only to the federal funds, but to all matching funds received from non-federal sources. In an unpersuasive footnote the Court rejected plaintiffs' argument that this extension was an unconstitutional condition.

The Court's grounds for rejecting the argument are inconsistent with the unconstitutional conditions doctrine it set out in the text. It maintained that the Title X recipient "is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." 111 S. Ct. at 1775 n.5. But this is true of any condition on a subsidy, including those the Court has found unconstitutional. In FCC v. League of Women Voters, 468 U.S. 364 (1984), for example, the Court struck down a condition that public television stations receiving federal funds not editorialize with any of their funds, whether federal or not. But a station surely could have avoided the no-editorializing rule by "simply declin[ing] the subsidy." One can always avoid a condition on a subsidy by turning down the subsidy. Thus, if this rationale were sufficient, there would be no such thing as an "unconstitutional condition."

The Court's second rationale is equally specious. It states that the condition is not constitutionally problematic because it applies only to the Title X program, and therefore the grant recipient can still use non-program monies for its "pro-abortion activities." 111 S. Ct. at 1775 n.5. This suggests that as long as a grant recipient can use some private money to speak freely, the government can, by broadly defining the "program" it subsidizes, restrict her ability to speak with other "program" funds not provided by the government. Under this rationale, the government could have defined the Title X program as a 24-hour-per-day, six-day-per-week program, provided 10% of the funding, and required the recipient not to speak in favor of abortion at any time during the program. Such a condition would presumably not be unconstitutional under Rust because the recipient would still be free to speak about abortion with private funds on the seventh day.

At several points in its opinion, the Court appeared to suggest that the unconstitutional conditions doctrine constitutes the only First Amendment limitation on federally funded speech. In rejecting plaintiffs' claim that HHS impermissibly discriminated in its funding on viewpoint-based (anti-abortion) grounds, the Court relied on broad unconstitutional conditions rhetoric:

> [t]he 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 alternate 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] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'[40]

In perhaps the most far-reaching sentence in the entire opinion, the Court then applied this unconstitutional conditions rhetoric to

---

Accordingly, the Rust Court's application of the unconstitutional conditions doctrine is circular. The doctrine assertedly limits the reach of conditions that government may impose on a benefit program, but the Court allows government to subvert those limits by failing to limit government's definition of the program.

40 111 S. Ct. at 1772. Significantly, the Court initially framed its discussion of plaintiffs' First Amendment challenge by generalizing about the denial of subsidies for the exercise of constitutional rights, without referring to the particular concerns of the First Amendment. 111 S. Ct. at 1772. This may be in part attributable to the Court's unconstitutional conditions approach to the case. Most commentators who have addressed the unconstitutional conditions issue have done so by attempting to develop a general theory, without distinguishing between the different constitutional rights that might be affected by conditions on government benefits. See, e.g., Sullivan, Kreimer, McConnell, Baker.

speech by way of an example, stating that "[w]hen Congress established the National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism or Fascism."[41] This example appears to tolerate even political viewpoint-based discrimination in government-funded programs. Thus, the Court suggested that as long as the scope of the content directions do not extend beyond the program to the recipient's own time and resources, the First Amendment imposes no substantive limits on the definition of government-funded speech programs.[42]

If this dicta were the end of the matter, the government would be free to draw whatever content- or viewpoint-based lines it desires in defining the scope of its speech subsidies. It could create a National Endowment for Democratic Party Values, and provide grants to speakers, journalists, authors, artists, and filmmakers for propaganda supporting the Democratic platform. It could require the National Endowment for the Arts, the National Endowment for the Humanities, and public broadcasting stations to use federal funds only for projects and programs that

---

41 Id. (citation omitted).

42 111 S. Ct. at 1773 ("Within far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program.").

support the Administration's or Congress's political ideology.[43] In other words, the government would be free to direct its substantial resources toward propagandizing the public.

C. Beyond Unconstitutional Conditions

Other parts of the Rust opinion, however, implicitly and explicitly acknowledge that the First Amendment imposes additional constraints on the control of government-funded speech. While the Court makes little or no effort to rationalize or systematize these constraints, its analysis implicitly recognizes the limits of the unconstitutional conditions doctrine. At the same time, its application of these purportedly independent constraints is deeply confused by unconstitutional conditions rhetoric and reasoning.

First, the Court found that "[t]his is not a case of the Government 'suppressing a dangerous idea,'"[44] thereby reaffirming the long-standing principle that government may not "discriminate in its subsidies in such

---

43 See, e.g., Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 198_) (striking down USIA regulations that allocated educational certificates for customs duty exemptions to documentary films on the basis of whether the films constituted "propaganda," or "lend [themselves] to misrepresentation of the United States").

44 111 S. Ct. at 1772.

a way as to 'ai[m] at the suppression of dangerous ideas.'"[45] If a mere decision not to subsidize speech "'does not infringe the right'" of free speech, as the Court's broad dicta suggested, the government's "aim" in allocating subsidies should be irrelevant. But the Rust Court did not hold that HHS's aim in promulgating the Title X regulations was irrelevant. Instead, it found that the Title X regulations were not designed to suppress dangerous ideas.

But while the Court articulated this restriction as distinct from the unconstitutional conditions doctrine, its application of the restriction was infected by its unconstitutional conditions approach. The Court concluded that "[t]his is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of its scope," suggesting that the two purposes are mutually exclusive.[46] Thus, the Court came close to

---

45 Regan, 461 U.S. at 548 (quoting Cammarano v. United States, 385 U.S. 498, 513 (1959)). See also Board of Education v. Pico, 457 U.S. 853, 871 (1982) (removal of government-purchased books from school library violates First Amendment if done to suppress ideas); cf. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (even in non-public forum, government must not restrict access in "an effort to suppress expression merely because public officials oppose the speaker's view"). [OTHER CASES FROM FINLEY BRIEF].

46 111 S. Ct. at 1772-73. It would be difficult to imagine regulations more clearly aimed at suppressing a dangerous idea. They forbid counseling or referrals about abortion, while requiring counseling and referrals directed toward preserving the health of the "unborn child." 42 C.F.R. § 59.8. They forbid advocacy in favor of abortion, while permitting anti-abortion advocacy. 42 C.F.R. § 59.10. And they instruct Title X counselors,

reducing the "suppressing dangerous ideas" prohibition to a restatement of the unconstitutional conditions doctrine.[47]

---

if asked specifically about abortion, to say that it is not "an appropriate method of family planning." 42 C.F.R. § 59.8(b)(5). Indeed, the Preamble to the regulations states that they "exhibit a bias in favor of childbirth and against abortion," and are intended to send the "message ... that the federal government does not sanction abortion." 53 Fed. Reg. at 2943-44.

The Court sought to portray the regulations as a neutral attempt to limit the family planning program to pre-conception family planning, rather than an attempt to suppress information specifically about abortion. It noted that "[t]he Title X program is designed not for prenatal care, but to encourage family planning," and therefore "a doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program." 111 S. Ct. at _ . The regulations challenged, the Court claimed, "are of the same ilk." Id.; see also id. at 24 ("[t]he [Title X] program does not provide post-conception medical care").

If the Title X regulations forbade all counseling or referrals of pregnant women, they would fit the "pre-conception" picture the Court painted. But when a pregnant woman seeks assistance, the regulations require a Title X clinic to give her counseling and referrals for one post-conception option, prenatal care, and forbid it from providing counseling and referrals with respect to the other post-conception option, abortion. Thus, the Title X regulations are in fact aimed at suppressing a particular idea, the idea that abortion is a legal option for a pregnant woman. From a doctrinal perspective, however, it is significant that the Court did not sanction the regulations as they are, but instead mischaracterized them as neutral to avoid the First Amendment's prohibition on "suppressing a dangerous idea."

47 Other courts have suggested such a move, by reasoning that because the mere refusal to subsidize speech does not infringe First Amendment rights, the only way that government can use its subsidies to "suppress dangerous ideas" is by instituting an "unconstitutional condition," namely by conditioning the subsidy on relinquishment of other, non-government-funded First Amendment activities. See, e.g., DKT Memorial Fun v. Agency for Int'l Dev., 887 F.2d 275, 287-90 (D.C. Cir. 1989).

Second, the Court concluded that the regulations were "narrowly tailored" to further the government's purpose. If the mere refusal to subsidize speech cannot infringe constitutional rights, there would be no need to determine whether the reason for the refusal was "narrowly tailored." Again, however, the reason the Court concluded that the regulations were narrowly tailored was that they were coextensive with the benefit, i.e., they were not an unconstitutional condition.[48]

Third, the Court suggested that selective government funding of speech might be invalid if it denies support to a small group of citizens

---

48 111 S. Ct. at 1773 n.4. To find the regulations narrowly tailored, the Court shifted its definition of the purpose of the program. Earlier, in determining that the regulations were not aimed at suppressing dangerous ideas, the Court strained to define their purpose as viewpoint-neutral: to limit the program to pre-conception family planning. See supra note ___. Yet a one-sided restriction on abortion counseling would not be "narrowly tailored" to meet that purpose, because a restriction on all post-conception counseling would serve this purpose more directly and neutrally. Accordingly, in its "narrowly tailored" inquiry the Court redefined the regulations' purpose as not to "promote or advocate" abortion as a method of family planning.

The Court made no effort to explain why it made a "narrowly tailored" finding. It cited two cases for the proposition that "Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use," but in neither case did the Court apply a "narrowly tailored" test. See South Dakota v. Dole, 483 U.S. 203, 207-09 (1987) (upholding condition that states set drinking age at 21 to receive federal highway funds and finding condition directly related to Congress's purpose, but declining to address "the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power"); Buckley v. Valeo, 424 U.S. 1, 99 (1976) (upholding public financing for Presidential elections, but not applying a "narrowly tailored" test).

because of the content of their speech. It was on this ground that the Court sought to distinguish Arkansas Writers' Project, Inc. v. Ragland,[49] which struck down a state sales tax exemption for religious, professional, trade, and sports magazines, but not general interest magazines. In Arkansas Writers' Project, a seven-member majority held that because the tax scheme allocated a subsidy on the basis of the magazines' content,[50] it violated the First Amendment absent a compelling state interest.[51] Even the dissenters, Justice Scalia and Chief Justice Rehnquist, agreed that stringent First Amendment scrutiny might be appropriate "when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern -- a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue."[52]

---

49 481 U.S. 221, 234 (1987).

50 Selective taxation presents the same issue as selective subsidies, because the tax system is in essence a structure for allocating government resources. Whether the government collects taxes first and then directs government subsidies to some taxpayers, or simply allocates tax exemptions and deductions at the outset, the net result is the same. Thus, the Court has long recognized that "'[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.'" Leathers v. Medlock, 111 S. Ct. 1438, 1445 n.3 (1991) (quoting Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983)); see also Ragland, 107 S. Ct. at 1731 (Scalia, J., dissenting).

51 481 U.S. at 230. The Court so held, moreover, despite acknowledging that the distinction was viewpoint-neutral and that "there is no evidence of an improper censorial motive." Id. at 230-31.

52 481 U.S. at 237 (Scalia, J., dissenting).

Thus, in Arkansas Writers' Project every member of the Court rejected the argument that the mere refusal to subsidize speech can never infringe First Amendment rights.[53] The Court had expressly reaffirmed Arkansas Writers' Project only one month before Rust, so overruling it was not a realistic possibility.[54] Instead, the Rust Court sought to distinguish it as a case of "a general law singling out a disfavored group on the basis of speech content."[55]

The Rust Court's attempt to distinguish Arkansas Writers' Project fails. Every decision to subsidize speech with a particular message has the effect of "singling out a disfavored group on the basis of speech content," namely the group that does not receive the subsidy because it seeks to express a different message. The decision to subsidize family planning clinics that will discuss prenatal care but not abortion "singl[es]

---

53 See also Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (construing statute governing allocation of second-class mailing privileges, "a form of subsidy," to prohibit judgments based on the quality of the publications' content, because to allow such judgments would authorize impermissible censorship).

54 Leathers v. Medlock, 111 S. Ct. 1438. In Leathers, the Court upheld a tax scheme that taxed cable television operators but not newspapers, magazines, and other television broadcasters. In so doing, the Court discussed the general issue of selective taxation as it applies to media and nonmedia speakers. 111 S. Ct. at 1442-46. It noted that selective taxation will trigger heightened First Amendment scrutiny when it singles out the press for taxes not applicable to nonmedia businesses, when it singles out a small group of members within the press, and when it is based on content. Id.

55 Rust, 111 S. Ct. at ____.

out ... on the basis of speech content" those clinics that provide and those women who seek full information on their medical options.

The Rust Court also considered it relevant that the Arkansas law targeted "a small group within the press," but did not explain how the refusal to subsidize the exercise of a fundamental right, which the Court earlier stated "'does not infringe the right,'"[56] becomes a constitutional violation when it affects "a small group."[57] Nonetheless, the Court's choice to distinguish rather than overrule Arkansas Writers' Project limits the Court's holding, and leaves room for arguing that a denial of a

---

56 111 S. Ct. at 1772 (quoting Regan, 461 U.S. at 549).

57 The Court in Leathers v. Medlock, 111 S. Ct. 1438, relied upon a similar distinction to uphold a selective state tax on cable television. The Court noted that the Arkansas Writers' Project tax effectively singled out three magazines, while the tax on cable operators affected 100 operators. 111 S. Ct. at 1444-45. But as the dissent in Leathers pointed out, reliance on such a numerical difference provides

> no meaningful guidance ... From the majority's discussion, we can infer that three is a sufficiently 'small' number of affected actors to trigger First Amendment problems and that one hundred is too 'large' to do so. But the majority fails to pinpoint the magic number between three and one hundred actors above which discriminatory taxation can be accomplished with impunity.

111 S. Ct. at 1451 (Marshall, J., dissenting) (original emphasis).

The fact that a small group is singled out might indeed be relevant as an indication that a facially content-neutral restriction is in fact designed to suppress speakers expressing particular ideas. But where, as in Arkansas Writers' Project, the restriction is on its face content-based, it should not matter whether a large or small group is singled out.

subsidy is unconstitutional because it is targeted at a small group disfavored because of the content of its speech.

The last paragraph of the Rust majority's First Amendment analysis contains the Court's most explicit statement that the mere denial of a speech subsidy may be unconstitutional in certain circumstances. As noted above, the Court warned that its decision should not be read 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."[58] As examples of situations in which government subsidies do not give the government carte blanche to control the content of subsidized expression, the Court pointed to the public forum doctrine and academic freedom cases.[59] In the public forum context, the fact that government is merely denying a subsidy when it denies a speaker access to government property does not excuse it from maintaining a content-neutral stance.[60] Similarly, the fact that a

---

58 111 S. Ct. at 1776.

59 Id.

60 Once the government "expressly dedicates [a particular forum] to speech activities," it cannot exclude speakers based upon the content of their speech. United States v. Kokinda, 110 S. Ct. 3115, __ (1990) (plurality); Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983); see also Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800-03 (1985) (plurality).

public university expends state funds does not give the state unfettered power to restrict speech by faculty or students.[61]

As with Arkansas Writers' Project, however, the Court failed to provide a convincing rationale for treating these contexts differently than medical counseling. It offered no explicit rationale for the public forum rule, merely suggesting that it has something to do with the fact that public forums and limited public forums are "'dedicated to speech activity.'"[62] With respect to universities, the Court simply stated that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that Government's ability to control speech within that sphere by means of [funding] conditions" is restricted.[63]

The Court acknowledged that the doctor-patient relationship might deserve similar First Amendment protection "even when subsi-

---

61 E.g., Healy v. James, 408 U.S. 169 (1972) (public university cannot deny support to student group because it disagrees with its point of view); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (PAREN); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring); Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Board of Education v. Pico, 457 U.S. 853, 87_ (1982) (plurality) (government may not remove books from a publicly-funded school library if it does so in order to "deny [students] access to ideas with which the [school board] disagreed").

62 Id. (quoting United States v. Kokinda, 110 S. Ct. at 3119).

63 Id.

dized by the Government,"[64] but asserted that it did not need to reach the question "because the Title X program regulations do not significantly impinge upon the doctor-patient relationship."[65] It grounded this finding on several factors: (1) the doctor's silence on abortion will not be misleading, because "[t]he program does not provide post-conception medical care"; (2) the patient has no basis for expecting that the Title X program will provide comprehensive medical care; and (3) the doctor can make clear that advice about abortion is beyond the scope of the program, and is not compelled to represent as his own any opinion he does not hold.[66]

None of the Court's factors, however, withstands scrutiny: (1) the program in fact mandates the provision of one-sided "post-conception medical care," for it mandates counseling and referral about prenatal care, but not abortion; (2) Title X patients do have a basis, grounded in medical ethics, standard medical practice, and almost twenty years of Title X practice, for expecting that their doctors will provide them with full information on their reproductive options;[67] and (3) the doctor is compelled to provide one-sided information on and referrals for prenatal

---

64 Id.

65 111 S. Ct. at 1776.

66 Id.

67 See infra pp. ___-__.

care, even if she believes full information should be provided, or that abortion is medically indicated. Thus, the Court went out of its way to misconstrue the facts, but in so doing it left open the legal question whether funding conditions on doctor-patient speech that do affect the relationship would violate the First Amendment.[68]

* * *

The Rust Court's initial broad dicta suggesting that selective speech subsidies do not violate the First Amendment as long as they leave grantees free to speak beyond the subsidized program is significantly qualified by its subsequent discussion. Rust does not in fact hold that the denial of a subsidy for speech does not infringe the First Amendment, or that the government is free to impose any substantive speech restrictions it chooses on the use of its funds. In theory, significant additional constitutional limitations on the government's regulation of

---

68 The Court's analysis at this point is particularly troubling, for it seems to imply that these restrictions would not be a significant impingement even if imposed directly rather than as a condition of federal funding. The determination that there was no significant impingement permitted the Court to avoid deciding whether the doctor-patient relationship should "enjoy protection under the First Amendment from governmental regulation." 111 S. Ct. at 1776. Thus, the Court implicitly found that even if this funding context deserved full First Amendment protections, the restrictions would be valid. That conclusion is directly contrary to host of Supreme Court decisions. Bigelow v. Virginia, 421 U.S. 809 (1975) (state may not restrict speech about abortion); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (state may not regulate doctor-patient counseling about abortion); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (same).

speech subsidies remain. Even where a condition is coextensive with the benefit it defines, the condition: (1) must not be "aimed at the suppression of dangerous ideas"; (2) must be "narrowly tailored" to further the government's purpose; (3) may not "singl[e] out a disfavored group" for the denial of a speech subsidy; and (4) may not be content- or viewpoint-based where the government subsidizes a forum dedicated, either by tradition or design, to expressive activities.

At the same time, the Court's application of these principles to the facts of Rust raises questions about the effectiveness of these constraints. If regulations barring discussion of one of two post-conception options and mandating discussion of the other option are not "aimed at suppressing a dangerous idea," that qualification may have no bite.[69] If regulations are "narrowly tailored" merely because they are consistent with the purpose the government has advanced, without questioning the legitimacy of the purpose, that constraint may be circular, and virtually all regulations will by definition be narrowly tailored.[70] These regula-

---

69 In fact, while the Supreme Court has often quoted this language as a restriction on government support of speech, it has never found any subsidy scheme invalid for aiming at the suppression of ideas. Lower courts have done so. San Diego Committee Against Registration and the Draft, MORE CASES.

70 Cf. Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972) (arguing that rational relationship requirement is circular, because statutory classification will always be rationally related to the purpose derived from the statutory terms itself).

tions plainly "single out a disfavored group on the basis of speech content," and the Court's conclusion to the contrary renders the application of that principle beyond the facts of Arkansas Writers' Project questionable. Finally, if regulations expressly telling doctors what they can and cannot say in counseling their patients do not interfere with the doctor-patient relationship, it is difficult to know what would constitute interference.

The Rust Court's analysis of plaintiffs' First Amendment claim is, in the end, hopelessly inconsistent. The Court asserts that the unconstitutional conditions doctrine is the only constraint on a government subsidy for speech, but simultaneously formulates several distinct First Amendment constraints. It offers no rationale for these distinct constraints. And in applying them it frequently reverts to its unconstitutional conditions analysis. Rust suggests both that the Court recognizes that there is something wrong with the claim that the mere refusal to subsidize speech cannot infringe First Amendment rights, and that the Court is at a loss as to how to correct it.

II. THE THEORETICAL LIMITS OF UNCONSTITUTIONAL CONDITIONS ANALYSIS

In the preceding section, I have sought to demonstrate that the unconstitutional conditions doctrine as articulated in Rust is insufficient

to address the full range of First Amendment concerns raised by government support of speech. But before rejecting the unconstitutional conditions doctrine as insufficient, two potential criticisms from within the terms of that doctrine must be addressed. First, one might argue that the Court's statement of the doctrine is inconsistent with the Court's previous unconstitutional conditions jurisprudence, and that properly understood, that jurisprudence does sufficiently address the First Amendment concerns raised by selective government funding of speech. Second, one might argue that even if the Court's doctrine does not address those concerns, a better understanding of unconstitutional conditions would do so. Neither internal critique stands.

A. Rust and Its Precedent -- The Triumph of Positivism

The Rust Court's statement of the unconstitutional conditions doctrine is in fact largely consistent with the Court's prior decisions. In virtually all of the cases finding an unconstitutional condition, the condition extended beyond the scope of the subsidy itself. In Perry v. Sindermann,[71] for example, the Court held that a college teacher stated a First Amendment claim when he alleged that he was not rehired because he had criticized the school administration in public. The Court held that the state could not deny him a benefit -- public employment --

71 408 U.S. 593 (1972).

on the basis of his non-employment speech.[72] In effect, the state had conditioned Perry's employment on his willingness not to criticize the school even on his own time.[73]

Similarly, in Speiser v. Randall,[74] the Court struck down a loyalty oath imposed as a condition on receiving a property tax exemption; swearing loyalty clearly extended beyond the scope of the government subsidy, for it governed the affiant's whole life. In FCC v. League of Women Voters,[75] the condition that the Court invalidated imposed an absolute bar on public broadcasters who received a small federal subsidy from engaging in any editorializing, even with non-federal funds.[76]

---

72 408 U.S. at 597-98.

73 The Court's public employment cases are thus a variant of the unconstitutional conditions doctrine. Where employees are fired for speech on their own time, as in Perry, it is as if the government had conditioned a benefit -- employment -- on restricting their speech on their private time. Where the employee is fired for on-the-job speech, as in Rankin v. McPherson, 483 U.S. 378, the situation is simply the reverse. Instead of extending the condition beyond the benefit, the government has denied a benefit -- employment -- that is greater than the speech subsidy. Because the denial of the benefit extends beyond the speech condition, it has the same effect of penalizing speech. Where the government dismisses an employee for on-the-job speech, it cannot be said to have merely declined to subsidize the speech; it has also fired the speaker.

74 357 U.S. 513 (1958).

75 468 U.S. 364 (1984).

76 468 U.S. at 400.

Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board, 450 U.S. 707 (1981), present a slightly different scenario, and not only because they involve the First Amendment's free exercise clause rather

Conversely, the Court has rejected unconstitutional conditions challenges where the condition is coextensive with the benefit, and therefore does not limit what the recipient can do with her own funds or on her own time. Thus, in Maher v. Roe[77] and Harris v. McRae,[78] the Court rejected challenges to Medicaid programs that covered medical expenses related to childbirth but not abortion. The Court in both cases found that because the condition on Medicaid funding was coextensive with the benefit, the government had merely declined to subsidize abortions, and such a refusal to subsidize, without more, was not an unconstitutional condition.[79]

---

than the speech clause. In these unemployment compensation cases, if the plaintiffs complied with the state's "condition," they would not receive the benefit (because they would be employed). See Baker, The Prices of Rights, supra note __ at __. In both cases, states found individuals ineligible for unemployment compensation because they ruled that their religious beliefs did not constitute "good cause" for refusing employment. The Supreme Court ruled that the state could not condition eligibility for the benefit of unemployment compensation on an individual's agreeing to violate his or her religious beliefs. Despite their differences, these cases can nonetheless be fit into the "unconstitutional conditions" pattern. Because religious belief is holistic in nature, to be compelled to violate one's beliefs in one setting necessarily affects one's entire religious life. Thus, the government's condition extended beyond the benefit to intrude on the recipient's religious identity.

77 432 U.S. 464 (1977).

78 448 U.S. 297 (1980).

79 Maher, 432 U.S. at 474-76; McRae, 448 U.S. at 316-18.

The Court applied the Maher and McRae approach to speech in Regan v. Taxation With Representation,[80] where it held that denial of a tax deduction for a charitable organization's lobbying activities did not violate the First Amendment.[81] The Court emphasized that nonprofit organizations that sought to lobby could continue to receive tax deductions for donations to their non-lobbying activities, by creating a separate affiliate, not tax-exempt, to engage in lobbying.[82] Accordingly, the condition was coextensive with the benefit, and "Congress has not infringed any First Amendment rights ... it has simply chosen not to pay for [plaintiffs'] lobbying."[83]

Thus, the Rust Court was consistent with prior precedent in articulating an extremely positivist theory of unconstitutional conditions.[84] In this view, the unconstitutional conditions doctrine is deter-

---

80 461 U.S. 540 (1983).

81 The Court's facile transfer of the Maher/McRae principle to the selective support of speech is problematic. See infra pp. __-__.

82 461 U.S. at 544.

83 461 U.S. at 546. Similarly, in Lyng v. Automobile Workers, 485 U.S. 360 (1988), the Court held that denying food stamps to families who become eligible as a result of a strike did not infringe strikers' associational rights because the government was merely declining to subsidize the choice to strike.

84 The theory is positivist in its choice of a baseline from which to measure whether conditions are unconstitutional. In order to decide whether a condition on funding makes a recipient worse off, one must adopt some baseline from which to measure. Kreimer, supra note ___ at 1353-59; Epstein, supra note __ at 13 ("an account of baselines is essential

mined by the government's definition of the scope of the benefit pro-

---

to any general analysis of unconstitutional conditions"). If, for example, a citizen has no baseline entitlement to a particular benefit, then any condition on the benefit may be seen as simply part of the offer, and will not be deemed to make the citizen worse off. If, on the other hand, the baseline norm is that the benefit is provided, then the imposition of any condition affecting the exercise of constitutional rights will be unconstitutional, by making the recipient worse off.

The Court's approach is positivist in that it accepts the government's definition of the benefit program as the baseline. One justification for this approach is that the Constitution does not generally establish an independent baseline of affirmative support for the exercise of constitutional rights; thus, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." Rust, 111 S. Ct. at 1772 (quoting Regan, 461 U.S. at 549). See also J. Ely, Democracy and Distrust 135-36 (1980); Baker, The Prices of Rights, supra note ___ at 1219-20 (Constitution generally provides rights against government interference, but "does not require the State also to remove the background economic impediments to engaging in the protected activity, which necessarily exist in a market economy"); Sullivan, supra note ___ at 1450; Seidman, Reflections on Context and the Constitution, 73 Mich. L. Rev. 73, 79 (1988) (Constitution "does not specify a normative baseline with regard to all conditional offers").

Constitutional law scholars have sought to respond to the limits of the Court's positivist approach by identifying baselines distinct from the government benefit itself. But if there are baselines to be discovered in the Constitution, they are specific to particular clauses and guarantees, and are not generalizable to the Constitution as a whole. Thus, the Establishment Clause requires the government to maintain an especially strict stance of neutrality towards religion, neither favoring nor disfavoring it. Similarly, the right to counsel has been construed to mandate a baseline of competent counsel for defense of a criminal trial, whether or not the defendant can afford to pay for a lawyer. Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment requires appointment of counsel for indigent defendants in all serious criminal cases). Other rights, such as the right to privacy, permit government support, but do not require it. Harris v. McRae, 448 U.S. 297 (1980). Because unconstitutional conditions doctrine seeks to establish general principles for conditions affecting all constitutional rights, the search for a general baseline is elusive. See infra pp. _-_ [NEXT SUBSECTION ON SCHOLARS].

gram, because the only conditions that make the recipient worse off are those that control his exercise of rights beyond the scope of the benefit.

As formulated, however, the unconstitutional conditions doctrine fails to capture significant First Amendment concerns raised by government-funded speech. It addresses the boundaries of the government's grant-making powers, but does not provide a tool for analyzing the substantive legitimacy of grant terms that do not extend beyond the borders of the grant itself. It tells us why a requirement that a government subsidy for teaching English be used to teach English is constitutionally unproblematic, while a further condition that the grantee speak no other language, even on his own time, is invalid. But it does not tell us whether a government subsidy for teaching citizens to support anti-abortion ideas is constitutional. It addresses only coercive effects on the speaker, and fails to take account of the listener's First Amendment rights.

The insufficiency of the unconstitutional conditions doctrine to address the full range of First Amendment issues raised by government control of funded speech is demonstrated by a slight variation on the facts of Rust. Assume that the government ran the Title X program itself, defined it as a pro-childbirth, anti-abortion family planning program, hired only counselors that agreed to advance its particular agenda, but

left employees free to engage in any speech they chose off the job. In that context, it is likely that no counselor would complain. Even if one did, he would have no unconstitutional condition complaint, because the restriction would be coextensive with the program. Nor would a client prevail on an unconstitutional condition claim, because she would only be limited in what she could hear within the boundaries of the program. But the effect of such a program on women dependent upon Title X services for family planning counseling -- indoctrination to the government's point of view -- would still raise serious First Amendment concerns. This audience-focused claim, which turns not on a claim that plaintiffs are penalized for exercising a constitutional right but on a claim that they are victims of government indoctrination, should have been at the heart of Rust. What is most constitutionally offensive about the Title X regulations is not the restriction they impose on doctors, but the effect of the resulting counseling on the indigent women who rely on Title X services. The Court's focus on unconstitutional conditions doctrine misdirected attention away from the constitutional questions raised by the substance, rather than the reach, of the regulations.

B. Rust and the Scholars -- Shifting Baselines

Constitutional scholars have proposed a number of alternative conceptions of the unconstitutional conditions doctrine, but these alternatives similarly fail to address the audience-related First Amendment concerns about domination and indoctrination. Again, a hypothetical may help to illustrate the deficiency. Imagine that the Republicans achieve a landslide electoral victory and control both Congress and the Presidency. In response to this popular mandate, Congress and the President create a multi-billion dollar education program to establish public universities and public broadcasting stations across the country to propagate Republican ideals. It requires the professors and broadcasters it hires to propagate the government's point of view within the program, but does not constrain their speech off the job. Such a program, I suggest, would raise significant First Amendment questions. However, it would not present an unconstitutional condition under the leading academic theories of unconstitutional conditions.

Kathleen Sullivan, for example, argues that unconstitutional conditions doctrine should recognize the important structural role constitutional rights play in maintaining the distribution of power between government and individuals, and among classes of individual

rights-holders.[85] But her solution provides little guidance for determining what conditions on funding are impermissible.

Sullivan would subject to "strict review any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government."[86] But as Michael McConnell has pointed out, any selective funding scheme will have the effect of pressuring people to engage in funded rather than non-funded conduct.[87] If Congress funds educational films on AIDS prevention techniques, it will have the inescapable effect of pressuring some documentary filmmakers to make films about AIDS prevention rather than other subjects. That is how the market works. All conditions on benefits in a market economy will have the effect of pressuring some recipients to alter their choices, yet surely all conditions on benefits should not be subject to strict scrutiny.

---

85 Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1491 (1989).

86 Id. at 1499-1500.

87 McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv. L. Rev. 989, 1001-02 (1991); see also Student Government Association v. Bd. of Trustees of University of Massachusetts, 868 F.2d 473, 479 n.4 (1st Cir. 1989) (denying subsidy to speech of particular viewpoint "will ordinarily cause a given viewpoint to be articulated less frequently than it would be with the subsidy").

At the same time, Sullivan overlooks the possibility that government may manipulate its funds to indoctrinate. Thus, she states that "earmarking" of government funds for a particular program "should not be held to pressure constitutional rights to .... speech.... Earmarking always implies a nonsubsidy of the entire universe beyond the earmarked one. Even if that excluded universe includes constitutional rights, not every nonsubsidy pressures rights."[88] But the hypothetical Republican education program is nothing more than earmarking. Sullivan's account does not provide meaningful guidance for determining which earmarkings are permissible and which are impermissible.

Seth Kreimer's theory of allocational sanctions proposes as a first line of analysis three different baselines for distinguishing unconstitutional, liberty-reducing threats, from constitutional, liberty-enhancing offers: history, equality, and prediction.[89] But putting aside the indeterminacy created by the interplay of three different baselines,[90] none of these baselines would invalidate a program to fund Republican education. The historical baseline looks to the existing status quo, and suggests that a decision to impose a condition on an existing benefit or to

---

88 Sullivan, supra note __ at 1501.

89 Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 13__-__ (1984).

90 See Marshall, supra note __ at 252 (baselines may be at cross purposes in a given context).

defund a program is more constitutionally problematic than a decision to create a new conditioned program. By its terms, a historical perspective does not help in judging the validity of a newly created program.[91] The equality baseline shares the same infirmity that Sullivan's theory exhibits: in a system of scarcity, all allocational decisions and all conditions thereon will result in some inequality, and therefore this baseline is overinclusive. The prediction baseline asks the Court to engage in the counterfactual inquiry of whether government would grant the benefit without taking into account citizens' exercise of their constitutional rights.[92] If government would otherwise grant the benefit, then the condition is an unconstitutional condition. But if the very purpose of a program is to propagate Republican ideals, government would not be likely to fund the program if it could not take into account the recipients' exercise of speech rights on the job.

Kreimer's second line of analysis suggests that even where the government's condition presents an offer rather than a threat, it may be unconstitutional where it affects inalienable rights.[93] But the utility of

---

91 In any event, it is not entirely clear why history should lock in the government. If, for example, the government decided to build an art museum on a public park, and to limit exhibits in that museum to artistic work of a particular period, the fact that historically the property was a public forum open to all speakers on all subjects presumably would not render the museum unconstitutional.

92 Id. at 1372-73.

93 Id. at ____-____.

this analysis is questionable. If First Amendment rights are inalienable, and Kreimer suggests that at a minimum they ought to be inalienable to the government,[94] then no content- or viewpoint-based speech funding programs should be upheld. The Administration could not hire a press spokesperson, because it would be buying up the spokesperson's inalienable right to speak against the Administration. As demonstrated in Section III below, government can and must engage in content- and viewpoint-specific funding of speech in a wide range of settings. Like the equality baseline, the inalienability inquiry is too blunt a tool to determine when such conditions are impermissible.

Michael McConnell has recently proposed a slightly different approach.[95] He proposes two tests for identifying an unconstitutional condition. The first -- when the condition imposes a cost beyond the scope of the benefit[96] -- simply restates the Court's positivist approach,

---

94 Kreimer writes:

> if the government is to be responsive to the outcome of public debate, it is hardly entitled to manipulate the discussion. The fact that those manipulated may consent to the manipulation makes the government's action no less than an attempt to fix the prices in the marketplace of ideas.

Id. at 1392.

95 McConnell, Selective Funding, supra note __.

96 Id. at 1017.

and is entirely dependent on the government's definition of the benefit.[97] The second -- when the government funds one mutually exclusive alternative where the choice between alternatives is constitutionally vested in the individual[98] -- is not helpful in most speech contexts, because speech rights do not generally come in paired substitutes.[99] The program to fund Republican education would pass muster under McConnell's baselines: its condition is coextensive with the benefit, and it leaves unfunded a wide range of alternative viewpoints.[100]

* * *

This review of unconstitutional conditions doctrine and scholarship is not meant to suggest that the doctrine is worthless, but only that

---

97 See supra p. __-__.

98 Id. at 1046. McConnell maintains that "[o]nly where there is a limited set of alternatives, and almost all of them are funded except for the protected right, will the pressure on the right be sufficient to pose a constitutional problem." Id. at 1003. He derives this from the economic understanding that a subsidy is equivalent to a tax only where it subsidizes a substitute, i.e., one of two mutually exclusive alternatives. Id. at ____.

99 The speech affected by the Title X regulations, concerning a pregnant woman's mutually exclusive options of childbirth or abortion, may be a rare exception. See infra at p.___-___.

100 Admittedly, McConnell does not focus on free speech. He concentrates on the privacy issue of abortion funding, and the free exercise/establishment clause issue of funding parochial schools. However, his analysis is not limited to these contexts, for he expressly seeks to articulate a general theory of unconstitutional conditions. Id. at 1047-48 (defending necessity of general theory for unconstitutional conditions).

its effectiveness for adjudicating First Amendment funding challenges is limited.[101] The doctrine is useful for addressing one way in which

---

101 I therefore disagree with Cass Sunstein's claim that the unconstitutional conditions doctrine should be abandoned altogether. See Sunstein, Why the Unconstitutional Conditions Doctrine Is An Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593 (1990). In his haste to move beyond the doctrine, Sunstein fails to recognize that the doctrine does serve its limited purpose quite well, namely identifying when the government has used its benefits to leverage control over an individual's exercise of constitutional rights on her own time.

In addition, Sunstein's alternative approach is too vague to be helpful. He says that "[i]n all of the cases the question is whether the measure at issue interferes with a constitutional right, and, if not, whether the government has sufficient justification for its interference." Id. at ___. But the critical issue is how to define whether interference has occurred where government has merely offered a benefit with conditions.

Sunstein himself unwittingly demonstrates the problems with his abandonment of unconstitutional conditions and with his substituted approach in the following argument:

> Consider, for example, a statute through which the government provides medical benefits only to those who agree to speak for a Democratic presidential candidate, and to speak against the Republican candidate. Such a statute would be unconstitutional. The right to free expression is a right to government neutrality as among competing ideas. It does not matter whether government violates the neutrality requirement by imposing criminal prohibitions or by providing cash payments.

Id. at 607. Sunstein's result is correct but his reasoning is wrong. The example he posits is a classic unconstitutional condition, because the condition extends beyond the benefit. Thus, his example is resolved by the doctrine he rejects. Moreover, it is not resolved by the analysis he puts forth in its place. The government need not remain neutral among competing ideas in all of its funding. The government could constitutionally hire a White House spokesperson on the condition that he speak in favor of the President's policies and against the Democrat's alternatives, even

government might infringe First Amendment freedoms through selective funding: where the government seeks to leverage its benefits into control of speech by imposing conditions that extend beyond how the benefit itself will be used.

But the unconstitutional conditions doctrine fails to address the audience-related concerns raised by selective government funding of speech. From an unconstitutional conditions perspective, a pro-life public forum or public university would not be constitutionally problematic, so long as the speakers, teachers and students were free to exercise their rights on their own time and with their own money. Unconstitutional conditions doctrine does not explain why First Amendment restrictions apply to government-supported public forums and public universities. The constitutional problem with the pro-life public forum is not the reach of its condition, but its substance. As the Rust Court itself intimated, a pro-life condition on access to a public forum or funding of public education would raise substantive First Amendment concerns even if it exerted no coercion on recipients' activities beyond the scope of the funding program. Because the unconstitutional conditions doctrine addresses only the appropriate reach of conditions on benefits,

---

though it could not enact a criminal statute to that effect. Thus, the paragraph's concluding sentence, like Sunstein's approach in general, begs the critical question of when government violates the neutrality requirement by providing cash payments. See infra p. ___-___.

it fails to address the most difficult issue in government-funded speech: how to respond to the threat that government will use selective support of speech to dominate the marketplace of ideas or indoctrinate its citizens.

II. RESURRECTING NEUTRALITY

A. The Paradox of Government Speech

Developing a coherent doctrine to review selective government support of speech is difficult because non-neutral government speech is paradoxical: It is at once integral to democratic society and potentially subversive of core First Amendment values. Government must be able to support speech in a non-neutral manner. But if government had unfettered discretion to control the content of the speech it supports, First Amendment values would be seriously threatened.

Government must be free to control the content of the speech it supports for at least three reasons. First, a government functions in large measure through communication and persuasion, and would be disabled by a mandate that it maintain only neutral positions. Because "government" as such cannot speak, the only way it can express its views is by paying human beings to do so. Whenever a public official speaks for the government, she is engaging in (usually non-neutral) government-supported expression. The Supreme Court itself engages in

government-funded non-neutral speech every time it issues an opinion. So does the Department of Health and Human Services when it announces funding for AIDS education programs. In order to fund an AIDS education program, the government must be able to insist that grantees conduct education about AIDS, and not about polio, cancer, baseball, or a host of other potential subjects.

Second, government often furthers First Amendment values by engaging in content- and viewpoint-based support of speech. Government must voice its views for the system of self-government to operate; the people need to know the government's views in order to decide whether to support it, and the government needs to be able to carry out and rally support for its programs by explaining their benefits. We elect representatives because we believe they "speak for us"; it would be perverse to disempower them from speaking once they became government actors. Government speech, at least in moderation, furthers a core purpose of the First Amendment: informed self-government. Thus, the President can use government funds to hold a press conference to set forth the Administration's views on abortion, and does not have to invite spokespersons for the other side.

Third, government-funded speech plays an important role in maintaining a diverse debate in a capitalist economy. Pervasive economic inequality in the private marketplace, which is permitted, encouraged,

protected, and reinforced by law,[102] creates a risk that private concentrations of wealth will dominate the marketplace of ideas.[103] These private sources of power often support maintenance of the status quo, and may effectively drown out or exclude dissenting views.[104]

Government support of speech is an important mechanism for counteracting the effects of economic inequality on public debate. At least in some settings, government funding may support speech that cannot obtain support in the private marketplace. The National Endowments for the Arts and the Humanities, for example, were established at least in part to support artists, scholars, and institutions that could not achieve sufficient commercial support from the private market.[105] The

---

102 Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927); Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470 (1923).

103 Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986). The power of concentrated wealth to control the marketplace of ideas is perhaps best demonstrated in the media, where a handful of television stations and newspapers exercise substantial control over what news is fit to discuss. See Edward S. Herman and Noam Chomsky, Manufactured Consent: The Political Economy of the Mass Media 3-14 (1988) (discussing wealth and financial data of 24 large media corporations); B. Bagdikian, The Media Monopoly (1983); T. Gitlin, The Whole World Is Watching (1980); E. Barnouw, The Sponsor (1978). **[GET MORE UPDATED AUTHORITY?].**

104 T. Gitlin, The Whole World Is Watching, supra note __ at 249-82; see, e.g., CBS v. DNC, 412 U.S. 94 (1973) (broadcasters may refuse to broadcast political advertisements with which they disagree).

105 S. Rep No. 300, Establishing a National Foundation on the Arts and the Humanities, 89th Cong. 1st Sess. 8 (June 8, 1965) (NEA and NEH created because "[t]here is a financial crisis facing the arts in the Unites

Corporation for Public Broadcasting serves a similar function in the broadcast marketplace.[106] Content-based judgments are critical to the functioning of these institutions. Non-neutral government-funded speech thus represents one possibility for counteracting the threat of a dialogue dominated by concentrated wealth.[107]

But while there are strong reasons for permitting non-neutral government support of speech, there are equally strong reasons to be skeptical about it. For example, while we have seen that the President may hold a news conference to speak out against abortion, we would have justifiable First Amendment concerns if at the news conference he announced a program offering government subsidies to newspapers willing to espouse the Administration's views on abortion or requiring public university professors to teach that abortion is wrong. If government were given free rein to direct its substantial resources toward propagating its point of view, the First Amendment's interrelated goals of

---

states, which stems primarily from the inadequacy of private sources to support artistic excellence ... and to foster and develop an environment which would fully stimulate the resources of American creative expression.").

106 See, e.g., Mark Schapiro, "Public TV Takes Its Nose Out of the Air," N.Y. Times, Nov. 3, 1991 at H31 (public television had its genesis in the desire to offer an alternative to network television, by keeping one station free of commercial values).

107 Of course, there are other possibilities for addressing this problem, from redistribution of wealth to the creation of access and reply rights. These institutional responses are beyond the scope of this paper.

a robust public debate, autonomous citizens, and informed self-government would be significantly compromised.[108] As the media age has made all too clear, it is possible to skew public debate not only by directly penalizing disfavored speech, but also by devoting tremendous resources to the expression of favored ideas.[109]

The First Amendment concerns raised by selective government support of speech parallel those raised by selective government suppression of speech -- the potential that government might dominate or skew public dialogue or indoctrinate the audience. While selective suppression of speech focuses attention on the speaker's rights, the structural concern raised by a content-based prohibition is the skewing effect the restriction may have on the marketplace of ideas.[110] Because of this structural concern, the First Amendment protects even corporations' speech, not because corporations have interests as speakers, but because society has a First Amendment interest in being exposed to corporations'

---

108 See supra pp. __-__; Shiffrin, supra note ___ at 607, 610.

109 Yudof, supra note __ at 897-98 ("massive government communications activities may as effectively silence private speakers as a direct regime of censorship").

110 Stone, Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi. L. Rev. 81, 101 (1978) (content-based actions are suspect because they "distort the ordinary workings of the 'marketplace of ideas' in a content-differential manner").

speech.[111] While the individual speaker's right may not be implicated in the same sense in a selective support setting as in a selective suppression setting, the structural interest in listener's rights is the same.

From the audience perspective, the dangers posed by selective support of expression differ in degree, not kind, from the dangers posed by selective prohibitions on speech. A program to fund patriotic art may distort the art marketplace less extremely than a criminal prohibition on art critical of the government, but not necessarily. If the funding offered is large enough and the penalty imposed small enough, the funding program may well cause greater distortion than the criminal prohibition. In any event, the problem with both government actions is their skewing effect on public debate.[112]

The Supreme Court has often recognized that listeners' First Amendment rights are implicated where government manipulates its support of speech to dominate the marketplace of ideas or indoctrinate its citizens. In Keyishian v. Board of Regents,[113] for example, the

---

111 Pacific Gas and Electric Co. v. Public Utilities Commission, 475 U.S. 1, ___ (1986); First National Bank of Boston v. Bellotti, 435 U.S. 765, ___ (1978).

112 Fiss, State Activism and State Censorship, 100 Yale L.J. 2096-97 (1991) ("the effect of a denial of a grant is roughly equivalent to that of a criminal prosecution, in that each tends to silence the artist or, in the case of exhibitions, makes the artist's work unavailable to the general, museum-going public").

113 385 U.S. 589 (1967).

Court invalidated a restriction on faculty speech in a public university, holding that even where the government is paying for expression, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom.... The classroom is peculiarly the 'marketplace of ideas.'"[114] The Court noted that education should proceed through a "robust exchange of ideas ... '[rather] than through any kind of authoritative selection.'"[115]

The Court has expressed similar concerns even in the elementary and secondary school settings, where the state's legitimate interest in inculcating community values justifies, and indeed requires, viewpoint-specific support of speech.[116] In this context, the Court has long struggled with striking a balance between the interest in inculcating specific values and the competing First Amendment right not to be indoctrinated.[117] Even as it has recognized the importance of value

---

114 Id. at 603.

115 Id. (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (_____ 19__)). For a more extensive discussion of the public education setting, see infra Section IV.B.

116 See, e.g., Bethel School District No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (public education must inculcate fundamental values to prepare pupils for citizenship); Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (same).

117 See, e.g., Board of Education v. Pico, 457 U.S. at 876-77 (Blackmun, J., concurring) (public education involves "two competing principles of constitutional stature": the legitimate inculcative role of the public school, and the guarantee that the state may not prescribe orthodoxy); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (presenting

inculcation, the Court has asserted First Amendment limits, warning that "in our system, state-operated schools may not be enclaves of totalitarianism," and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[118]

Another context in which the Court has recognized the specter of government domination through selective support of speech is the press. Justice Stevens voted to uphold a ban on editorializing by public television stations in FCC v. League of Women Voters in order to "keep[] the Federal Government out of the propaganda arena."[119] Stevens wrote: "By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of Government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of

---

dilemma of whether public school can inculcate value of tolerance by exposing children of fundamentalist Christians to liberal approach to education); Stolzenberg, "He drew a circle that shut me out...": Assimilation, Indoctrination and the Paradox of Liberal Education (on file with the author) (discussing paradox presented by liberal education's insistence on inculcating tolerance).

118 Tinker v. Des Moines School Dist., 393 U.S. 503, ___ (1969); see also West Virginia State Bd v. Barnette, 319 U.S. 624, 642 (1943) (government may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924) (denying any "general power of the State to standardize its children").

119 468 U.S. at 414 (Stevens, J., dissenting).

Adolf Hitler over Radio Berlin to appreciate the importance of that concern."[120] The full Court expressed similar concerns, if somewhat less dramatically, in Red Lion Broadcasting Co. v. FCC,[121] stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee... It is the right of the public to receive... ideas .. which is crucial here."[122]

The danger that government speech will become propaganda also underlies Public Utilities Commission v. Pollak,[123] which addressed the constitutionality of broadcasting music and service-related announcements to passengers on public streetcars. The Court rejected plaintiffs' claim that they had a First Amendment right not to be exposed to this government-funded expression, but qualified its holding by noting that the transit authority broadcast only music and explanatory announcements, so that "[t]here is no substantial claim that the program has been used for objectionable propaganda."[124] In a concurrence, Justice Black

---

120 Id. at 409.

121 395 U.S. 367 (1969).

122 Id. at 390 (emphasis added).

123 343 U.S. 451 (1952).

124 Id. at 463.

went further, and stated that "subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment."[125] Justice Douglas dissented on privacy grounds, but his decision was also informed by First Amendment considerations about exposure to government propaganda. He found that the streetcar passengers were a captive audience, and that "[w]hen we force people to listen to another's ideas, we give the propagandist a powerful weapon."[126]

Similar audience-focused concerns have begun to surface in the Court's campaign finance jurisprudence. Last Term, the Court recognized a compelling interest in counteracting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[127] Government-funded speech poses an even greater threat than corporate speech; its aggregations of wealth dwarf those of corporations, and it has a much more immediate self-interest in seeking to dominate the marketplace of ideas. Indeed, what makes campaign finance such a difficult area is that

---

125 Id. at 466 (Black, J., concurring).

126 Id. at 469 (Douglas, J., dissenting).

127 Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1397 (1990); see also FEC v. MCFL, 107 S. Ct. 616, 628 (1986) (same).

threats of domination of the political marketplace stem from both government and private sources.[128]

These cases are founded on a recognition that First Amendment rights may be infringed where government selectively directs support to speech expressing a particular content or viewpoint, a recognition directly contrary to the Court's unconstitutional conditions analysis in Rust v. Sullivan. As I will argue later, it is no accident that the Court has recognized this danger in settings involving public education, the press, campaign speech, and captive audiences.

B. The Function of First Amendment Neutrality

Because selective government suppression of and support for speech pose similar dangers, the more established First Amendment doctrine addressed to the former may provide guiding principles for reviewing the latter. When judging prohibitions on speech, the Court enforces a strict neutrality mandate: government generally must remain neutral as to the content and viewpoint of speech, absent a compelling justification.[129] While there are a host of exceptions for so-called

---

128 See Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, ____ Yale L. & Policy Rev. ___ (1991).

129 United States v. Eichman, 110 S. Ct. ___ (1990); Texas v. Johnson, 109 S. Ct. at 2543-44; Boos v. Barry, 485 U.S. 312, 321 (1988).

unprotected speech, such as obscenity, libel, and fighting words, the background norm requires content neutrality.[130]

Two characteristics of the neutrality mandate are important to bear in mind. First, it is a prophylactic guarantee. First Amendment doctrine does not require a (probably impossible) showing that a government prohibition on speech has in fact dominated the market or indoctrinated listeners. Rather, it presumes that content-based discrimination will have that effect. The neutrality mandate responds to the dangers of government domination and indoctrination not on a case-by-case basis, but as a structural matter, by presumptively requiring content-neutral government treatment of speech across the board, absent compelling justifications.

---

130 See, e.g., Texas v. Johnson, 109 S. Ct. 2533, ___ (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

The content neutrality principle finds support in both the First Amendment and the Equal Protection Clause. As Kenneth Karst has argued, equality is a central principle of the First Amendment, which requires government to treat speech and speakers equally irrespective of the content of their speech. Karst, Equality as a Central Principle of the First Amendment, 43 U. Chi. L.Rev. 20 (1975). Similarly, the Equal Protection Clause imposes a strict requirement that government treat similarly situated people equally in the distribution of fundamental rights, including the freedom of speech. Police Department of Chicago v. Mosley, Carey v. Brown (quotes re: EP Clause).

Second, the neutrality mandate as traditionally understood and applied is a formal rather than substantive guarantee. It requires government to adopt an agnostic stance towards speech; it demands neutral treatment, not neutral outcomes. This is in part because substantive outcome neutrality is meaningless in most speech settings; what is a neutral outcome of a debate on the death penalty, abortion, or the relative merits of checkers and chess? Moreover, even if we could define outcome neutrality, we probably would not want it enforced, since the purpose of public debate is often to define and refine our moral and political principles, and to lead us as a society toward ultimately non-neutral choices. And perhaps most significantly, we simply do not trust government to define what is a "neutral" outcome in the field of ideas.[131] To avoid such problems, speech doctrine requires government to maintain a prophylactic, hands-off agnosticism toward the content of speech.

Is the neutrality mandate applicable to selective government funding of speech? By definition, selective funding raises a question of neutrality. The Supreme Court's unconstitutional conditions rhetoric

---

131 The danger of letting government officials define neutrality is demonstrated by Bullfrog Films v. Wick, 847 F.2d 502, ___ (9th Cir. 1988). In that case, USIA regulations empowered government officials to grant valuable educational certificates to documentary films that did not advocate or condemn a point of view. Applying that standard, the USIA found films about the dangers of nuclear power to be biased, and films about the safety of nuclear power to be neutral and balanced.

often ignores this question by treating challenges to selective funding as asserting an affirmative entitlement to subsidization. But the issue is not whether citizens have an absolute affirmative First Amendment right to have their speech subsidized, but whether government can selectively decline to subsidize certain speech on content- or viewpoint-based grounds.[132] The claim is for neutral treatment of speech. The family planning clinics and patients in Rust, for example, did not argue that the mere failure to subsidize abortion counseling, "without more," was a constitutional violation.[133] Rather, they claimed that the government's refusal to subsidize abortion counseling, given its simultaneous decision to fund counseling about childbirth, violated the First Amendment's mandate of neutrality. They did not assert an affirmative entitlement to support, but a relative right to neutrality, triggered by the government's choice to fund counseling about only one of a woman's two post-pregnancy options.

Enforcing neutrality in the funding context, however, appears to be precluded by the paradoxical nature of government speech in a

---

132 Cf. McConnell, Selective Funding, supra note __ at 1001 (plaintiffs' objection in the abortion funding cases "was not to a lack of funding, but to selective funding – funding of only one of the two mutually exclusive alternatives, when the choice between them is constitutionally vested in the individual.").

133 Rust, 111 S. Ct. at 1772.

democratic polity.[134] We cannot mandate neutral funding across the board, because such a rule would disable government as we know it. Neither the President nor Congress would be permitted to expend funds to explain their stands on social and political issues of the day. Indeed, Supreme Court decisions themselves might be unconstitutional. The two leading commentators to address the problem of government speech accordingly have both concluded that neutrality principles are largely unhelpful in regulating government support of speech.[135] That

---

134 See supra note__-__; see also Shiffrin, supra note __ at 568-___; Yudof, supra note ___ at 897-906.

135 See Yudof, supra note __ at 897-906; Shiffrin, supra note __ at 568-__. Mark Yudof, who has most comprehensively addressed the issue of government speech, see M. Yudof, When Governments Speak (19__), argues not only that neutrality is not a feasible requirement in funding, but that imposing any direct judicial restrictions on selective government funding would be deeply problematic.

Yudof's solution would have the courts defer to the legislature, striking down "excessive" government speech on state law ultra vires principles. This approach, he maintains, would permit the courts to avoid the intractable constitutional issue and allow political forces in the legislature to determine whether the speech should be permitted. Id. at 912-17. But this response is insufficient in several respects.

First, it does not free the courts from drawing the difficult lines Yudof identified. Because "not all government speech should be subjected to a presumption that it is ultra vires in the absence of explicit legislative endorsement," Id. at 913, the courts must still draw lines to determine which government speech should be held to the ultra vires standard. Second, the fact that selective government speech is sanctioned by the legislature provides no guarantee that it will not skew the intellectual marketplace or indoctrinate the citizenry. Yudof's test ultimately rests constitutional rights on the ordinary political process, a process that there is little reason to believe will protect First Amendment rights. See, e.g.,

reasoning is also reflected in the Supreme Court's unconstitutional conditions rationale in Rust, which suggests that the government is free to set any content limits it chooses on funded programs, because the

---

Congress's response to the flagburning and NEA issues.

Steven Shiffrin, addressing the same problem, proposes an "eclectic" approach that requires balancing the many competing concerns raised by government speech. Shiffrin, supra note __ at ____. Shiffrin's balancing test, however, is fatally open-ended. For example, his analysis of the scheme for selective public financing of Presidential candidates upheld in Buckley v. Valeo, 424 U.S. 1 (1976), would proceed as follows:

> Under an eclectic approach, the Court would have started with the presumption that selective funding of political candidates required substantial justification. It would have scrutinized the government interests with care to be assured that a purpose independent of partisan favoritism was involved. Finally it would have balanced the contribution to the government interests against the impact on the relevant constitutional values and considered the possibility of less harmful means to further the same interests.

Shiffrin, supra note __ at 626; see also id. at 610 ("An eclectic approach .... recommends that the values which counsel restricting government speech be weighed against legitimate government interests in its own communication.").

Shiffrin's approach no doubt marks an improvement over the Supreme Court's analysis in Buckley, which consisted of the bare assertion that no First Amendment issue was raised by selective government funding of Presidential candidates because a subsidy "furthers, not abridges, pertinent First Amendment values." Buckley v. Valeo, 424 U.S. at 93. But Shiffrin's approach incorporates so many intangible values that it appears at best to require ad hoc, case-by-case determinations, and at worst to be judicially unmanageable.

denial of a subsidy for speech does not infringe the First Amendment.[136]

But while one side of the paradox of government-funded speech forecloses a strict neutrality approach, the other side counsels against outright rejection of neutrality principles. If government were allowed unfettered discretion to support speech that it favored, public debate would be subject to substantial co-optation. An incumbent government could constitutionally allocate unlimited sums to getting itself re-elected, direct mailing privileges only to those magazines and newspapers that supported its policies, and transform the nation's public schools and universities into propaganda tools. The Rust Court's discomfort with this prospect presumably led it to insist at the close of its First Amendment discussion that there are limits on government's ability to control the content of funded speech, citing the examples of the public forum and public university.[137]

As the conflicting strands of dicta in Rust illustrate, the Supreme Court is satisfied with neither extreme, but confused about how to maintain a middle position. The principal source of confusion stems from the impossible line-drawing problems that would arise if the Court were to attempt to distinguish between permissible government speech

---

136 See supra note __-___.

137 111 S. Ct. at ____.

and impermissible government indoctrination or domination on a case-by-case basis. As Mark Yudof has argued, limiting the dangers of government speech without sacrificing its benefits seems to require elusive distinctions "between propaganda and education, partisan and nonpartisan speech, and subtle and explicit indoctrination,"[138] and ad hoc judgments about whether government expression has "distort[ed] the thinking processes of listeners."[139]

But ad hoc case-by-case balancing is not the only way to accommodate the competing values and dangers of government-funded speech. A structural accommodation, attuned to the role that public institutions play in maintaining a robust public debate, would avoid the necessity of distinguishing between propaganda and education on a case-by-case basis. This structural accommodation would draw on the neutrality principle that governs selective prohibitions on speech, but would apply it only to certain spheres of government funding.

Although democracy requires a robust public debate, our society is far too large to have a single dialogue; the vitality of the debate requires the interaction of many independent forums for public discussion. Many of the institutions most critical to public debate, such as the academy, the press, the arts, and public forums, are subsidized by the

---

138 Yudof, supra note __ at 911-12.

139 Id. at 900.

government. A structural approach to government-supported speech would explicitly consider the role such public institutions play in public debate, and the dangers that government content control of those institutions would in turn pose to a robust exchange of ideas.

Where a public institution plays an important role in public debate or in the formation of individual opinion, the dangers of indoctrination or domination from government content control are too great to allow the government free rein. In such settings, notwithstanding government funding, the First Amendment should mandate either neutrality or independence. Where strict neutrality is consistent with the institution's function, neutrality should be required; where some non-neutral content decisions must be made, the First Amendment should guarantee a degree of independence for the decision-maker. Where, on the other hand, such concerns are not present, or where non-neutral government speech is necessary to a legitimate government function or furthers First Amendment values, government should be free to support speech non-neutrally. By requiring neutrality and independence in certain spheres of government funding and allowing departures from neutrality in others, the First Amendment can structurally accommodate the inherently contradictory values and dangers of government-funded speech on an institution-by-institution rather than case-by-case basis.

The "spheres of neutrality" approach I suggest shares certain attributes with the neutrality principle governing prohibitions on speech. As in the traditional context, the neutrality mandate would be applied presumptively and prophylactically. Thus, its application would not require a finding that in a given case the government had skewed public debate or indoctrinated citizens, but that government control of content in a particular funded context presents an unacceptable risk of government domination and indoctrination. And as in the traditional context, the analysis here requires neutrality in treatment, not outcome. Thus, where the nature of a public institution demands neutrality, it would not require the government to assure that the institution was balanced, but simply that the government was agnostic toward the content of speech supported.[140]

---

140 This structural accommodation has a counterpart in First Amendment doctrine regarding regulation of the broadcast and print media, another context which presents irreconcilable values and dangers. The First Amendment permits government to mandate access and reply rights in the broadcast setting, but not in the print media. See supra note __. Lee Bollinger has argued that this differential treatment is a sensible way to accommodate the contradictory values of access and editorial independence on an institutional basis. Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1 (1976). By allowing government to require access to the broadcast media, the Court provides some means for those without substantial resources to speak, thus counteracting the danger of private monopolization of the broadcast marketplace. And by simultaneously guaranteeing the editorial independence of the print media, the Court ensures that one branch of the media will be free of government oversight, and will thereby be able to oversee and counteract abuses of the access policy applied in the other branch. Similarly here, a spheres of neutrality

A spheres of neutrality approach begins to make sense of the Court's otherwise inconsistent jurisprudence of government-supported speech. It suggests a way to reconcile the central contradiction in that doctrine, reflected in the Rust Court's broad statements that the refusal to subsidize speech does not abridge the First Amendment,[141] and its simultaneous acknowledgment that in certain settings government's selective refusal to support speech does violate the First Amendment.[142]

E. A Republican Vision of Free Expression

Both the Court's unconstitutional conditions doctrine and its correlative proposition that the government may control the content of the speech it funds are founded on a classically liberal First Amendment vision, a vision which is insufficient to address the distinct dangers of government-supported speech. The liberal laissez-faire model of First Amendment freedom, first set forth in Justice Holmes' dissenting opinion in Abrams v. United States,[143] posits a private market of competing

---

approach would mandate neutrality in some contexts of government funding, and allow content-based decisions in others, thus accommodating the values of content-neutrality and the values of content-based government speech.

141 Rust, 111 S. Ct. at 1772, 1775.

142 Id. at 1776; see supra p. __-__.

143 250 U.S. 616, 630-31 (Holmes, J., dissenting).

ideas. Its mandate that government let "free trade in ideas" proceed unimpeded bars coercive government interventions in the speech market. The unconstitutional conditions doctrine rests on that laissez-faire analysis; it identifies as problematic only those funding conditions that penalize speech in the "private" market.

But this laissez-faire ideology does not provide a coherent framework for analysis when government intervenes in the public debate not through coercive penalties, but through affirmative support of speech. A laissez-faire approach is forced to treat such intervention in one of two polar ways: either as presumptively illegitimate, because government must stay out of the market altogether; or as presumptively legitimate, by defining government-supported speech as no intervention at all. Because of the necessity of non-neutral government-funded speech,[144] the Court cannot adopt the former approach. Accordingly, the Court has taken the latter approach of simply defining away the problem.

A more subtle and calibrated analysis requires modification of the liberal model with republican principles. The First Amendment's foundations are both liberal and republican -- while it protects the liberal value of individual autonomy, it also reflects the republican ideal of a robust public debate, understood as central to the self-governance of a

---

144 See supra note __-__ and accompanying text.

democratic community.[145] While Justice Holmes's opinion in Abrams captures the liberal approach, the other founding opinion of the First Amendment tradition, Justice Brandeis's concurrence in Whitney v. California,[146] advances a more republican conception. Free speech is necessary, Brandeis argued, because the First Amendment reflects a conviction "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government."[147] Emphasizing the value of free speech to self-government, Justice Brandeis moved away from a laissez-faire ideal, and argued that government should counter "dangerous" ideas by persuasion, that is, by government speech, rather than by force.

Thus, the two foundations of First Amendment jurisprudence appear at once to require government to stay out of the marketplace of

---

145 As Nomi Stolzenberg has argued, the "special genius of civic republican thought is to join the political value of collective self-government to a central conception of individual freedom, such that the two form an indissoluble whole." Stolzenberg, supra note __ at 92. From a republican standpoint, self-government and individual liberty are inextricably linked; self-government is not possible without individual liberty, and individual liberty is not possible without self-government. Id. at 92-94. Freedom of expression is a central mechanism in forging that link. See generally Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1541 (1988) (arguing that liberalism and republicanism are not irreconcilable, and articulating a version of republicanism that "incorporates central features of the liberal tradition").

146 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

147 Id. at 375.

ideas altogether and to portray government at its most legitimate when it operates through the marketplace by persuasion. The liberal tradition has sought to mediate this contradiction by distinguishing sharply between suppression and support of speech. Laissez-faire ideology is presumptively suspicious of attempts to suppress speech, and presumptively approving of government support of expression. Adopting that perspective, the Court in Buckley v. Valeo,[148] rejected a challenge to discriminatory funding of presidential candidates with the simple assertion that a subsidy "furthers, not abridges, pertinent First Amendment values."[149] Similarly, in Rust the Court upheld selective support of speech while claiming that it would bar selective suppression of speech.[150] But once one recognizes that selective government support for speech can undermine the First Amendment's republican goal of a vigorous, undominated public dialogue, the distinction between suppression and support is insufficient.

The approach I suggest moves beyond the laissez-faire liberal conception of the First Amendment to a conception built on the republican notions advanced by Justice Brandeis's concurrence and later devel-

---

148 424 U.S. 1 (1973).

149 Id. at 93.

150 Rust, 111 S. Ct. at ____.

oped by Alexander Meiklejohn[151] and Justice Brennan. If Holmes's "free trade" metaphor represents the paradigmatic liberal vision of free speech, Meiklejohn's town meeting captures the republican vision of an inclusive public exchange in which ordinary people actively participate as citizens, engaged in an ongoing dialogue about public values and norms.[152] Where the liberal view sees an "invisible hand" that reaches truth through the self-interested behavior of atomistic individuals, the republican vision emphasizes the constitutive role of public dialogue in shaping our collective identity as a community.[153]

Justice Brennan succeeded in fusing the republican and liberal elements of First Amendment jurisprudence in his distinctive metaphor of the "marketplace of ideas," which revised Justice Holmes's free trade vision by insisting on the importance of the forum for and the process of exchange.[154] In Brennan's articulation, the marketplace of ideas recalls the Greek "agora," a central town square where people meet to partici-

---

151 Alexander Meiklejohn, Free Speech and its Relation to Self-Government; Meiklejohn, The First Amendment is an Absolute, 1961 S. Ct. Rev. 245, 255, 260.

152 Alexander Meiklejohn, Political Freedom, supra not __ at 24-26; see also Frank Michelman, The Supreme Court, 1985 Term -- Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 31-33 (1986) (invoking republican ideal of empathetic public dialogue between undominated citizens).

153 Meiklejohn, Political Freedom, supra note __ at 61-6, 72-74 (criticizing Holmes's Abrams dissent as applauding excessive individualism, and thereby undermining the obligation to think and act as citizens).

154 See Cole, supra note __ at 892-902.

pate in an ongoing economic, cultural, social, and political exchange. Where Holmes saw the free trade of ideas in instrumental terms, Brennan's view sees the exchange itself as an integral part of the richness of communal life. The "marketplace of ideas" metaphor also alters Meiklejohn's town meeting metaphor by recognizing that the polity's constitutive dialogue takes place not only in the traditionally political sphere, but in all spheres of cultural exchange and communication. Thus, Brennan recognized what politicians have long understood: that the television is at least as important a "marketplace of ideas" as the town meeting.[155]

Because republicanism values deliberation and dialogue, "republicans will attempt to design political institutions that promote discussion and debate among the citizenry."[156] In place of liberalism's emphasis on natural or individual rights, a republican conception emphasizes a structural approach, one designed to provide mechanisms for participation by the citizenry in dialogue and debate about public issues. Thus, Meiklejohn argued that "[i]n every village, in every district of every town and city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consid-

---

155 CBS v. DNC, 412 U.S. at 195 (Brennan, J., dissenting).

156 Sunstein, supra note __ at 1549.

eration of public policy."[157] The purpose of such centers would be to "bring[] every citizen into active and intelligent sharing in the government of his country."[158]

While governments have not taken up Meiklejohn's specific invitation, there are a number of publicly supported institutions that serve as such forums. These include the public forum, the university, and the media. Even though the First Amendment may not require the state to subsidize such institutions at all, once the state chooses to do so First Amendment values are furthered by ensuring that the state's subsidies are allocated in such a way as to respect the autonomy and independence of the institutions. A "spheres of neutrality" approach seeks to protect that independence.

Whether the First Amendment is seen as an instrument to protect the ability of the people to govern themselves[159] or to check the governors,[160] it will only further those goals if it guarantees the indepen-

---

157 Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. at 260.

158 Id.

159 Meiklejohn, supra note __.

160 Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B.F. Research J. 521. Blasi's "checking value" approach demonstrates that a vision of the First Amendment as an integral part of the checks and balances of a democratic government can also be based on a pluralist rather than republican conception. Blasi's approach is not premised on the constant involvement of the citizenry in self-government, but nonetheless values freedom of expression from a structural or

dence of those public institutions that function in our society as arenas for public dialogue, debate, and value-formation. Just as "checks and balances, bicameralism, federalism and legal rights" are designed to "increase the likelihood of deliberation in government" by decentralizing power and providing competing forums for normative debate,[161] so the First Amendment must be viewed in the context of government-funded speech. As Justice Brennan has noted, the First Amendment "acts as an important check [on government], akin in purpose to the other checks and balances that infuse our system of government."[162] It will only serve that function if it safeguards the independence of those public institutions in which the public debate takes place.

---

consequentialist rather than an individualistic perspective. Like Meiklejohn, he sees freedom of speech as a check on government officials, and accordingly as a part of the separation of powers. Blasi, supra note ___ at 563 ("the [First Amendment's] checking value sees political decision-making as a product of contending forces and counterforces, with some groups continually pitted against other groups").

161 Sunstein, supra note __ at 1561; see also Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 Yale L.J. 1651, 1654-55 (1988) (in republican constitutional theory, checks and balances, federalism, and bicameralism are means to "plac[e] authority in the hands of independent actors and institutions, [so that] each participant will be forced to understand and deliberate with others in order to secure government action, thereby promoting reasoned dialogue"); Horowitz, History and Theory, 96 Yale L.J. 1825, 1834 (1987) ("The separation of powers ... can also be seen as deriving from a Republican vision.").

162 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (Brennan, J., concurring); see also id. at 587 (First Amendment has "structural role to play in securing and fostering our republican form of government").

By barring government control of the content of speech in critical public institutions, the First Amendment furthers its ultimate goal of ensuring an "uninhibited, robust, and wide-open"[163] public debate. If protected by the First Amendment, these institutions can continue to play an important counter-hegemonic role in maintaining a diverse democracy. If left unprotected by a strict laissez-faire approach, they are susceptible to becoming mouthpieces for government indoctrination. It is important to protect freedom of speech in these government-funded public institutions precisely because of the central role they play in the public dialogue through which we constitute ourselves as a community.

IV. ENFORCING NEUTRALITY IN A NON-NEUTRAL WORLD

The challenge for developing a coherent jurisprudence of government-funded speech is to explain why such settings as public forums, public universities, and the press demand neutrality or independence, why others do not, and how to determine where else the neutrality mandate should apply. In this section, I will first show that a "spheres of neutrality" approach provides a rationale for the Court's otherwise inconsistent decisions imposing First Amendment restrictions on government support of speech in these three settings. I will then apply the

---

163 New York Times v. Sullivan, 376 U.S. at 254, 270 (1964).

lessons drawn from those decisions to two areas of current controversy: government funding of the arts and of medical counseling.

A. Existing Spheres of Neutrality and Independence

It is relatively well-established that the First Amendment restricts the extent to which government can control the content of the speech it supports in public forums, universities, and the press. What is less clear, however, is why this is the case, and how those principles can be squared with the unconstitutional conditions approach advanced in Rust.

1. The Public Forum

The most developed area of law in which the First Amendment requires neutral government support of speech is the public forum doctrine. In a public forum, such as a street or park, even though the government is supporting speech through granting access to its property, it must do so on a content-neutral basis.[164] The same neutrality mandate that applies to selective government suppression of speech also applies where the government devotes its property to support speech.

---

164 See, e.g., United States v. Kokinda, 110 S. Ct. 3115, ____ (1990) (cite language applying to public forum).

In a public forum, the mere refusal to subsidize speech of a particular content, without more, does violate the First Amendment.

While the Court has developed an arcane set of doctrinal rules for determining which First Amendment rules apply to which types of government forums,[165] it has not sufficiently explained why this type of government-supported speech triggers First Amendment scrutiny in the first place. Two principal factors appear to support the Court's conclusion. First, public property plays a critical role in public debate, and therefore government control over the content of speech on public property would gravely threaten the marketplace of ideas. Speech by necessity has to take place on someone's property, and the government owns a great deal of property. Indeed, by definition the only other property is privately owned, so if people did not have access to government property only those who own or have access to private property would be able to speak.[166] Thus, this is an area where the government exercises extensive, almost monopolistic control over a public resource central to public dialogue.[167] Mass demonstrations and protests, which

---

165 See infra note __-__ and accompanying text.

166 Martin v. Struthers, 319 U.S. 141, 146 (1943).

167 Government, of course, is not a monolithic construct. Federal, state, county, and city officials may exercise control over different properties in a single city, making the situation more akin to an oligopoly than a monopoly. Nonetheless, some form of government controls all public property, and government forces will often share interests in suppressing criticism of the status quo, simply because most governments reflect the

play a particularly important role in public debate where issues of great controversy capture the community's interest, virtually invariably take place on government property. If the government could define the content of speech it supported through access to public property, it could exploit its monopolistic power to suppress such political activity and skew the public debate.

Second, in a public forum dedicated to expression, the function of government property will not be hindered by a neutrality mandate, and will in fact be furthered by enforced adherence to neutrality. If the purpose of the forum is to promote public expression, First Amendment dictates should be consistent with that purpose, since the theory of the First Amendment is that public expression is best advanced by requiring the government to remain content-neutral. Where the purpose of the forum is not incompatible with public expression, the same rationale would apply. In such circumstances, the government will be hard-pressed to argue that its ability to use its property will be frustrated by remaining neutral as to speakers.[168]

Not all public property can be devoted to supporting public speech, however, and the public forum doctrine marks an attempt by the Court to delineate those properties that should be governed by a con-

---

status quo.

168 Cornelius, dissent

tent-neutral mandate and those that should not. This attempt at classification has generated one of the most confused and widely-criticized areas of First Amendment law.[169] Scholars have attributed the Court's confusion to a preoccupation with the location of the speech,[170] or to a failure to recognize the differences between public and private property.[171] But while the Court certainly seems to have become overly concerned with questions of property,[172] this may be a reflection rather than a cause of the Court's confusion.

The ultimate source of the Court's confusion appears to be its failure to confront the paradoxical nature of government-supported speech. As in Rust, the public forum decisions reflect two contradictory impulses: on the one hand, a sense that government must be allowed to

---

169 See, e.g., Dienes, The Trashing of the Public Forum, 55 G.W.U.L.Rev. 109 (1986); Goldberger, Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials, 32 Bull.L.Rev. 175 (1983); Werhan, The Supreme Court's Public Forum Doctrine and the Return of Formalism, 7 Cardoza L.Rev. 335 (1986); Stone, Fora Americana: Speech in Public Places, 1974 Sup.Ct.Rev. 233.

170 L. Tribe, American Constitutional Law 987, 993-94 (2d ed. 1990); Karst, Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad, 37 Ohio St. L.J. 247, ___ (1976); Melville B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment §4.09[D] at 4-71 to 4-76 (Student ed. 1984).

171 Post, Between Governance and Management: The History and Theory of the Public Forum, 34 U.C.L.A. L. Rev. 1713 (1987); others?

172 See, e.g., United States v. Kokinda, 110 S. Ct. 3115, ___ (1990).

control speakers' access to its property in order to function;[173] and on the other, a recognition that permitting selective support of speech on public property would undermine public debate.[174] These impulses at bottom simply reflect the double-edged nature of government-supported speech.

The Court's unwillingness to acknowledge the paradox leads it to contradictory statements and results. Just as the Rust Court first overstated the scope of government discretion in funding speech and then qualified its overstated dictum,[175] so in the public forum doctrine the Court began by overstating the principle of neutrality, and has ever since sought to limit that overstatement. In Police Department of Chicago v. Mosley,[176] the Court announced:

> 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. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard.[177]

---

173 Kokinda, 110 S. Ct. at ___; Greer v. Spock, 424 U.S. 828 (1976).

174 Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

175 See supra pp. __-__.

176 408 U.S. 92.

177 408 U.S. at 96. Mosley involved a city ordinance that sought to regulate access to a public resource -- public property -- for speech purposes. The ordinance prohibited all picketing on "the public way"

This account exaggerates the neutrality principle; no one would deny that Congress can select "which issues are worth discussing or debating" in forums such as Congressional hearing rooms, that the Administration can do so in the White House briefing room, or that a public broadcaster can do so on the evening news. Ever since Mosley the Court has been engaged in an effort to define when the Mosley principle applies and when it does not. Public forum doctrine thus offers a microcosm of the general problem confronted in government funding of speech: how to identify those settings where neutrality is mandated within an often necessarily non-neutral world.

The public forum doctrine divides government property into three types: the traditional public forum, the limited public forum, and the non-public forum. In each setting, some version of neutrality applies. "[G]overnment property that has been traditionally open to the public for expressive activity, such as public streets and parks," is a traditional public forum.[178] Here, government may not discriminate among speakers on the basis of content, and is restricted to content-neutral

---

within 150 feet of a school during school hours, except picketing of a school involved in a labor dispute. The Court held the ordinance unconstitutional because by distinguishing between labor and non-labor picketing, it failed to maintain the stance of strict neutrality required by the First Amendment and the Equal Protection Clause.

178 United States v. Kokinda, 110 S. Ct. 3115, 3119 (1990).

time, place, and manner restrictions.[179] In a limited or dedicated public forum -- property not traditionally open for speech but which government has "expressly dedicated to speech activity"[180] -- government is permitted at the outset to restrict the scope of the forum to speech by a particular class of persons or on particular subjects.[181] However, once government has defined the forum, it must abide by the same rules that govern a traditional public forum.[182] Finally, all other government property is treated as a non-public forum, in which the government's access policies need only be "reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'"[183]

Under this approach, the designation of public property as a public, limited, or non-public forum is the most important step in the Court's analysis. But because the Court has failed to confront the

---

179 Perry Education Assn. v. Perry Local Educators' Assn, 460 U.S. 37, 45 (1983).

180 Kokinda, 110 S. Ct. at 3119.

181 A public university's student activities program, for example, providing rooms and/or financial assistance to all student groups, would be a limited public forum for the purposes of student's associational activities. Widmar v. Vincent, Gohn. A school job fair might be a limited public forum open to all who can provide advice to students regarding employment and career choices. Searcey v. Crim, (11th Cir. 19__).

182 Id.

183 Id. at 31__ (quoting Perry Education Association, 460 U.S. at 46).

paradoxical nature of government-supported speech, it is at a loss as to how to make this all-important designation. Like the unconstitutional conditions doctrine, the public forum doctrine has become increasingly positivist. The "traditional public forum" standard merely requires government to remain content-neutral in those areas where it has done so in the past -- parks and streets. The limited public forum standard holds the government only to doing what it has said it will do.[184] The Court will enforce a heightened neutrality mandate only where the government either traditionally has been neutral or expressly states that it will be neutral. Such a positivist reading of the doctrine deprives it of the capability of opening up public resources for speech.[185]

While the impetus for the public forum doctrine reflects a recognition of the structural importance of public property to public debate, the Court's increasingly positivist approach in recent years appears to have lost sight of the doctrine's origins and purpose. If the public forum doctrine were understood as a mechanism for safeguarding a critically important arena in the marketplace of ideas, the Court would be less

---

184 As the Court stated recently, "'[t]he government does not create a public forum by ... permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'" Kokinda, 110 S. Ct. at 31__ (quoting Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 802 (1985)).

185 In this sense, modern public forum doctrine recalls Mark Yudof's proposal that courts defer to the representative branches in defining limits on government speech. See supra note ___.

concerned with whether government has designated particular property as open to public expression, and more concerned with whether public expression is compatible with the property's function. Four members of the Court favored such a "basic incompatibility" approach as recently as Cornelius.[186] Under the incompatibility analysis, the White House briefing room would not require neutral access, because such a requirement would be incompatible with its function of informing the public of the government's views, but a general-purpose charity drive addressed to federal employees would require neutral access.[187] The incompatibility inquiry substitutes a normative presumption in favor of making government property available for public speech opportunities (at least where that can be achieved without undermining the property's purpose) for a positivist approach that simply accepts the government's designations of all property other than traditional public forums. From this perspective, tradition and government intent are relevant factors not simply as a way of asking what the government has in fact done, but as one guidepost

---

186 Cornelius Blackmun, Brennan, Stevens, Marshall. Justice Marshall recused himself in Cornelius, but he was the originator of the basic incompatibility approach. See Grayned, 408 U.S. 104, ___ (1972). See also M. Nimmer, supra note __ at 4-72 to 4-74 (discussing incompatibility approach).

187 Cornelius, CITE.

for a normative inquiry about how to identify government property appropriate for free public expression.[188]

Notwithstanding its weaknesses, the public forum doctrine offers several lessons for the broader issue of government support of speech. First, in no circumstance is access to government property for speech purposes free of some neutrality mandate. Even where government property is a non-public forum, the government may not deny access merely because it opposes the speaker's view. Thus, public forum doctrine creates an important inroad on the dictum that the failure to subsidize speech does not infringe First Amendment rights. With respect to public property, it is never sufficient for government to say that it is merely declining to subsidize speech.

Second, the doctrine demonstrates that neutrality in government support of speech can be enforced in a context-specific manner. Public forum doctrine neither applies the First Amendment neutrality principle across-the-board, nor holds it broadly inapplicable because the govern-

---

188 Robert Post has suggested a functional approach to the public forum problem, urging that a strong neutrality mandate be imposed where the government plays a governance role and seeks to govern the speech of the general public, but that even viewpoint discrimination should be permitted when the state acts internally to manage speech within an institution with an instrumental function. Post, supra note __. This approach, like the basic incompatibility approach, is not limited to a positivist acceptance of tradition and government intent, but rather seeks to define as a normative matter those institutional settings in which guaranteeing free expression is most important.

ment is merely declining to support speech. Rather, the doctrine recognizes that different property will be used for different purposes, and seeks to tailor the neutrality mandate to the forum's function. Where government property is expressly used for the purpose of supporting public expression, the Court mandates relatively strict neutrality. Where property is not so designed, the Court merely requires that speech access not be aimed at suppressing dangerous ideas. Like the "spheres of neutrality" approach I have proposed, the Court's context-specific public forum inquiry accommodates the competing values and dangers associated with government-supported speech by creating institutional spheres of neutrality in a non-neutral world.

Third, the rationales for enforcing neutrality in public forums suggest the centrality of two related considerations in determining whether to impose neutrality on other institutions of government-supported speech: (1) whether government content control in the public institution would threaten the institution's free speech function in the community as a whole; (2) whether the neutrality requirement is consistent with the forum's internal functioning. As we will see, these considerations also drive the Court's treatment of the public university and the press.

2. Public Education

The second context in which the Rust Court acknowledged that the mere refusal to subsidize speech might violate the First Amendment was the public university. The university, the Court cryptically explained, "is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions ... on Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[189]

The Rust Court gave no indication beyond the above sentence as to why universities are treated differently from other government-funded speech settings. The Court's academic freedom decisions, however, suggest two principal reasons, parallel to those that underlie public forum doctrine: (1) government content control would undermine First Amendment values, both because the university plays a critical role in public debate, and because students are a captive audience; and (2) the neutrality principle is consistent with the university's internal pedagogical functioning.

As the Rust Court stated, the university plays a central role in the public dialogue that defines our social, cultural, and political identity. As

---

189 Rust, 111 S. Ct. at 1776 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603, 605-06 (1967)).

the Court stated in Sweezy v. New Hampshire,[190] "[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[191] Because the citizenry and its leaders are shaped by education, government control of the content of speech in a university would pose a heightened risk of domination and indoctrination. Thus, the Court views academic freedom as an instrumental means of protecting First Amendment rights throughout society; academic freedom is "of transcendent value to all of us and not merely to the teachers concerned."[192] The academy provides a locus for normative debate and

---

190 354 U.S. 234 (1957).

191 Sweezy, 354 U.S. at 250. Justice Frankfurter advanced the same idea in his concurrence, insisting upon "the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university." Id. at 262 (Frankfurter, J., concurring); see also Keyishian, 385 U.S. at 603 ("[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas"); Byrne, Academic Freedom: A Special Concern of the First Amendment, 99 Yale L.J. 251, 261 (1989) (academic speech "contributes profoundly to society at large [because w]e employ the expositors of academic speech to train nearly everyone who exercises leadership within our society").

192 Keyishian, 385 U.S. at 603. This conception of academic freedom as serving the interests of the public at large because of the role the university plays in the polity reflects a republican understanding of the First Amendment. Thus, Meiklejohn referred to academic freedom as "a special form, a subform, of popular freedom." Alexander Meiklejohn, "The Teaching of Intellectual Freedom," reprinted in Meiklejohn, Political Freedom, supra note __ at 128. He explained:

inquiry which contributes to the richness of the public dialogue precisely because it is distinct from the governmental sphere. It provides fertile ground for criticism, oversight, and dissent.[193] For that reason, the academy is often the target of repression by threatened regimes, and merits protection.[194]

> the final justification of our academic freedom is to be found not in our purposes but in theirs [the public at large]. In the last resort, it is granted not because we want it or enjoy it, but because those by whom we are commissioned need intellectual leadership in the thinking which a free society must do.

Id.

193 For example, universities played an important role in the anti-Vietnam War movement, David Schalk, War and the Ivory Tower: Algeria and Vietnam 112-61 (1991) (discussing role of universities and intellectuals in opposition to Vietnam War), and in the civil rights movement. Emily Stopper, The Student Nonviolent Coordinating Committee: The Growth of Radicalism in a Civil Rights Organization (1989). See generally Seymour Lipset, Rebellion in the University 236-49 (1971) (discussing student political activism in many countries).

194 It is no accident that repressive governments often crack down on their universities. American universities were a frequent target of repression during this country's anti-Communist period. E. Schrecker, No Ivory Tower (1986) (history of attacks on universities during McCarthy era); Alexander Meiklejohn, "Professors on Probation," reprinted in Meiklejohn, Political Freedom, supra note __ at 133-41 (criticizing dismissal of three professors and probation of three others at University of Wisconsin for Communist Party membership).

A more recent example of repression against public universities is provided by China in the aftermath of the Tianenman Square demonstrations. The government attributed the demonstrations to "the serious downturn in ideological and political work in colleges and universities," Zhang Huande, "Reflections on Ideological and Political Work in Institutions of Higher Learning," Guangming Ribao, Aug. 15, 1989 at 3 (English translation published in FBIS-CHI-89-175, Sept. 12, 1989), and accordingly

Government content control is also especially threatening in the university setting because students are a captive audience. Where government holds an audience captive, just as where it controls a vast amount of property, the danger that it will monopolize the marketplace of ideas and indoctrinate citizens is at its apex.[195] For many university

---

called for increased Marxist training. "Leaders stress ideological study in universities," China Daily, July 17, 1989 at 1; Robert Delfs, "Top Marx: Political Education is Set to Return to Universities," Far Eastern Economic Review, Aug. 24, 1989 at 13. In 1991, China dismissed the top Chinese Communist official at Beijing University "for failing to take a strong enough stance against students who participated in the 1989 democracy movement." Lena H. Sun, "China Fires Key Official at University," Washington Post, Jan. 22, 1991 at A8.

In Africa today, where universities are funded by the state, academic freedom is seriously threatened, both by direct abuses such as summary execution and torture of academics and students, and by lesser forms of coercion such as denial of promotions and tenure to dissenting teachers and scholarships to politically active students. Africa Watch, Academic Freedom & Human Rights Abuses in Africa 2 (1991). As the Africa Watch Report explains, "Governments of the right and the left, military regimes as well as civilian administrations, have felt threatened by the essential function of academics: to exercise and to develop in their students, a spirit of critical inquiry." Id. at 3. "African academics, who depend entirely on the government-run educational system for their livelihood, are thus vulnerable to the pressures of political conformity." Id. at 12-13.

195 Mark Yudof has argued:

> The greater the ability of the school system to control what goes on in every classroom, the greater the danger of its promulgating a uniform message to its captive listeners. If teachers were automatons, required to adhere rigidly to lesson plans and assignments of materials promulgated by a central authority, the state would increase its capacity to indoctrinate a single ideological point of view. If teachers were free to interpose their own judgments, values, and comments, without close supervision, a sort of pluralism

students, campus life is practically their whole life. As a result, the Court's First Amendment protections in the university extend beyond traditional conceptions of academic freedom,[196] to the university's treatment of students. For example, the Court has rejected arguments that universities should be free to refuse selectively to support student activities on campus on the ground that students are free to engage in such activities off campus, and universities should not be compelled to subsidize constitutional rights.[197] Selective support of speech in a

---

> would exist in the school environment, a pluralism that is particularly important when student attendance is compulsory and that audience, in practical terms, is not free to absent itself from the classroom. Hence, just as the balkanization of responsibility for education among governments reduces the potential danger of a thorough indoctrination, the autonomy of the classroom teacher diminishes the power of government to work its will through communication.

Yudof, supra note ___ at 876-77; see also id. at 902; Van Alstyne, The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes, 31 Law & Contemp. Prob. 530, 534 (1966) (argument for restricting government expression is strongest in captive audience settings); Public Utilities Commission v. Pollak, 343 U.S. at 469 (Douglas, J. dissenting) (government may not force a captive audience "to listen to any program").

196 See Byrne, supra note __ (academic freedom traditionally understood to protect faculty's rights, not students').

197 Widmar v. Vincent, 454 U.S. 263, ___ (1981); Healy v. James, 408 U.S. 169, ___ (1972). Under an unconstitutional conditions approach, the fact that a student could engage in free speech outside of the government-funded program would defeat any First Amendment claim. See supra note __-___ and accompanying text.

captive audience setting infringes First Amendment principles just as would selective prohibitions on speech.

Second, First Amendment dictates are consistent with the university's pedagogical function. In Sweezy v. New Hampshire, Justice Frankfurter, bringing a highly respected professor's perspective to the issue, maintained that intellectual life cannot survive without freedom from political constraints:

> Freedom to reason and freedom of disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university....It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation.[198]

---

198 354 U.S. at 263 (Frankfurter, J., concurring). Justice Frankfurter was of course not the first scholar to advance this maxim. The American Association of University Professors' influential 1915 General Declaration of Principles proclaimed that "in all of these domains of knowledge [natural science, social science, and philosophy and religion],, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results." General Report of the Committee on Academic Freedom and Academic Tenure, 1 A.A.U.P Bull. pt. 1, at 28, reprinted in 2 American Higher Education: A Documentary History 867 (R. Hofstadter & W. Smith eds. 1961). Outside of the American experience, the insight dates back still further. See, e.g., Benedict de Spinoza, Theologico-Political Treatise XX, 261 (Dover edition, Elwes trans. 1670) (freedom of thought and speech are "absolutely necessary for progress in science and the liberal arts: for no man follows such pursuits to advantage unless his judgment be entirely free and unhampered"). For discussion of the intellectual origins of the academic freedom idea, see Byrne, supra note __ at 267-88; R. Hofstadter & W. Metzger, The Development of Academic Freedom in the United States (1955).

Therefore, Justice Frankfurter maintained, "[a] university ceases to be true to its own nature if it becomes the tool of Church or State."[199] In other words, in the public university there is a congruence between pedagogical concerns and constitutional doctrine, captured in the First Amendment vision of the marketplace of ideas. As the Court has stated, "[t]he classroom is peculiarly the 'marketplace of ideas.'"[200]

This congruence is more than coincidental. Both the First Amendment and our notion of education rest on a liberal faith in reason as the arbiter of disputes, and on free communication and exchange as the process by which reason operates.[201] The constitutional implica-

---

199 Id. at 262. Meiklejohn made the same point:

> an institution which limits intellectual freedom is not a university ... Anyone who submits, under pressure, to coercive control over his thought or his speech, ceases to be a scholar searching for the truth, ceases to be a teacher leading his pupils toward honest and fearless inquiry and belief. He becomes a hired man, thinking what he is paid to think, saying what he is hired to say.

Meiklejohn, supra note __ at 130.

200 Keyishian, 385 U.S. at 603; see also id. (education "discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (_____ 19__)).

201 See Fish, Liberalism Doesn't Exist, 1987 Duke L.J. 997, 1000. The founding opinions of First Amendment jurisprudence reflect precisely such faith. Justice Holmes's famous dissent in Abrams v. United States, 250 U.S. 616, 630-31 (Holmes, J., dissenting), asserts that not only the First Amendment, but "the theory of our Constitution," is based on a faith more fundamental than "many fighting faiths": "that the best test of truth is the power of the thought to get itself accepted in the competition of the

tion of this congruence is that the academic institution not only can function, and functions best, where freedom of expression is required. Indeed, it is the existence of freedom of expression that marks the elusive dividing line between government-funded education and indoctrination.[202] By creating an enforceable sphere of neutrality in the university, the Court both guards against the danger of government speech and furthers the central function of the public university.

The public university differs from the public forum, however, in that absolute content neutrality is not consistent with the university's function. While a public forum can be run on a first-come, first-served basis, the university cannot. Teaching requires the constant selection of material to present and discuss, and such selection must be both content and viewpoint-sensitive. Thus, while freedom of inquiry is consistent with the university's function, strict neutrality is not. Recognizing that content judgments must be made in the university context, First Amend-

---

market." Similarly, Justice Brandeis wrote in Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), that the drafters of First Amendment, "[b]elieving in the power of reason as applied through public discussion, ... eschewed silence coerced by law -- the argument of force in its worst form." As Peter Byrne explained the Supreme Court's rationale for academic freedom in Keyishian, "[t]he rhetoric of the Keyishian Court implies that the elements of free inquiry, discussion, dissent, and consensus are not important primarily because they lead to truth ... but because they express an invaluable sense of what kind of society we, as a people, desire." Byrne, supra note __ at 296.

202 See, e.g., West Virginia Bd. of Educ. v. Barnette, 319 U.S. at ___.

ment doctrine does not mandate content neutrality by all concerned, but instead guarantees independence to those who make the day-to-day content judgments -- faculty. Constitutional academic freedom "exclud[es] non-academics from academic decisions, [and] requires academic decision-makers to justify their decisions on properly academic grounds."[203] The academic freedom doctrine insulates teachers from elected government officials and overtly political decisions. This sphere of independence reflects an accommodation of the need for content decisions in a government-funded institution and the danger posed by government-controlled speech in that institution.

Academic freedom ensures that even where public education requires "authoritative selection,"[204] students will be shaped by the authoritative selections of a "multitude of voices," rather than the monolithic selection of a government body. By protecting the rights of individuals in the school system to dissent, the Court effectively creates an institutional check against the government's power to indoctrinate. The First Amendment protects the independence of professors not

---

203 Byrne, supra note __ at 304; see also id. at 255 ("the essence of constitutional academic freedom is the insulation of scholarship and liberal education from extramural political interference"); see, e.g., Levin v. Harleston, 60 U.S.L.W 2186 (S.D.N.Y. Sept. 4, 1991) (declaring unconstitutional public university's attempt to place restrictions on professor because of offensiveness of his ideas about racial supremacy).

204 Keyishian, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. at 372).