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Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services

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JUSTICE OR INJUSTICE FOR THE POOR?: A LOOK AT THE CONSTITUTIONALITY OF CONGRESSIONAL RESTRICTIONS ON LEGAL SERVICES

Upon enacting the Legal Services Corporation Act in 1974, Congress created the Legal Services Corporation (LSC), which provides federal funding to grantees that perform legal services for low-income individuals. In recent years, Congress has enacted restrictions upon grantees' receipt of such federal funding, limiting the legal services these legal aid attorneys can provide to their clients. This move has sparked great debate. Proponents of the restrictions argue that they are needed to correct abuse and misuse of the legal services program, while opponents argue that the restrictions only harm low-income individuals.

In this Note, the author addresses this controversial issue by first examining the purpose and history of the Legal Services Corporation. The author then examines recent Supreme Court opinions analyzing the constitutionality of attaching conditions to the use of federal funds. In applying the "unconstitutional conditions" doctrine recently set out by the Supreme Court, the author argues that many of Congress's recent restrictions are not only harmful; they are unconstitutional.

The author argues that many of the restrictions Congress recently has enacted interfere with the protected attorney-client relationship and implicate First Amendment concerns. Specifically, the author argues that the restrictions prohibiting welfare-reform advocacy and abortion-related litigation constitute viewpoint discrimination and thus are unconstitutional. Also unconstitutional are the restrictions on lobbying and influencing the government because they are impermissibly overbroad. Finally, the author argues that restrictions requiring affiliate organizations of grantees to satisfy certain program integrity requirements unconstitutionally restrict grantees' right to engage in prohibited speech or activities using non-LSC funds.

The author concludes the Note by arguing that in enacting the recent restrictions, Congress has thwarted the purpose of the Legal Services Corporation Act. Instead of providing justice for low-income individuals, the restrictions only create more injustice.

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> The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[1]

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in

[1] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

> exchange for a valuable privilege the state threatens otherwise to withhold . . . . It is inconceivable that guarantees embedded in the Constitution of the United States may be thus manipulated out of existence.[2]

INTRODUCTION

In the Fall of 1996, President Clinton signed into law the Omnibus Consolidated Recessions and Appropriations Act of 1996 (1996 OCRAA).[3] Within this massive appropriations bill, the Republican-controlled Congress made significant changes to the Legal Services Corporation Act (LSC Act)[4]—the Act that authorizes the Legal Services Corporation (LSC) to provide funding grants to legal aid programs across the country.[5] The legal aid programs use LSC funds, along with nonfederal funds,[6] to provide free legal services to low-income clients.[7] In the 1996 OCRAA, Congress reduced funding to the Legal Services Corporation by thirty percent[8] and enacted far-reaching restrictions on the recipients (grantees) of LSC funding.[9]

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[2] Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1925).

[3] Omnibus Consolidated Recessions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. Since 1980, the LSC has operated without authorization and survives only through annual appropriations bills. The 1997 funding is in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. The proposed appropriations bill for 1998 can be found in H.R. CONF. REP. NO. 105-405, at H10828 (1997), *reprinted in* 1998 U.S.C.C.A.N. 2440, 2510-12.

[4] Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (1994)).

[5] In addition to the typical nonprofit legal aid programs, the LSC may distribute federal funds to individuals, partnerships, firms, corporations, and state and local governments as long as the grants are "for the purpose of providing legal assistance to eligible clients." 42 U.S.C. § 2996e(a)(1)(A) (1994).

[6] In 1996, LSC grantees received 324 million dollars from private donors in addition to the federal funds distributed through the LSC. *See* David E. Rovella, *Will Court Win Spur GOP Backlash?*, NAT'L L.J., Jan. 13, 1997, at A1.

[7] The declaration of purpose for the Act is found at 42 U.S.C. § 2996 (1994). *See infra* note 16 and accompanying text.

[8] The 1996 OCRAA reduced LSC funding from 400 million dollars to 278 million. *See* Omnibus Consolidated Recessions and Appropriations Act of 1996, 110 Stat. at 1321-50. The Omnibus Consolidated Appropriations Act, 1997 and the 1998 proposed bill basically maintained the 1996 funding level by authorizing the funding of 283 million dollars. *See* Omnibus Consolidated Appropriations Act, 1997, 110 Stat. at 3009-59; H.R. CONF. REP. NO. 105-405, at H10827; *see also* William Booth, *Attacked as Left-Leaning, Legal Services Suffers Deep Cuts*, WASH. POST, June 1, 1996, at A1 (describing reductions in LSC funding).

[9] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504. Congress continued these restrictions for 1997. *See* 1997 Omnibus Consolidated Appropriations Act § 502; *see also* Claudia MacLachlan, *Legal Services Fights Back*, NAT'L

These new restrictions, combined with existing ones, severely curtail the legal services grantees are able to provide. For example, legal aid attorneys are prohibited from "influencing" the government, restricted as to which clients they may represent, and forbidden from pursuing certain types of claims.[10] Moreover, Congress extended the restrictions to include non-LSC funds received by grantees.[11]

Proponents of the legislation argue that the new restrictions are needed to reign in legal aid attorneys misusing the LSC funding by pursuing their own political agendas rather than using the funds to provide basic legal services poor people need.[12] Critics, however, contend that the new restrictions were driven by a conservative ideology that is more concerned about protecting those in power and squelching disagreement with their policies toward the poor than improving the legal representation that grantees provide to the poor.[13] They argue that the new restrictions will only harm poor people by limiting their access to justice.[14] Regardless of one's particular viewpoint on the LSC Act, the new congressional restrictions and accompanying LSC regulations raise difficult constitutional questions about Congress's ability to condition the receipt of federal funds on a grantee's agreement to forfeit certain rights.[15] This Note addresses whether the re-

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L.J., July 8, 1996, at A1 (describing the new restrictions); James Ridgeway, *The Legal Straitjacket*, VILLAGE VOICE (New York), Aug. 6, 1996, at 20 (describing the new restrictions).

[10] Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504.

[11] *See id.* § 504(d)(1).

[12] *See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before the Subcomm. On Commerce, Justice, State and Judiciary of the House Appropriations Comm.*, 104th Cong. 9, 129 (1996) [hereinafter *Hearings*]; Ruth Larson, *Heat Turns up on Legal Services Corp.: Coalition Slams Agency as House Panel Begins Probe*, WASH. TIMES, Feb. 26, 1997, at A4; Catherine Trevison, *Helping Poor with Some Legal Aid Now Taboo*, TENNESSEAN, Oct. 28, 1996, at 1A. *See generally* James T. Bennett & Thomas J. DiLorenzo, *Poverty, Politics, and Jurisprudence: Illegalities at the Legal Services Corporation*, *in* LEGAL SERVICES CORPORATION: THE ROBBER BARONS OF THE POOR? 113, 117-29 (Wash. Legal Found. 1985); Orrin G. Hatch, *Myth and Reality at the Legal Services Corporation*, *in* THE ROBBER BARONS OF THE POOR?, *supra*, at 3-13.

[13] *See* Booth, *supra* note 8; Claire Cooper, *Suit Seeks to End Limits on Legal-Aid Networks: They Say Restrictions Hurt Their Ability to Aid Clients*, SACRAMENTO BEE, Jan. 10, 1997, at A4 ("The restrictions 'can most plausibly be understood as an effort by Congress to suppress the expression of certain ideas, and limit the rights of certain groups, that Congress now disfavors for ideological reasons.'"); Ridgeway, *supra* note 9, at 20.

[14] *See* Steven Stycos, *Revoking Legal Services: Republicans Want to Keep Lawyers From the Poor*, PROGRESSIVE, Apr. 1, 1996, at 29.

[15] Restrictions that limit an attorney's ability to represent clients have been held unconstitutional outside of the funding context. *See, e.g.*, *In re* Primus, 436 U.S. 412 (1978) (holding that a practicing lawyer who advised a gathering of women with respect

strictions violate the constitutional rights of the grantees and their clients.

Part I reviews the history of the LSC, its current framework, and the impact of the new restrictions on legal aid programs. Part II reviews the United States Supreme Court's analysis for evaluating the constitutionality of restrictions attached to government funding. Part III applies the Court's constitutional analysis to the restrictions Congress placed on LSC grantees.

I. THE CONTEXT OF THE NEW CONGRESSIONAL RESTRICTIONS

This Part establishes the context of the new congressional restrictions by reviewing the purpose and history of the Legal Services Act and discussing the new restrictions and how they impact legal aid attorneys and clients.

A. *The Purpose and History of the Legal Services Corporation Act*

The purpose of the Legal Services Corporation Act (LSC Act) is to provide "equal access to the system of justice . . . [for] those who would otherwise be unable to afford adequate legal counsel."[16] The Act recognizes that for most low-income individuals the costs of retaining an attorney

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to their legal rights was not subject to disciplinary action under the First Amendment); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (holding that an injunction that restrained a brotherhood from maintaining and carrying out a plan for advising injured workers to obtain legal advice and for recommending specific lawyers denied members rights guaranteed by the First and Fourteenth Amendments); NAACP v. Button, 371 U.S. 415 (1963) (holding that under the First Amendment Virginia may not prohibit the NAACP from advising prospective litigants to seek assistance and may not make it a crime to refer prospective litigants to an attorney). *See generally* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 171 (1992).

[16] 42 U.S.C. § 2996 (1994). The statute states:

> (1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;
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> (2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;
>
> (3) providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this chapter;
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> (4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;
>
> (5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and
>
> (6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

Id.

are prohibitive.[17] Without access to legal counsel, low-income individuals are, for all practical purposes, excluded from a system of justice that claims to be available to all.[18] Thus, the purpose of the Act is to provide low-income individuals access to the courts where none would otherwise exist.[19]

The Act established the Legal Services Corporation, a private,[20] nonprofit corporation located in the District of Columbia, for "the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[21] The LSC administers grants to qualified programs and ensures that grantees abide by the restrictions placed upon them as a condition for receiving the funding.[22] While the LSC provides funding, it does not represent eligible clients.[23] Congress designed the program to be highly decentralized.[24] Rather than utilizing a centralized delivery mechanism, the actual delivery of legal services is done by locally controlled, nonprofit corporations located

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[17] *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE 59-62 (1976); JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK 176-81 (1993); Mark Green, *The Gross Legal Product: "How Much Justice Can You Afford?"*, *in* VERDICTS ON LAWYERS 63, 77-79 (Ralph Nader & Mark Green eds., 1976).

[18] *See* Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1981). Cramton writes:

> For most of our history, the situation with respect to civil legal aid for the poor could well have been summed up in Anatole France's famous gibe that: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." The courts were open to all, but only the well-to-do could afford the lawyer who was necessary for the vindication of rights.

Id. at 522; *see also* Griffin v. Illinois, 351 U.S. 12, 19 (1955) (Black, J.) (opining that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has").

[19] *See* Cramton, *supra* note 18, at 524-25.

[20] For First Amendment analysis, however, the LSC is considered a governmental entity, notwithstanding its declaration that it is a private corporation. *See infra* Part III.B.1.

[21] 42 U.S.C. § 2996b(a) (1994).

[22] *See id.* § 2996e. "The Corporation shall have authority to insure the compliance of recipients and their employees with the provisions of this subchapter and the rules, regulations, and guidelines promulgated pursuant to this subchapter, and to terminate . . . financial support to a recipient which fails to comply." *Id.* § 2996e(b)(1)(A).

[23] *See id.* § 2996e(c)(1). The LSCA states that the Corporation itself shall not

> participate in litigation unless the Corporation is a party, or a recipient of the Corporation is a party, or a recipient is representing an eligible client in litigation in which the interpretation of this subchapter or a regulation promulgated under this subchapter is an issue, and shall not participate on behalf of any client other than itself.

Id.

[24] *See* Booth, *supra* note 8.

throughout the country.[25] These local legal aid offices set their own priorities and are generally run independently from the LSC.[26]

The LSC's roots can be traced to the Legal Services Program in the Office of Economic Opportunity (OEO), which was established in 1966 as part of Lyndon Johnson's war on poverty.[27] Although the OEO Legal Services Program had scant funding and targeted mainly urban areas,[28] both conservatives and liberals attacked the program.[29] Conservatives viewed it as interventionist law reform, while liberals thought of it as little more than a service function.[30] In the early 1970s, conservative political opposition sought to eliminate the OEO entirely, including the legal services program.[31] To this end, President Nixon appointed Howard Phillips to dismantle the OEO.[32] When this effort failed, however, Congress and the Nixon administration focused on establishing a congressionally funded, but politically independent, Legal Services Corporation.[33] On July 25, 1974, after many compromises and amendments, President Nixon signed into law the Legal Services Corporation Act.[34]

Notwithstanding the attempt to make the LSC politically independent, the controversy over federally funded legal services to the poor continued after its inception in 1974.[35] Although President Carter bolstered the LSC in the late 1970s, President Reagan attempted to eliminate it during the

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[25] *See Testimony in Fiscal Year 1997 House of Representative Appropriations For Commerce, Justice, State, and Judiciary, Before the Subcomm. on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 104th Cong. 208 (1996) (statement of Alexander D. Forger, President, Legal Services Corporation).

[26] *See id.*; Joseph A. Dailing, *Their Finest Hour: Lawyers, Legal Aid and Public Service in Illinois*, 16 N. ILL. U. L. REV. 7, 11 (1995). It is interesting to note that legal aid programs usually are governed by a board of directors largely composed of local attorneys appointed by local bar associations. *See* 42 U.S.C. § 2996c(a)(C) (1994).

[27] *See* CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES 6-11 (1992); *see also* AUERBACH, *supra* note 17, at 269-75. For a history of legal aid in America, see JOHN A. DOOLEY & ALAN W. HOUSEMAN, LEGAL SERVICES HISTORY (1984); PHILIP J. HANNON, FROM POLITICS TO REALITY: A HISTORICAL PERSPECTIVE OF THE LEGAL SERVICES CORPORATION (1976); and Stephen K. Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America*, 44 GEO. WASH. L. REV. 754 (1976).

[28] *See* Dailing, *supra* note 26, at 10.

[29] *See* ROWLEY, *supra* note 21, at 10.

[30] *See id.* at 11.

[31] *See* Dailing, *supra* note 26, at 10-11.

[32] *See id.*

[33] *See id.*

[34] *See id.*; Booth, *supra* note 8; Stycos, *supra* note 14, at 29.

[35] *See* ROWLEY, *supra* note 27, at 11-16; LEGAL SERVS. CORP., 1994 ANNUAL REPORT 5 (1994); Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (1997) (discussing how the LSC Act has been controversial since its inception).

1980s.[36] While the Reagan administration failed to eliminate the LSC, it succeeded in cutting LSC funding and "institut[ing] a number of other changes ostensibly designed to rein in the perceived left-wing radicals allegedly in control of legal services programs across the country."[37] Moreover, Congress began an extensive monitoring and evaluation process to search for suspected wrongdoing and misuse of congressional funds.[38] Congressional Republicans continued to attack the LSC in the latter part of the 1980s and early 1990s.[39]

With the 1994 Republican takeover of Congress, the conservatives again tried to eliminate the LSC, but failed when President Clinton vetoed their initial budget plan.[40] In an apparent compromise, however, Congress agreed to retain the LSC, albeit at a sharply reduced funding level, in exchange for the enactment of new restrictions on grantees.[41] Because LSC funding requires annual appropriations, the future of the LSC remains uncertain from year to year. Furthermore, the retention of Congress by the Republicans in the 1996 elections means the LSC's harshest critics again will be seeking to eliminate funding altogether.

B. *An Overview of the New Congressional Restrictions and Their Effects on Legal Aid Attorneys and Clients*

The 1996 OCRAA imposes nineteen restrictions[42] in addition to the ten or so existing restrictions in the LSC Act.[43] The restrictions fall into four general categories: (1) a prohibition on influencing government, (2) restrictions on which clients grantees may represent, (3) restrictions on the type of cases grantees may take, and (4) restrictions on how attorneys repre-

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[36] *See* Dailing, *supra* note 26, at 18.

[37] *Id.* at 21. For example,

> [i]n 1983, LSC published a new regulation outlining the composition of governing bodies of LSC grantees. In the future, while LSC grantee boards would continue to be composed of sixty percent attorneys, the majority of these attorneys would need to be appointed by the largest bar association in the program's service area. The assumption seems to have been that local attorneys would limit the actions of legal services programs deemed to be controversial.

Id.

[38] *Compare* Hatch, *supra* note 12, at 4-10, *with* Dailing, *supra* note 26, at 22 (offering different perspectives on the purpose of the legal services monitoring program).

[39] *See* Stycos, *supra* note 14, at 29.

[40] *See id.*

[41] *See id.* at 30.

[42] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1352-56.

[43] *See* Legal Services Corporation Act of 1974, 42 U.S.C. § 2996f(b) (1994).

sent clients.[44] Furthermore, all the restrictions apply to a grantee's non-LSC funds as well.

The first category of restrictions prohibits legal aid attorneys from influencing government. Grantees cannot attempt to influence the issuance or revocation of any executive order or any federal, state, or local government regulation,[45] nor can they attempt to influence any "adjudicatory proceeding" that is "designed for the formulation or modification of any agency policy of general applicability and future effect."[46] Grantees cannot participate in any legislative advocacy including "attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body."[47] Grantees also cannot engage in lobbying[48] or any political activity,[49] nor are they allowed to conduct training programs that advocate a "particular public policy or encourag[e] a political activity."[50] These new restrictions "are far more extensive than those included in prior appropriations provisions or in the LSC Act . . . ."[51] Indeed, a review of the regulations promulgated by the LSC in implementing these restrictions reveals extremely broad and far-reaching rules.[52] For example, the regulations set forth an absolute prohibition (grantees cannot use LSC or non-LSC funds) on "grass-roots lobbying" by a recipient and its employees.[53] Grass-roots lobbying is defined as any form of communication that contains a direct suggestion to the public to contact public officials in support of any legislation, regulations, or administrative board decisions.[54] Legislation is further defined as any action or proposal by a legislative body intended to prescribe law or public policy.[55] Other regulations prohibit participation in

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[44] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a).

[45] *See id.* § 504(a)(2); 42 U.S.C. § 2996f(a)(5) (1994).

[46] Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(3).

[47] *Id.* § 504(a)(4).

[48] The fiscal year 1995 appropriations bill restricted grantees from lobbying. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, § 403(b)(1), 108 Stat. 1724, 1759 (1994) (applying the restrictions from the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, § 606(a), 104 Stat. 2101, 2148-51 (1990)).

[49] *See* 42 U.S.C. § 2996f(b)(4) (1994) (referring to specific prohibitions in 42 U.S.C. § 2996f(a)(6)) (1994); *id.* § 2996e(d)(3)-(4).

[50] Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(d)(12).

[51] 62 Fed. Reg. 19,400, 19,401 (1997).

[52] *See* 45 C.F.R. § 1612.1-.11 (1996).

[53] *Id.* § 1612.4.

[54] *See id.* § 1612.2(a)(1).

[55] *See id.* § 1612.2(b)(1). Public policy means "an overall plan embracing the general goals and procedures of any governmental body and pending or proposed statutes, rules, and regulations." *Id.*

bar association activities related to restricted activities,[56] training that advocates a particular public policy or trains participants to engage in activities prohibited by the Act,[57] organizing a group in any manner,[58] or engaging in illegal activity at any time.[59] "Illegal" activity includes any activity that violates the LSC Act, whether engaged in during or outside of working hours.[60] These are just a few examples of the extensiveness of the regulations related to influencing government.

When the LSC rules are viewed as a whole, it appears that the only interaction a legal aid attorney may have with a governmental body occurs when he or she is representing an individual client in an administrative hearing or responding to a specific request from a governmental body.[61] Even the narrow exception for administrative hearings is severely undercut by another regulation that completely prohibits a legal aid attorney from challenging any government agency's regulations related to "welfare" reform.[62]

In addition to the general prohibition against influencing government, the 1996 OCRAA specifically prohibits grantees from participating in any welfare-reform advocacy.[63] "Welfare reform" is very broadly defined and includes *all* of the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, except for the Child Support Enforcement Provisions.[64] As noted above, an exception is made for the represen-

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[56] *See id.* § 1612.5(c)(5). Recipient attorneys are allowed to participate fully and actively in bar association activities provided that the bar does not use recipient resources or identify the recipient with any activities proscribed by the regulations. *See id.* Thus, "when a bar association activity is devoted to a prohibited activity, such as participating in a meeting whose principal purpose is to determine and communicate the bar's position on pending or proposed legislation or regulations; recipient attorneys must either decline to participate or participate solely on their own time." 62 Fed. Reg. at 19,402.

[57] *See* 45 C.F.R. § 1612.8. For example, under this expanded prohibition on training, a grantee cannot train participants on how to engage in class actions; lobbying, welfare reform, and the like. *See id.*

[58] *See id.* § 1612.9. This prohibition extends to both LSC and non-LSC funding.

[59] *See id.* § 1612.7(b)(3).

[60] *See* Permissible Activities Using Non-LSC Funds, 62 Fed. Reg. at 19,403.

[61] *See* 45 C.F.R. §§ 1612.5-.6.

[62] *See infra* text accompanying note 63. Needless to say, a significant portion of legal representation to low-income clients involves governmental agencies that provide "welfare" benefits.

[63] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996, Pub. L. No. 104-134,] 504(a)(16), 110 Stat. 1321, 1356. No funds are to be used by grantees to "initiate[ ] legal representation, or participate[ ] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State Welfare system . . . ." *Id.*; *see* 45 C.F.R. § 1639 (1996) (promulgating accompanying regulations).

[64] 45 C.F.R. § 1639.2(a) (1996). The interim rule defined "welfare" system to in-

tation of a client seeking specific relief from a welfare agency as long as the grantee does not challenge "existing laws."[65] The LSC regulations, however, significantly limit this exception by including federal and state agency regulations in the definition of "existing laws."[66] Thus, a legal aid attorney may only seek relief according to an agency's interpretation of the law (its regulations). The attorney, however, may not challenge the agency's interpretation, even if that interpretation appears erroneous.

The new restrictions also limit the types of clients grantees may represent. Illegal aliens and many legal aliens cannot be represented.[67] Similarly, grantees may not represent individuals being evicted from public housing if the individuals have been charged with drug crimes,[68] nor may they represent prisoners, even for nonprison-related matters, such as divorce.[69]

Furthermore, the restrictions limit the types of cases grantees may accept. Prior restrictions prohibited grantees from taking fee generating cases, criminal cases, civil cases arising out of criminal cases, labor-related activities, cases involving nontherapeutic abortions, litigation relating to desegregation, and selective service cases.[70] The new restrictions further prohibit cases related to redistricting,[71] all abortion-related litigation,[72] and, as previously noted, any litigation involving an effort to challenge welfare reform.[73] Recently, litigation related to assisted suicide, euthanasia, and mercy killing also were restricted.[74]

Finally, the 1996 OCRAA affects the manner in which grantees can represent clients. Most notable is the prohibition against filing class action

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clude only "Federal and State Aid to Families with Dependent Children ("AFDC") programs under Title IV-A of the Social Security Act, 42 U.S.C. § 601 *et seq.*, and State General Assistance, or similar State means-test programs for basic subsistence." 62 Fed. Reg at 30,764. The final rule expanded the definition to include all provisions of the Personal Responsibility Act, including Social Security Income ("SSI") and the Food Stamp Program. *See id.*

[65] Omnibus Consolidated Recessions and Appropriations Act of 1996, § 504(a)(16).

[66] 62 Fed. Reg. at 30,765. (discussing comments regarding the definition of "existing law").

[67] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(11).

[68] *See id.* § 504(a)(17); *see also* 45 C.F.R. § 1633 (1996).

[69] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(15).

[70] *See* 42 U.S.C. §§ 2996f(b)(1)-(3),(6),(8)-(10) (1994).

[71] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(1); *see also* 45 C.F.R. § 1632.3 (1996).

[72] *See.* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(14).

[73] *See* 45 C.F.R. § 1639.3 (1996).

[74] *See* Assisted Suicide Funding Restriction Act of 1997, Pub. L. No. 105-12, 111 Stat. 23; *see also* 45 C.F.R. § 1643 (1996).

law suits.[75] The Act also disallows the recovery of attorneys' fees pursuant to federal or state statute.[76] Many procedural requirements have been imposed, including requirements that plaintiffs be specifically identified by name in complaints and that plaintiffs write out statements of facts upon which complaints are based.[77]

In addition to imposing nineteen new restrictions on a grantee's use of LSC funding, Congress applied the restrictions to a grantee's use of "non-LSC"[78] funding as well.[79] Prior to the 1996 legislation, the restrictions applied to a grantee's use of private funding, but not public funding.[80] The 1996 OCRAA, however, applied the new restrictions to all non-LSC funding, both private and public.[81] This is a significant extension because public funds are defined as "non-LSC funds derived from a Federal, State or local government," including Interest on Lawyer Trust Accounts (IOLTA) funds, which often represent a major source of nonfederal funding.[82]

In an attempt to prevent grantees from "circumvent[ing] statutory conditions on a recipient's LSC and non-LSC funds"[83] by transferring funds to another organization, the LSC promulgated regulations that extended the restrictions to organizations receiving funds from a grantee. In the initial rule that the LSC promulgated on December 2, 1996, if a grantee transferred LSC funds to another person or entity, the restrictions applied to the funds transferred and to the non-LSC funds of the transferee.[84] If a grantee transferred non-LSC funds to another person or entity, the LSC restrictions still

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[75] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(7).

[76] *See id.* § 504(a)(13); *see also* 45 C.F.R. § 1642 (1996).

[77] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(a)(8).

[78] "*Non-LSC funds* means funds derived from a source other than the Corporation." 45 C.F.R. § 1610.2(d) (1996).

[79] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(d). This section allows a grantee to use "non-LSC" funds only "if such funds are used for the specific purposes for which such funds were received, except that such funds *may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.*" *Id.* § 504(d)(2)(B) (emphasis added). Grantees are required to notify in writing all non-LSC funding sources of the extension of these restrictions to their funding. *See id.* § 504(d)(1).

[80] "*Private funds* means funds derived from an individual or entity other than a governmental source or the LSC." 45 C.F.R. § 1610.2(e) (1996).

[81] Thus, the restrictions in the LSC Act apply to LSC funds and private funds, but not to public funds, while the restrictions in the 1996 OCRAA apply to all LSC and non-LSC funds (including both public and private funds). *See* Omnibus Consolidated Recessions and Appropriations Act of 1996 § 504(d).

[82] 45 C.F.R. § 1610.2(f) (1996).

[83] Summary, Use of Non-LSC Funds, 61 Fed. Reg. 63,749, 63,752 (1996).

[84] *See* 45 C.F.R. § 1610.7(a) (1996).

applied to the transferred funds (but not to other funds of the transferee), even though the transferee received no LSC funds.[85] In essence, once grantees received LSC funds, or transferees received LSC funds from a grantee, *all* non-LSC funds of the grantee or the transferee became forever "tainted" with the restrictions, notwithstanding that the non-LSC funds were transferred to an organization receiving no LSC funding.

On May 21, 1997, the LSC revised these regulations after a federal judge in Hawaii enjoined the LSC from enforcing nine of the new restrictions as applied to the use of non-LSC funds on the basis that the restrictions likely were unconstitutional.[86] The LSC replaced the section that applied the restrictions to transferees of non-LSC funds[87] with a new section entitled "Program Integrity of Recipient." Under this section, a "recipient must have objective integrity and independence from any organization that engages in restricted activities."[88] A program satisfies this criterion if "(1) [t]he other organization is a legally separate entity; (2) the other organization receives no transfer of LSC funds and LSC funds do not subsidize restricted activities; (3) and the recipient is physically and financially separate from the other organization."[89] The LSC, even in its revised regulations, has gone to great lengths to prevent grantees from establishing a separate entity that uses non-LSC funds to engage in the restricted activities.[90]

The new restrictions on their face are very broad and extensive. The significant effects of the restrictions become readily apparent when one considers the actual impact of the restrictions on legal aid attorneys and clients. For example, the restriction on "influencing government" means that local legal aid agencies have to remain silent as new rules and regulations that affect poor people are written,[91] and simple but effective activities, like

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[85] *See id.* § 1610.7(b).

[86] *See* Legal Aid Soc'y v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997). This case is discussed more fully in Part III.A.

[87] *See* Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695, 27,696-97 (1997).

[88] 45 C.F.R. § 1610.8 (1996).

[89] *Id.* For a recipient to be physically and financially separate requires more than keeping LSC funds separate from other funds. Rather, the recipient must have separate personnel, separate accounting and timekeeping records, a certain degree of separation from facilities in which restricted activities occur, and other distinguishing characteristics. The determination is to be based on the totality of the circumstances on a case-by-case basis. *See id.*

[90] Legal aid attorneys working for recipients of LSC funding also are prohibited from engaging in the "outside practice of law." *See* 45 C.F.R. § 1604 (1996). Thus, a legal aid attorney who works for a grantee is subject to the extensive restrictions when working for the grantee and is prohibited from providing legal services on her own time outside of work. Thus, to engage in the prohibited activities, a legal aid attorney would have to find a nonprofit organization that either does not receive LSC funds or receives non-LSC funds and meets the objective integrity and independence criterion.

[91] *See* James Ridgeway, *Legal Disservices: Attacked by Congress, the People's Law-*

meeting with local police departments to discuss protocols or procedures, are prohibited.[92] This leaves a large void because "advocacy organizations like those LSC-funded programs are one of the few sources that have expertise and knowledge and can speak for [poor] people. So it's really silencing a voice, particularly when it silences people from even commenting on regulations."[93] Moreover, providing zealous advocacy for clients sometimes requires challenging laws and regulations. Consequently, because there often is no clear demarcation between challenging the application of a law or regulation and challenging the law itself, nor is there an easy way to disentangle the two forms of advocacy, the restrictions have the potential to severely curtail the effectiveness of the legal representation clients receive.[94]

Likewise, the restrictions prohibiting lobbying have a significant impact on the type of legislation passed that affects poor people.[95] Grantees often are the few advocates of the poor who understand the intricacies of government benefit programs, such as Aid for Families With Dependent Children and Medicaid.[96] "The new lobbying restriction . . . would deny legislators information they need to redraft welfare laws and would deny welfare recipients a voice in shaping their future."[97]

The restrictions on class action lawsuits and the prohibition against recovering statutory attorneys' fees also take away an important advocacy tool from legal aid attorneys. The class action rule allows one or a few clients, who represent the interests of a group of similarly situated individuals, to file a lawsuit on behalf of the class.[98] This eliminates the costly and duplicative effort of filing a separate lawsuit for each individual.[99] Class

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yers Can't Decide Whether to Play Dead or Fight Back, VILLAGE VOICE (New York), Aug. 6, 1996, at 20.

[92] *See* MacLachlan, *supra* note 9, at A1.

[93] Ridgeway, *supra* note 91, at 21.

[94] *See* MacLachlan, *supra* note 9, at A1.

[95] *See generally* Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39 (1994) (analyzing the federal regulation of legal service attorneys' lobbying activities).

[96] *See* Stycos, *supra* note 14, at 31.

[97] *Id.*

[98] *See* FED. R. CIV. P. 23.

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> That change, says William Beardall, litigation director of Texas Rural Legal Services, would drastically increase the cost of legal actions on workers' behalf and clog the courts with identical lawsuits . . . "The class action is the only way you can ensure that the employer doesn't rip off people year after year and profit from it." Under the new restriction prohibiting class-action suits, if ten or twenty members of a crew of 200 farm workers seek the help of legal services to recover unpaid wages, says Beardall, "the employer can pay off the ten or twenty people and still end up ahead." But a class-action lawsuit settled by a court-approved order, he says, ensures all present and future workers will be paid, or the employ-

actions have yielded major victories for the poor[100] because not only are they cost-effective and efficient, they provide a way for attorneys to hold businesses and government agencies accountable in cases in which widespread injustice has occurred.[101] Class actions are particularly important in cases involving migrant farm workers[102] and recipients of government benefits.[103] Likewise, the recovery of attorneys' fees provides attorneys with an important bargaining chip and serves as a deterrent against the filing of frivolous lawsuits against poor people.[104]

The restrictions prohibiting legal aid attorneys from representing illegal—and many legal—aliens will have a particularly significant impact on undocumented workers who now have nowhere to turn when employers fail to fulfill their promises to pay certain wages and to provide certain living conditions.[105] Illegal aliens who encounter domestic violence and abuse also will be left with few alternatives.[106]

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er risks being found in contempt of court.

Stycos, *supra* note 14, at 30.

[100] *See* Trevison, *supra* note 12; Ridgeway, *supra* note 91, at 21.

[101] *See* Stycos, *supra* note 14, at 30.

[102] *See* Ridgeway, *supra* note 91, at 21 ("The Legal Services Corporation . . . [provided] for the first time a sure line of defense for migrant workers challenging agribusiness and the Farm Bureaus.").

[103] *See* Stycos, *supra* note 14, at 30.

> In 1989, for example, Rhode Island Legal Services sued the State Department of Human Services for failing to give a portion of child-support payments to welfare recipients. The successful class-action suit will eventually return $400,000 to women on welfare in Rhode Island, according to staff attorney Gretchen Bath. In Vermont, legal services filed a class-action suit to speed processing of welfare-benefit applications; in Cleveland, to integrate and renovate public housing; and in Louisiana, to force implementation of the "motor-voter" law designed by Congress to encourage people to register to vote.

Id.

[104] *See* Ridgeway, *supra* note 91, at 21.

[105] *See id.*

[106] *See* William Claiborne, *Abused Immigrant Slain After Plea for Legal Services Help Is Denied; New Law Limits Federal Program to Lawful Permanent Residents*, WASH. POST, June 5, 1996, at A3; Dori Meinert, *Slaying of Woman Underscores Tighter Legal-Aid Restrictions*, SAN DIEGO UNION-TRIB., July 21, 1996, at A18. These articles report the case of Mariella Batista, a Cuban immigrant who was shot to death by her son's estranged father. Ms. Batista had sought help from a federally funded legal services organization to get a protective court order against the man, but she was rejected because Congress had adopted, twelve days earlier, the new restrictions prohibiting assistance to anyone who is not a lawful permanent resident, even if private, non-LSC funds are used. *But see* Patrick J. Manshardt, *LSC Backers Real Ones to Blame*, NAT'L L.J., Sept. 2, 1996, at A16 (suggesting that LSC advocates are exploiting the death of Ms. Batista and that the real cause of the tragedy was not the new restrictions on grantees, but the failure of a pro-bono attorney to arrive on time).

Congress's extension of the restrictions to non-LSC funding is a tremendous blow to grantees because it prevents recipients of LSC funds from engaging in any restricted activity, regardless of whether they use LSC or non-LSC funds for the activity.[107] In essence, Congress has restricted the grantees' activities—whether or not funded by the government—rather than restricting the grantees' use of federal funds. Moreover, because Congress allows grantees to transfer non-LSC funds only to recipients who maintain objective integrity and independence from the grantees (including separate facilities and personnel), for all practical purposes grantees are unable to set up separate entities to engage in restricted activities.[108] Consequently, the new restrictions, coupled with the existing restrictions, very seriously impact grantees and their clients, as Congress undoubtedly intended.

C. *A Look at the Ideological Debate Over Federally Funded Legal Services*

Whether one views the restrictions as a positive or negative step in reforming the way legal services are delivered to the poor depends in large part on one's ideological underpinnings. Conservatives, who long have criticized the LSC and the use of LSC funds by grantees, believe the restrictions are a necessary step in reforming federally funded legal aid to the poor. They maintain that the "restrictions are necessary to keep legal services focused on the day-to-day legal needs of the poor—fighting unfair evictions, appealing denial of welfare benefits, and handling child-custody cases."[109]

Conservatives argue that legal aid attorneys have misused federal funds by pursuing their own "radical agenda" and by "engaging in dubious litigation that is of no real benefit to poor people."[110] United States Representative Charles H. Taylor once remarked, "Of the 1.6 million legal matters [legal service organizations] say they handled [in 1995], at our request, they

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In an apparent response to the Batista case, Congress enacted in the 1997 OCRAA an exception to the prohibition against grantees representing aliens that allows representation for cases involving aliens or their children who have been subject to domestic violence. Omnibus Consolidated Appropriations Act, 1997 Pub. L. No. 104-208, § 502(a)(2)(C), 110 Stat. 3009, 3059. The proposed 1998 appropriations rider continues this exception. H.R. CONF. REP. NO. 105-405, at H10828, *reprinted in* 1998 U.S.C.C.A.N. 2440, 2510-12.

[107] *See* Anna Cekola, *Legal Aid Society Hails Ruling Easing Restrictions on Spending Law*, L.A. TIMES, Feb. 25, 1997, at B1; Kathryn Ericson, *Limits on Legal Services Corporation Challenged in Federal Court*, WEST'S LEGAL NEWS, Jan. 13, 1997, *available in* 1997 WL 8482;

[108] Establishing a separate entity that uses different facilities and personnel simply would be cost prohibitive under the existing budgets that most grantees work within.

[109] Stycos, *supra* note 14, at 30.

[110] *Hearings*, *supra* note 12, at 130 (testimony of Rep. Dan Burton); *see also* Cekola, *supra* note 107.

could not find one case where they helped throw a drug dealer out of public housing or helped protect a home schooler."[111] Conservatives' basic belief is that

> in practice the LSC has routinely diverted taxpayer funds from legitimate litigation to promoting radical political objectives that are often irrelevant or detrimental to the poor. In short, the poor have been used as pawns by Legal Services lawyers to procure taxpayer funding of their personal political agendas. These agendas call for radically interventionist governmental policies, many of which have been shown to unequivocally make the poor worse off.[112]

Those opposed to the new restrictions, however, believe the restrictions undermine the legal representation grantees provide low-income clients.[113] They believe the restrictions are a misguided attempt to "protest a handful of ideologically charged cases."[114] Grantees, they argue, already spend the vast majority of their time on day-to-day matters that are important to poor people.[115] Rather than improving the services grantees provide, "[t]he legislation weakens the ability of poor people to stand up for their legal rights and to have an impact, when it may be their only effective method to petition the government for redress of grievances."[116] Furthermore, many who are critical of the restrictions believe that conservative members of Congress are trying to silence those opposed to their new policies towards the poor and are protecting certain constituents.[117] "[T]he new restrictions," according to legal aid advocates, "would simply ensure that poor people cannot effectively sue the government, the rich, and the influential. Those who would lose the most, they say, are America's least powerful residents—migrant farm workers, battered women, low-wage factory workers, welfare recipients, and disabled people . . . ."[118]

Therefore, the new restrictions and their effects should be understood as part of an ongoing debate over whether the government should provide funding for legal services, and if so, for which activities. From the start of

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[111] Booth, *supra* note 8.

[112] Bennet & Dilorenzo, *supra* note 12, at 113.

[113] *See* Booth, *supra* note 8.

[114] *Id.*

[115] *See id*; *see also* Gail Gibson, *For Legal Aid Lawyers, A Quieter Voice,* WASH. POST, Dec. 22, 1997, at A25.

[116] Varshavsky v. Geller, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996), *reprinted in* N.Y.L.J., Dec. 31, 1996, at 22 (col. 2).

[117] *See* Stycos, *supra* note 14, at 29.

[118] *Id.*

the LSC, the debate has been ideologically driven. To the extent that the Republican-led Congress was able to enact these restrictions, the Republican view appears to have carried the day; however, one of the most difficult questions remains: Are these restrictions constitutional?

II. THE CONSTITUTIONAL FRAMEWORK

The new restrictions on legal services raise not only ideological questions regarding the role of a federally funded legal service program, but also important and difficult constitutional questions.[119] Simply put, to what extent can Congress, in exchange for federal funds, require LSC grantees and clients to forego rights that otherwise would be constitutionally protected?[120] Part II examines the constitutional framework within which this question needs to be addressed and reviews two doctrinal approaches: the right-privilege distinction and the unconstitutional conditions doctrine. Part II concludes with a review of relevant Supreme Court case law. Part III applies the constitutional analysis to determine whether the new LSC restrictions are constitutional.

Discerning a coherent analytical model for evaluating the constitutionality of congressional restrictions attached to funding grants has become more difficult as the size and scope of government has increased.[121] Further

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[119] *See* Recent Legislation, 110 HARV. L. REV. 1346 (1997). The constitutionality of the restrictions is not only important to the attorneys and clients who receive funding grants from the LSC, but to our society as a whole as an increasing number of citizens become economically and socially dependent on their affiliation with the government. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1103-06 (1987). Furthermore, as the trend to decentralize government services to nongovernmental entities picks up momentum through such mechanisms as federal block grants, the restrictions Congress may constitutionally place on these grants become increasingly important. *See e.g., id.* at 1142-60; Terry Carter, *Mum's the Law: Lawyers Protest Statute Gagging Medicaid Advice*, 84 A.B.A. J. Jan. 1998, at 20; Romesh Ratnesar, *Mock Trial*, NEW REPUBLIC, Dec. 9, 1996, at 16; Richard C. Reuben, *The Welfare Challenge*, 83 A.B.A. J., Jan. 1997, at 34.

[120] *See* 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 7:1 (1996); Rosenthal, *supra* note 119, at 1103-06, 1120. "The general question is whether the power of government—federal, state, or local—to deny a privilege includes the power to grant it on any terms, including the surrender of an otherwise applicable constitutional right." *Id.* at 1120.

[121] *See* 1 SMOLLA, *supra* note 120, § 7:1 ("Devising intelligent constitutional principles to govern this sort of indirect restriction on freedom of speech is one of the most challenging problems facing any society committed to openness and free expression."); Richard A. Epstein, *Unconstitutional Conditions, State Power, and The Limits of Consent*, 102 HARV. L. REV. 4, 7-14 (1988); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 544 (1996); Rosenthal, *supra* note 119, at 1103-11; Frederick Schauer, *Too Hard: Unconstitutional Conditions*

complicating matters is the fact that the analysis may vary depending on the setting and the particular rights involved.[122] Although many constitutional scholars have proposed new analytical models,[123] the United States Supreme Court has relied on two competing doctrines in reviewing the constitutionality of restrictions placed on government-financed programs: the right-privilege distinction and the doctrine of unconstitutional conditions.[124]

A. *The Right-Privilege Distinction*

The right-privilege distinction is a doctrine based on a simple understanding of the difference between the *rights* the Constitution guarantees to citizens and the *privileges* the government offers to citizens on a voluntary basis.[125] The government is not entitled to restrict an individual's rights

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and the Chimera of Constitutional Consistency, 72 DENV. U. L. REV. 989 (1995).

[122] *See* Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 971 (1995). Government places conditions on receiving certain benefits in a multitude of contexts. For example, the government may place conditions on charitable or religious organizations that receive federal funding or tax exemptions, *see* Regan v. Taxation With Representation, 461 U.S. 540 (1983); may place conditions on land use in exchange for zoning rights or permits, *see* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987); or may attach conditions to the recipients of Aid to Families with Dependent Children benefits, *see* Lyng v. International Union, 485 U.S. 360 (1988); Wyman v. James, 400 U.S. 309 (1971). The government, however, may not attach conditions to the receipt of unemployment benefits, *see* Sherbert v. Verner, 374 U.S. 398 (1963); to the use of public school facilities by religious groups, *see* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); or to government employment, *see* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); Pickering v. Board of Educ., 391 U.S. 563 (1968). The government also may impose content-neutral restrictions on the use of public forums, *see* Ward v. Rock Against Racism, 491 U.S. 781 (1989); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). The resolution of the question potentially impacts any setting in which the government confers a benefit on an individual or entity. The Court's application of different standards to different contexts obviously complicates the analysis.

[123] *See e.g.*, Lynn A. Baker, *Bargaining for Public Assistance*, 72 DENV. U. L. REV. 949 (1995); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996); Redish & Kessler, *supra* note 121; Rosenthal, *supra* note 119; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

[124] *See* Post, *supra* note 123, at 152.

[125] *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517-18 (1892) (upholding the firing of a police officer for certain political speech, on the basis that the government could constitutionally place conditions on employment); *see also* 1 SMOLLA, *supra* note 120, § 7:3; Redish & Kesler, *supra* note 121, at 549; Rodney A. Smolla, *The Re-*

unless its justification and methods for doing so pass the proper constitutional standards of review (rational basis, intermediate scrutiny, or strict scrutiny). Privileges, however, are viewed more as public charity in that they are not guaranteed by the Constitution, but rather, are a product of the political process's allocation of public resources.[126] Thus, "[t]he government . . . could grant citizens privileges on the condition that they surrender or curtail the exercise of constitutional freedoms that they would otherwise enjoy."[127]

Under a right-privilege analysis, the government may place conditions on government benefits that otherwise would be unconstitutional because no rights are violated, only privileges.[128] Such a conclusion derives its support from two premises. "First, by definition, a government subsidy is a matter of governmental largesse, and the greater governmental power to deny the subsidy logically includes the lesser power to grant the subsidy conditionally on the waiver of a constitutional right."[129] Second, one could argue that the government violates individuals' constitutional rights by offering subsi-

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emergence of the Right-Privilege Distinction In Constitutional Law: The Price of Protesting Too Much, 35 STAN. L. REV. 69, 71-75 (1982).

[126] *See* 1 SMOLLA, *supra* note 120, § 7:3, at 7-5. ("In private transactions, the homespun wisdom is that 'beggars can't be choosers' and 'gift horses are not to be looked in the mouth'; the giver may attach what conditions he pleases to the gift.").

[127] *Id.* The right-privilege distinction often was viewed in contractual terms. Rights were vested interests held independent of the state, while privileges were contractual relationships between the government and its citizens. As partial consideration for the privilege, citizens voluntarily gave up rights they otherwise enjoyed. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (1892).

In *McAuliffe*, a police officer was fired for talking about politics while on duty. In upholding the firing as constitutional, Oliver Wendell Holmes, then serving as a justice on the Supreme Judicial Court of Massachusetts, articulated the right-privilege distinction as a matter of simple contractual waiver in which the police officer took "the employment on the terms which [were] offered him." *Id.* at 518. According to Justice Holmes, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 517; *see also* Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) (arguing that a Kansas statute that required out-of-state businesses to pay a charter fee to the state treasurer before entering into business in Kansas did not violate the Constitution), Commonwealth v. Davis, 39 N.E. 113 (1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897) (upholding a city ordinance that prohibited public speaking in a municipal park without a permit from the mayor);

[128] *See* 1 SMOLLA, *supra* note 120, § 7:3.

[129] Redish & Kessler, *supra* note 121, at 549. The flaw with this argument is best described by referencing the equal protection context in which the government's power to withhold a benefit does not include the power to withhold it from a certain racial group. Likewise, in the free speech context, the right to prohibit unprotected speech, such as fighting words, does not include the power to prohibit only certain viewpoints expressed with fighting words. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

dies with conditions, but individuals are free to choose whether to accept such subsidies, and the individuals are in no worse a position than if the government had offered no subsidies in the first place.[130]

B. *The Doctrine of Unconstitutional Conditions*

Modern courts and scholars have rejected the overly simplistic and deceptive logic of the right-privilege distinction as unworkable.[131] In *Perry v. Sindermann*,[132] the Supreme Court explicitly rejected the right-privilege distinction and adopted the modern notion of unconstitutional conditions. Justice Potter Stewart stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.[133]

The Court, however, did not adopt an absolute prohibition against attaching conditions to government benefits.[134] Rather, it recognized that under certain circumstances the government can grant benefits to individuals and attach conditions that restrict the constitutional rights of the recipient. There-

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[130] *See* Redish & Kessler, *supra* note 121, at 549.

[131] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831-38 (1995); Perry v. Sindermann, 408 U.S. 593, 597 (1972); 1 SMOLLA, *supra* note 120, §§ 7:5-7:7; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *But see* Smolla, *supra* note 125, at 69-71.

[132] 408 U.S. 593 (1972).

[133] *Id.* at 597 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[134] *See* Rosenthal, *supra* note 119, at 1121-22; 1 SMOLLA, *supra* note 120, § 7:15. The unconstitutional conditions doctrine does not adopt the same constitutional analysis in settings when the government is not the employer or financier. In that context, a "sometimes doctrine" of unconstitutional conditions exists. *Id.* at 7:24.

fore, rather than apply an absolute prohibition, courts look to the special settings and circumstances in which the government and individuals interact, as well as the nature of the conditions and benefits involved.[135] Ideally, the doctrine sets out a set of principles that recognizes the government's right to participate in the political marketplace[136] while providing the necessary constitutional safeguards for individuals who receive government benefits. In practice, however, the doctrine of unconstitutional conditions is difficult and messy to apply.[137]

C. *The Doctrine of Unconstitutional Conditions When Government Is Financier*

This Section describes the principles for applying the unconstitutional conditions doctrine when the government provides funding with strings attached. It also reviews the importance of the threshold determination regarding the characterization of the relationship between the funding recipient and the government and concludes by reviewing four relevant Supreme Court cases.

Analyzing the constitutionality of the restrictions placed on recipients of government funds is particularly difficult because

> [i]t renders uncertain the status of speakers, forcing us to determine whether speakers should be characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government. And it renders uncertain the status of government action, forcing us to determine whether subsidies should be characterized as govern-

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[135] *See Rosenberger*, 515 U.S. at 831-34; Finley v. NEA, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997) (overturning a statute that required applicants for National Endowment for the Arts funding to apply "general standards of decency and respect" to their work); *see also* Sullivan, *supra* note 123, at 1421-22. Professor Sullivan argued that "[u]nconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference." *Id. But see* Post, *supra* note 123, at 152-53 (arguing that the Court has failed to consider adequately the social implications of First Amendment law).

[136] *See* 2 SMOLLA, *supra* note 120 §§ 19:8-19:14 (1996).

[137] *See* Post, *supra* note 123, at 152 ("It is no wonder that the haphazard inconsistency of the Court's decisions dealing with subsidized speech has long been notorious; the precedents have rightly been deemed 'confused' and 'incoherent, a medley of misplaced epigrams'") (citation omitted); Rosenthal, *supra* note 119, at 1121-22; Sullivan, *supra* note 123, at 1416-17; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U. L. REV. 593, 620 (1990).

> ment regulations imposed on persons or instead as a form of government participation in the marketplace of ideas.[138]

Therefore, the initial inquiry must be into how to characterize the relationship between the government and the recipient of federal funds upon whom the restrictions are placed.[139] Understanding the nature of the relationship is critical because "substantive First Amendment analysis will depend on whether the citizen who speaks is characterized as a public functionary or as an independent participant in public discourse."[140]

When the government provides funding to independent actors, the unconstitutional conditions analysis is similar to the analysis that is applied when no government benefits are involved;[141] however, when the government funds individuals to serve as government agents, the unconstitutional conditions analysis is more deferential to the government because the state is considered a participant[142] in the public discourse and, therefore, has the ability to organize its resources in such a way to achieve its goals.[143] To the extent that individuals act as government agents in achieving these goals, the Court views them as instruments of the state rather than as autonomous actors.[144]

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[138] Post, *supra* note 123, at 152.

[139] *See id.*

[140] *Id.* at 155; *see Rosenberger*, 515 U.S. at 831-38; Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (characterizing federally funded family planning clinics as government programs and holding that the government could constitutionally prohibit clinics from advocating abortion as a method of family planning); FCC v. League of Women Voters, 468 U.S. 364, 370, 384-86 (1984) (finding a public broadcaster to be a nonprofit corporation and holding the prohibition against "editorializing" on federally funded public broadcasting stations to be an unconstitutional violation of the First Amendment).

[141] *See* Finley v. NEA, 100 F.3d 671, 681-82 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997). In terms of free speech, the fundamental principle that unimpeded public discourse is vital to democratic self-governance, requires zealous protection of the rights of independent actors within the domain of public discourse. *See Rust*, 500 U.S. at 200; Post, *supra* note 123, at 153-54.

[142] Although the Constitution does not prohibit the government from participating in the political marketplace of ideas (that is, there is no "political establishment" clause), scholars have raised legitimate concerns that the government has an unfair advantage and may indoctrinate individuals to its point of view. *See* 2 SMOLLA, *supra* note 120, §§ 19:1-19:4; MARK YUDOF, WHEN GOVERNMENT SPEAKS 15, 156 (1983). Some argue that these dangers require that certain limitations be imposed on government speech. *See* YUDOF, *supra*, at 166-70; Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

[143] *See Rosenberger*, 515 U.S. at 831-34.

[144] *See id.*; *see also* Post, *supra* note 123, at 154. In *Rosenberger*, the Court noted in the context of a public university that

The mere fact of government subsidization, however, does not automatically mean the relationship is characterized as an agency relationship rather than an independent relationship.[145] Such an approach would be a return to the Holmes right-privilege distinction, which the Court clearly has rejected, at least in theory, if not consistently in practice. Rather, the characterization of the government-recipient relationship should be based on the

> normative and ascriptive judgments as to whether particular speakers in particular contexts should constitutionally be regarded as autonomous participants in the ongoing process of democratic self-governance. Whether explicitly addressed or not, such judgments are essential predicates to all cases of subsidized speech.[146]

Once one determines the nature of the government-recipient relationship, the proper constitutional analysis can be applied. The analysis follows a set of guiding principles developed through prior case law.[147] The principles of neutrality,[148] precision,[149]and proportionality[150] are particularly relevant for evaluating the constitutionality of the restrictions Congress placed on LSC grantees.

The neutrality principle prohibits the government from discriminating against speech based on the content of what is said or done.[151] Thus, "the

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> [w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Rosenberger, 515 U.S. at 833.

[145] *See Rosenberger*, 515 U.S. at 831-34. The public forum cases provide the best example of how a person can receive government benefits and still be an independent actor. *See* Hague v. Committee for Indust. Org., 307 U.S. 496 (1939) (holding that individuals have the right to use public streets and parks to communicate their views). Some examples include the independent nature of publications, notwithstanding that they receive second-class mail subsidies, *see* Hannegan v. Esquire, Inc., 327 U.S. 146 (1946), and the independent nature of a privately operated school whose income is derived primarily from public sources, *see* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

[146] Post, *supra* note 123, at 163.

[147] *See generally* SMOLLA, *supra* note 15, at 183-208 (identifying and discussing the principles of neutrality, proportionality, professionalism, accommodation, and licensing).

[148] *See id.* at 183-85.

[149] *See id.* at 51-53.

[150] *See id.* at 185-89.

[151] *See* Texas v. Johnson, 491 U.S. 397 (1989) (holding that a Texas statute that

government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[152] Within the public domain, the government must justify content-based regulations on autonomous individuals under the most exacting standards.[153] When the government finances private actors to participate in the public domain, however, it, by necessity, creates a limited-purpose public forum.[154] While the government retains control of the boundaries of the forum, it does not control the independent actors participating in the forum. Accordingly, within a limited forum, content-based discrimination that excludes a class of speech is legitimate only if it preserves the purposes of the limited forum.[155]

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prohibited flag desecration to preserve the flag's symbol of national unity was inconsistent with person's First Amendment right to free expression); Spence v. Washington, 418 U.S. 405 (1974) (holding that a Washington statute that prohibited superimposing extraneous material on the American flag violated a student's First Amendment right to free expression; Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (holding that a school violated a student's First Amendment right to protest the Vietnam war by banning the wearing of black armbands).

[152] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[153] *See id.* Content-neutral regulations, however, are afforded an intermediate standard of review. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791-96 (1989) (holding as constitutional "time, place and manner" restrictions related to the use of an outdoor stadium); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying a lower standard to content- neutral regulations that impact speech).

[154] Public-forum doctrine sets forth substantive constitutional analysis related to the use of government property. *See generally* 1 SMOLLA, *supra* note 120, §§ 8:1-6. The Court has applied public-forum doctrine not only to government-created forums involving government "property," but also to broader forums that facilitate certain conduct and activities. Thus, the Court recognized a limited public forum in government-created access to solicit contributions from government employees, *see* Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 788 (1985), in the use of a public school's inter-district mail system, *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), and in funding for student activities, *see Rosenberger*, 515 U.S. 819. The principles relating to a limited public forum are applicable when the forum is created by government funding, *see Rosenberger*, 515 U.S. at 827-31, although in such a case the "forum [is] more in a metaphysical than a spatial or geographic sense." *id.* at 829. "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Id.* at 829. (citations omitted). However, "[o]nce [the State] has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Id.*

[155] *See Rosenberger*, 515 U.S. at 829-31.

> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum."

When the government participates in the political marketplace through private entities, however, no public forum is created. Therefore, it may freely engage in content-based regulations of its agents, subject only to the requirements that the restrictions are proportional to the government's funding and are related to the government's message.[156] In fact, to effectively communicate a coherent message, the government must engage, to a certain extent, in making content-based choices.[157]

A more problematic type of restriction is one that engages in viewpoint discrimination, a subset of content-based restrictions.[158]

> When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[159]

Viewpoint discrimination is *per se* unconstitutional for independent actors.[160] Likewise, viewpoint discrimination of government-financed private actors within a limited forum is unconstitutional.[161] Viewpoint discrimination appears constitutional, however, when applied to private individuals acting as government agents in the political marketplace.[162]

Id. at 829 (citations omitted) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 804-06 (1985)). Therefore, "[c]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981).

[156] *See* Rust v. Sullivan, 500 U.S. 173, 194-95 (1991); *see also* Post, *supra* note 123, at 154-55. The proportionality principle is discussed *infra* text accompanying notes 171-74.

[157] *See Rosenberger*, 515 U.S. at 833. "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled not distorted by the grantee." *Id.; see also Rust*, 500 U.S. at 194 ("When the Government appropriates public funds to establish a program it is entitled to define the limits of the program . . . .").

[158] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that a city ordinance could not target certain kinds of unprotected speech).

[159] *Rosenberger*, 515 U.S. at 829.

[160] *See R.A.V.*, 505 U.S. at 395.

[161] *See Rosenberger*, 515 U.S. at 829 ("[V]iewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations.").

[162] *See Rust*, 500 U.S. at 192-93. To the extent viewpoint discriminatory restrictions are placed on recipients acting as government agents, the restrictions must be related to

Related to the neutrality principle is the precision principle, which requires that government restrictions be precise and not overbroad or vague.[163] Accordingly, funding restrictions that infringe upon "traditional spheres" of free expression fundamental to the functioning of our society must be narrowly tailored. "Government's ability to control speech within th[ese] sphere[s] by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[164] Preliminarily, when government, vis-a-vis its funding, regulates traditional spheres of free expression, it may do so only to further a legitimate and substantial purpose.[165] Absent such a purpose, the regulations by definition are overbroad.[166] Even if the purpose is substantial, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"[167] or by means that are ambiguous or vague in their application.[168]

Thus, when the government's regulations are susceptible to sweeping and improper application because of the uncertainty of its proscriptions, they are unconstitutionally defective on vagueness grounds. "[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[169] Similarly, "[w]here statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical' . . . . 'The breadth of legislative

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the purpose of the government's message and satisfy the proportionality principle.

[163] *See* 1 SMOLLA, *supra* note 120, §§ 6:1-6:6.

[164] *Rust*, 500 U.S. at 200; *see also* Finley v. NEA, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997).

[165] *See* Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967).

[166] *See* NAACP v. Button, 371 U.S. 415, 444 (1963) (holding regulations that restricted litigation activities of the NAACP overbroad because the State had failed to advance a substantial government interest for the regulations).

[167] *Keyishian*, 385 U.S. at 602 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[168] *See Button*, 371 U.S. at 432-33.

> The Fifth Amendment due process clause requires that a statute be sufficiently clearly defined so as not to cause persons "of common intelligence—necessarily [to] guess at its meaning and [to] differ as to its application." . . . In the area of expressive conduct, vague laws offend several important values: (1) they may trap the innocent by failure to provide fair warning; (2) they may fail to provide explicit and objective standards and therefore permit arbitrary and discriminatory enforcement; and (3) they may inhibit First Amendment freedoms by forcing individuals to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

Finley v. NEA, 795 F. Supp. 1457, 1471 (C.D. Ca. 1992) (citations omitted), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997).

[169] *Keyishian*, 385 U.S. at 603 (quoting *Button*, 371 U.S. at 430).

abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.'"[170]

The third important principle for evaluating the constitutionality of the restrictions on LSC grantees is the proportionality principle.[171] Simply put, to the extent that the government can place conditions on recipients, these conditions must be in proportion to the government's economic contribution.[172] Stated in a slightly different manner, the government must allow for adequate alternative channels for engaging in restricted speech or activities using nongovernment funds.[173] When the government attempts to control the use of resources it did not contribute, it has moved beyond merely attaching conditions to its own money to regulating the general marketplace.[174] Thus, "unconstitutional conditions cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on the particular program or service, thus, effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[175] Therefore, while the government may attach certain conditions to its funding, it is limited in its ability to extend these conditions to funds it did not contribute.

To summarize, the constitutional analysis applicable to conditions attached to government funding begins with characterizing the grantee within the grantee-government relationship as either an independent actor or a government agent. This characterization is a prerequisite for applying the neutrality, precision, and proportionality principles. While these principles may appear coherent in theory, the Supreme Court often has applied them in a confusing and inconsistent manner. Thus, a review of a few of the Court's key holdings in this area is warranted.

D. *The Supreme Court's Application of the Unconstitutional Conditions Doctrine*

This Section reviews four Supreme Court cases that provide insight into

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[170] *Id.* at 609 (citations omitted) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

[171] *See* FCC v. League of Women Voters, 468 U.S. 364, 399-400 (1984); 2 SMOLLA, *supra* note 120, §§ 19:11-19:13.

[172] *See League of Women Voters*, 468 U.S. at 400; 2 SMOLLA, *supra* note 120 § 19:13.

[173] *See* Legal Aid Soc'y v. Legal Servs. Corp., 961 F. Supp. 1402, 1414 (D. Haw. 1997).

[174] *See* 2 SMOLLA, *supra* note 120, § 19:13. "The more lax constitutional treatment given to the government when it participates in the speech market, however, should not be extended to the government when it is in fact engaged in market regulation, under the pretext of mere participation." *Id.*

[175] Rust v. Sullivan, 500 U.S. 173, 197 (1991).

how the constitutional analysis for restrictions attached to funding grants has been applied: *Regan v. Taxation with Representation*,[176] *FCC v. League of Women Voters*,[177] *Rust v. Sullivan*,[178] and *Rosenberger v. Rector & Visitors of the University of Virginia*.[179] Although the Court is still searching for an intellectually satisfying approach to restrictions attached to government funding, the case law establishes that the Court is concerned with government regulations that violate the neutrality, precision, and proportionality principles.

At issue in *Regan* was whether § 501(c)(3)) of the Internal Revenue Code,[180] which granted tax exemptions to charitable organizations, was constitutional. Congress limited the exemption to those organizations that did not attempt to influence legislation and did not participate in political campaigns. Thus, in exchange for tax relief (a federal subsidy) the charitable organizations agreed not to engage in lobbying and campaigning—activities considered to be at the heart of democratic self-governance.

Justice Rehnquist, in a unanimous opinion, held that Congress could condition the tax exemption in such a way. Rehnquist noted that Congress merely decided which charitable activities to subsidize through the tax code.[181] Furthermore, under the code, charitable organizations could establish a tax exempt § 501(c)(4) entity to engage in lobbying on behalf of the 501(c)(3) entity.[182] Thus, Congress's decision of how to allocate scarce resources, even if done by subsidizing some speech ("charitable" speech) rather than all speech (lobbying and political involvement), did not violate a fundamental right of the charitable organizations.[183]

A year after *Regan*, the Court decided *FCC v. League of Women Voters*.[184] In a five-to-four decision, the Court struck down a regulation forbidding any station that received grants from the Corporation for Public Broadcasting (CPB) from engaging in "editorializing." Congress created the

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[176] 461 U.S. 540 (1983).

[177] 468 U.S. 364 (1984).

[178] 500 U.S. 173 (1991).

[179] 515 U.S. 819 (1995).

[180] 26 U.S.C. § 501(c)(3) (1996).

[181] *See Regan*, 461 U.S. at 545-46.

[182] *See id.* at 544; *id.* at 551-54 (Blackmun, J., concurring).

[183] *See id.* at 545-46. Justice Rehnquist noted, however, that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Id.* at 548.

Although Congress had enacted a regulation based on the content of speech (lobbying and political speech), it had not engaged in viewpoint discrimination (for example, subsidizing only certain lobbying or political speech). It merely subsidized nonprofit charitable organizations that did not participate in lobbying and politics. *See id.* at 544.

[184] 468 U.S. 364 (1984).

CPB through the Public Broadcasting Act of 1967[185] to disburse federal funds to noncommercial television and radio stations in support of educational programming. In essence, the restriction prohibited the management of a station that received CPB funding from expressing its views on current issues. Justice Brennan, writing for the majority, noted that the regulation was "specifically directed at a form of speech—namely the expression of editorial opinion—that lies at the heart of First Amendment protection."[186]

Of particular importance in the holding was Justice Brennan's discussion distinguishing *Regan*. The government argued, relying on *Regan*, that "Congress ha[d], in the proper exercise of its spending power, simply determined that it 'will not subsidize public broadcasting station editorials.'"[187] Justice Brennan responded that, under *Regan*, "a charitable organization could create . . . an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and at the same time, establish . . . a separate affiliate to pursue its lobbying efforts without such contributions."[188] Thus, the restriction in the tax code did not impinge upon any protected activity; Congress simply chose not to subsidize the lobbying and political activities of tax-exempt organizations.

As Justice Brennan explained, *League of Women Voters* was fundamentally different because

> a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all non-editorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.[189]

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[185] 47 U.S.C. §§ 390-399 (1967).

[186] *League of Women Voters*, 468 U.S. at 381. The protection of the right to discuss issues of public importance "has always rested on the highest rung of the hierarchy of First Amendment values" because of "'a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 381-82 (citations omitted).

[187] *Id.* at 399 (quoting the Government's brief).

[188] *Id.* at 400. Justice Blackmun's concurrence in *Regan* foreshadowed Justice Brennan's concern that affiliate organizations be allowed to engage in prohibited activities. *See Regan*, 461 U.S. at 551-54 (Blackmun, J., concurring).

[189] *League of Women Voters*, 468 U.S. at 400. Compare Justice Brennan's reasoning with Justice Rehnquist's dissenting opinion in which Justice Rehnquist argued that the government was simply exercising its right to allocate public funds and that the condition imposed need only bear a rational relationship to the government's objectives un-

Therefore, while *Regan* established the general proposition that the government could attach content-based regulations to subsidies, *League of Women Voters* limited such regulations to situations in which the restrictions would apply only to the government's economic contribution, which would leave the recipient free to create alternate channels to use nonfederal funds to engage in the prohibited activities. Thus, in *Regan* and *League of Women Voters*, the Court established and defined the proportionality principle when government is financier.

In 1991, the Court again had the opportunity to review the principles underlying the unconstitutional conditions doctrine in *Rust v. Sullivan*.[190] *Rust* involved regulations promulgated by the Secretary of Health and Human Services (HHS) that placed restrictions on recipients of family planning funds pursuant to Title X of the Public Health Service Act.[191] These regulations prohibited recipients from engaging in abortion-related counseling or promoting abortion as a method of family planning, and required Title X projects to maintain objective integrity and independence from affiliate organizations who engaged in prohibited activities.[192] The Title X regulations were challenged by grantees and doctors who argued, *inter alia*, that the restrictions "impermissibly impos[ed] 'viewpoint-discriminatory conditions on government subsidies.'"[193]

In a five-to-four decision, Chief Justice Rehnquist, writing for the majority in *Rust*, upheld the regulations as constitutional.[194] Chief Justice Rehnquist's rationale was similar to that used in *Regan*: "[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to

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less the conditions are aimed at suppressing dangerous ideas. *See id.* at 405-08 (Rehnquist, J., dissenting).

[190] 500 U.S. 173 (1991).

[191] Title X of the Public Health Service Act, 84 Stat. 1506 (1970) (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (1970)). The Court noted that the statute was ambiguous as to whether recipients of Title X funds could engage in abortion counseling, referral, or advocacy. *See Rust*, 500 U.S. at 184. Accordingly, the Court gave great deference to the Secretary's interpretation and corresponding regulations. *See id.*

[192] The challenged regulations prohibited a Title X project from "provid[ing] counseling concerning the use of abortion as a method of family planning," 42 C.F.R. § 59.8(a)(1) (1989), or from engaging in activities that "encourage, promote or advocate abortion as a method of family planning," *id.* § 59.10(a). The regulations further required that Title X Projects be organized so that they were "physically and financially separate" from prohibited abortion activities. *Id.* § 59.9. *See also Rust*, 500 U.S. at 179-80.

[193] *Rust*, 500 U.S. at 192 (quoting Brief for Petitioners).

[194] Interestingly, Justice Brennan had been replaced by Justice Souter. Justice Souter provided the necessary vote for Chief Justice Rehnquist's majority, as Justice Brennan undoubtedly would have found the restriction unconstitutional. *See* 2 SMOLLA, *supra* note 120, § 19:14.

fund one activity to the exclusion of the other."[195] According to the Chief Justice, "[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 the project's scope."[196] Rehnquist clearly viewed the Title X project recipients as government agents conveying the government's message that abortion was not an acceptable form of family planning.[197]

Chief Justice Rehnquist acknowledged that in certain "spher[es] of free expression,"[198] "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 [not] invariably sufficient to justify Government control over the content of expression."[199] The Chief Justice noted that the traditional doctor-patient relationship may be such a sphere deserving heightened constitutional protection, but concluded that the Title X regulations did "not significantly impinge upon" the relationship to warrant such protection.[200] Thus, while acknowledging the importance of the precision principle in the funding context, Rehnquist determined it was not applicable to the facts in *Rust*.

Chief Justice Rehnquist also upheld the HHS regulations that imposed stringent conditions on the ability of doctors receiving Title X funding to perform abortion counseling using non-Title X funds.[201] Unlike the simple requirement for establishing an affiliate in *Regan*, which only required creating a separate legal entity and maintaining separate books,[202] the HHS regulations went significantly further by requiring that an affiliate maintain "objective integrity and independence" from the Title X project.[203] Maintaining objective integrity and independence required, *inter alia*, that the HHS Secretary consider on a case-by-case basis whether separate personnel existed and the degree of physical separation of the project from facilities for prohibited activities.[204] According to Chief Justice Rehnquist, Title X grantees were government agents communicating government messages. As such, more restrictive regulations were permitted because HHS had the right to "avoid creating the appearance that the Government is supporting abortion-related activities."[205]

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[195] *Rust*, 500 U.S. at 193.
[196] *Id.* at 194.
[197] *See id.* at 193-95.
[198] *Id.* at 200.
[199] *Id.* at 199.
[200] *Id.* at 200.
[201] *See id.* at 196-99.
[202] *See* Regan v. Taxation with Representation, 461 U.S. 540, 544 & n. 6 (1983).
[203] *Rust*, 500 U.S. at 180.
[204] *See id.* at 187-88.
[205] *Id.* at 188.

Notably, *Regan* involved government funding of *independent actors*. In that case the government was limited to only those regulations on affiliate organizations that would provide adequate accounting and traceability of the federal funding as a means to ensure it was not used in the affiliate organization.[206] Thus, *Rust* acknowledged the proportionality principle established in *Regan* and *League of Women Voters*, but further defined its application by allowing greater restrictions on affiliate organizations when the funding involves government actors, as compared to independent actors.

While further analysis of *Rust* is outside the scope of this Note, it suffices to say that *Rust* represents a marked conservative shift in the Court's unconstitutional conditions doctrine—a shift that looks amazingly similar to the old right-privilege distinction.[207]

The Court in *Rosenberger v. Rector & Visitors of the University of Virginia*,[208] however, reaffirmed its commitment that funding restrictions that discriminate on the basis of viewpoint are unconstitutional at least when applied to funding recipients who remain independent actors in the political marketplace. At issue in *Rosenberger* was the constitutionality of the University of Virginia's student publication funding policy that funded only groups that, among other things, did not engage in religious activities.[209]

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[206] *See Regan*, 461 U.S. at 543-45. Indeed, it is unlikely that the Court would have upheld the *Rust* regulations relating to the establishment of affiliate organizations had the regulations been imposed on the nonprofit recipients of federal funding at issue in *Regan*. *See id.* at 552-54 (Blackmun, J., concurring) (opining that any significant restrictions on the alternative channel of communication beyond simply requiring it to be a separate legal entity and to maintain separate books "would extend far beyond Congress' mere refusal to subsidize lobbying . . . [and] would render the statutory scheme unconstitutional.").

[207] Scholars have severely criticized the holding in *Rust* based on Chief Justice Rehnquist's narrow definition of viewpoint discrimination and his dismissal of the recipient's argument that the regulations violated the protected doctor-patient relationship. *See* Cole, *supra* note 123, at 683-84; Post, *supra* note 123, at 168-77; Redish & Kessler, *supra* note 121, at 573-77; 2 SMOLLA, *supra* note 120, § 19:14; *see also* Phillip J. Cooper, *Rusty Pipes: The* Rust *Decision and the Supreme Court's Free Flow Theory of the First Amendment*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359 (1992); Ronald J. Krotoszynski, Jr., Brind & Rust v. Sullivan: *Free Speech and the Limits of a Written Constitution*, 22 FLA. ST. U. L. REV. 1 (1994); Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993); Peter M. Shane, *The Rust That Corrodes: State Action, Free Speech, and Responsibility*, 52 LA. L. REV. 1585 (1992); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of* Rust v. Sullivan, 45 STAN. L. REV. 185 (1992). *But see* William W. Van Alstyne, *Second Thoughts on* Rust v. Sullivan *and the First Amendment*, 9 CONST. COMMENTARY 5 (1992).

[208] 515 U.S. 819 (1995).

[209] *See id.* at 825. The policy defined religious activity as any activity that "primarily

The University denied funding to a student organization called Wide Awake Productions because it was a publication organized to promote Christian viewpoints. The University funded other religious groups as long as they did not engage in religious editorializing.

The Court held, in a five-to-four decision, that the restrictions amounted to viewpoint discrimination because the "prohibited perspective, not the general subject matter," was regulated.[210] In strong language, the Court reaffirmed that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[211] Moreover, the Court explained, "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."[212]

Justice Kennedy, writing for the majority, distinguished *Rust* from *Rosenberger* in that *Rust* involved the "government disburs[ing] public funds to private entities to convey a governmental message,"[213] while in *Rosenberger* the University was not speaking through the organizations, but used funding to "encourage a diversity of views from private speakers."[214] Thus, Justice Kennedy recognized that for constitutional analysis there is a key, if not controlling, distinction between subsidies to independent actors and subsidies to individuals who function as government agents.[215] Therefore, "[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles."[216] *Rosenberger*, when compared to *Rust*, underscores the critical nature of the initial characterization of the government-recipient relationship.

III. THE CONSTITUTIONALITY OF THE RESTRICTIONS PLACED ON THE RECIPIENTS OF LSC FUNDS

In this Part, the unconstitutional conditions doctrine[217] is applied to the restrictions Congress placed on recipients of LSC funding. This Section begins by reviewing the existing challenges to the new legislation and then

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promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.*

[210] *Id.* at 831.

[211] *Id.* at 829.

[212] *Id.* at 835.

[213] *Id.* at 833.

[214] *Id.* at 834.

[215] *See id.* at 833. Justice Kennedy stated that in *Rust*, "[w]e recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Id.*

[216] *Id.* at 834.

[217] For a discussion of the unconstitutional conditions doctrine, see *supra* Part II.

proceeds to analyze the constitutionality of the new legislation and accompanying rules.

A. *A Review of Existing Challenges to the Restrictions*

Legal aid organizations that receive LSC funding have been divided over whether to challenge the regulations. On the one hand, some grantees believe that challenging the regulations will simply give Congress a reason to eliminate funding altogether.[218] According to this reasoning, it is better to live with the restrictions because they affect so few cases than risk losing funding altogether. Others, however, believe that the restrictions go too far and should be challenged if legal aid organizations are to retain any type of independence and integrity in serving clients.[219] The constitutionality of the restrictions are being challenged in three cases, which are reviewed in this Section.[220]

On December 24, 1996, a New York State judge ruled in *Varshavsky v. Geller*[221] on the constitutionality of the LSC regulations that require legal aid attorneys to withdraw from class action lawsuits. At issue in *Varshavsky* was whether Valerie Bogart, a staff attorney with Legal Services for the Elderly (LSE) (a subsidiary office of Legal Services of New York City (LSNY)), was required to withdraw as class counsel pursuant to the 1996 OCRAA restrictions and accompanying LSC regulations.[222] LSE received one-third of its funding from LSC sources and two-thirds from non-LSC

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[218] *See* Jan Hoffman, *Counseling the Poor, But Now One by One*, N.Y. TIMES, Sept. 15, 1996, at 47; Ridgeway, *supra* note 91, at 21; David E. Rovella, *Legal Aid Lawyers Roll Dice With New Lawsuit: LSC Officials Fear Angry Congressional Reaction*, NAT'L L.J., Feb. 10, 1997, at A6; Recent Legislation, *supra* note 119, at 1351.

[219] *See* Rovella, *supra* note 218.

[220] LSC restrictions previously have been challenged unsuccessfully. *See, e.g.*, Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 783 F. Supp. 1426 (D.D.C. 1992) (upholding a LSC rule prohibiting funding or redistricting lawsuits).

[221] Varshavsky v. Geller, No. 40767/91, (N.Y. Sup. Ct. Dec. 24, 1996), *reprinted in* N.Y.L.J., Dec. 31, 1996, at 22 (col. 2); *see also* Daniel Wise, *Class Action Ban for Poor Struck: Legal Services Rule Held Unconstitutional*, N.Y.L.J., Dec. 27, 1996, at 1; *New York Judge: Laws Barring Legal Services from Class Actions Unconstitutional*, WEST'S LEGAL NEWS, (Jan. 6, 1997,) at 14,048, *available in* 1997 WL 2053; Don Van Natta, Jr., *Lawyers for Poor Applaud Lifting of Class Action Ban*, AUSTIN AM. STATESMAN, Jan. 1, 1997, at A27.

[222] The class-action lawsuit was commenced in 1991 and challenged the New York State Department of Social Services' abolition of its In-Home Administrative Hearing Program. In 1992, a preliminary injunction was issued which later was affirmed on appeal that prohibited Social Services from terminating benefits without an initial telephone interview and, if necessary, an in-home hearing. *See* Varshavsky v. Pearles, 202 A.2d 155 (N.Y. App. Div. 1994). Ms. Bogart had served as class counsel from its inception.

sources. Pursuant to the new rules, Ms. Bogart was required to withdraw as class counsel in August, 1996, and the LSC had threatened to withdraw all of LSNY's funding if she did not withdraw. Ms. Bogart requested that the court decide whether her withdrawal was permissible under the New York State Code of Professional Responsibility and whether the 1996 OCRAA and LSC rules were unenforceable because they violated the Constitution.[223]

The court preliminarily held that withdrawal as class counsel would not violate Ms. Bogart's professional responsibility obligations because it would not result in a "material adverse affect [sic] on the interests of the client."[224] After noting that the LSC Act prohibited the LSC from promulgating any rules that interfered with attorneys' professional responsibilities,[225] the court noted that co-counsel, who was employed by a non-LSC funded organization, was able to take over the case without an adverse impact. Thus, the court was required to address the constitutionality of applying the restrictions to non-LSC funds.

In proceeding with its constitutional analysis, the court first determined that a constitutional right was implicated by the ban on class action lawsuits.[226] Citing *NAACP v. Button*,[227] *United Mine Workers v. Illinois State Bar Ass'n*,[228] and *United Transportation Union v. State Bar of Michigan*,[229] the court stated that the case at bar implicated the "fundamental First Amendment right to engage in collective litigation to achieve political objectives."[230] While giving a scathing rebuke to Congress regarding the new restrictions,[231] the court concluded it did not need to decide the issue

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[223] *See Varshavsky*, No. 40767/91, *reprinted in* N.Y.L.J., Dec. 31, 1996, at 22 (col. 2).

[224] *Id.* (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(c) (1996)).

[225] *See* 42 U.S.C. § 2966e(b)(3) (1994).

[226] *See Varshavsky*, No. 40767/91, *reprinted in* N.Y.L.J., Dec. 31, 1996, at 22 (col. 2).

[227] 371 U.S. 415 (1963).

[228] 389 U.S. 217 (1967).

[229] 401 U.S. 576 (1971).

[230] *Varshavsky*, No. 40767/91, *reprinted in* N.Y.L.J., Dec. 31, 1996, at 22 (col. 2).

[231] *See id.* The court stated:

> Here there is no justification for the ban on the use of non-federal funds for class action litigation, compelling, substantial, or rational. The ostensible goal of saving money will not be accomplished by relegating the poor to less efficient individual actions for the same relief.
>
> The legislative history of the restriction on class action litigation challenged here reveals that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients and anyone who agrees with them. The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions.

of whether the withdrawal of federal funding alone would violate the Constitution, because the LSC regulations extending the restrictions to non-LSC funds clearly were unconstitutional.[232] Relying primarily on *Regan v. Taxation with Representation*[233] and *FCC v. League of Women Voters*[234] the court held the LSC Act and Rules unconstitutional, opining that:

> The Acts and the Rules threaten our most cherished American First Amendment freedoms: freedom of association, freedom of speech and freedom to petition the government for redress of grievances. The rhetoric of budget reform is being used to thinly disguise an attack on basic freedoms. The restrictions could effectively bar LSC attorneys, their clients, their private and State donors, and those to whom LSC wishes to donate its non-federal funds from exercising their constitutionally protected right to freedom of association. That Congress may not do this has been explicitly stated in a long line of Supreme Court precedents that derived from attacks on desegregation and unions. At bottom, the legislation weakens the ability of poor people to stand up for their legal rights and to have an impact, when it may be their only effective method to petition the government for redress of grievances.[235]

It is noteworthy that the LSC regulations in place at the time the court reviewed Ms. Bogart's motion were those that the LSC promulgated on December 2, 1996, which completely prohibited the use of non-LSC funds, even if given away, for restricted activities.[236] As previously mentioned, the LSC substantially revised these regulations on May 21, 1997, in response to the Hawaii temporary injunction.[237]

In *Legal Aid Society v. Legal Services Corp. (Hawaii I)*,[238] legal aid organizations that received LSC funding brought an action in federal court to enjoin the LSC from enforcing the restrictions as applied to non-LSC

Id.

[232] *See id.*

[233] 461 U.S. 540 (1982).

[234] 468 U.S. 364 (1984).

[235] *Varshavsky*, No. 40767/91, *reprinted in* N.Y.L.J., Dec. 31, 1996, at 22 (col. 2).

[236] 45 C.F.R. § 1610 (1996).

[237] *See supra* text accompanying notes 86-90.

[238] 961 F. Supp. 1402 (D. Haw. 1997) [*(Hawaii I)*]; *see also* Anna Cekola, *Legal Aid Society Hails Ruling Easing Restrictions on Spending Law*, L.A. TIMES, Feb. 25, 1997, at B1; Claudia MacLachlan, *Hawaii Court Blocks Limits on LSC*, NAT'L L.J., Mar. 3, 1997, at A9; Barbara Vobejda, *Congressional Curbs on Legal Aid Programs Challenged in Court*, WASH. POST, Jan. 10, 1997, at A19.

funds. Similar to the analysis in *Varshavsky*, the court first identified the constitutional rights that the 1996 OCRAA and LSC rules implicated.[239] The court began with the restrictions prohibiting grantees from influencing and lobbying legislators and administrators and found that they clearly infringed on First Amendment rights.[240] Next, citing *NAACP v. Button* and its progeny, the court opined that there appeared to be a constitutional "right of access to the courts" for any reason, but that such a right clearly existed when it was to "[protect] a litigant's right to vindicate constitutional rights," such as the right to an abortion;[241] however, the court did not find that the initiation of a class action lawsuit was a constitutionally protected right, contrary to the holding in *Varshavsky*.[242]

The court also concluded that the new legislation and rules implicated the right of association,[243] although the protected right of association did not extend to aliens because of Congress's plenary power over immigration issues.[244] Finally, the court noted that when

> [r]ead together, the freedom of association defined above coupled with the right of meaningful access to the courts provides First Amendment protection from government's intentional interference with the confidential relationship between lawyers (or legal aid associations) and prospective clients.[245]

The court, however, found that no constitutional rights were implicated by the restrictions preventing the claiming or collection of attorneys' fees or the requirement that a written statement of facts be prepared prior to the initiation of litigation or pre-litigation negotiations.[246]

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[239] *See Hawaii I*, 961 F. Supp. at 1408-11.

[240] *See id.* at 1408. The court held that the following sections from the 1996 OCRAA implicated the right to lobby: sections 504(a)(1) through 504(a)(3) and section 504(a)(16).

[241] *Id.* at 1408-09. The court held that only section 504(a)(14), which limited participation in litigation related to abortion, implicated the right of meaningful access to the court.

[242] *See id.* at 1410.

[243] *See id.* at 1409. The court held that the prohibition against representing people allegedly engaged in drug activity in public housing, (section 504(a)(16)), and against conducting training programs advocating public policies or encouraging political activity,(section 504(a)(12)), implicated the constitutional right of association and the confidential attorney-client relationship.

[244] *See Hawaii I*, at 1410.

[245] *Id.* at 1409 (citing Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992)).

[246] *See id.* at 1411.

Determining that constitutional rights were implicated, the court proceeded to review the constitutionality of the restrictions relating to the establishment of affiliate organizations that could use non-LSC funds to engage in the restricted activities. According to the court, the dispositive factor based on *Regan v. Taxation with Representation*, *FCC v. League of Women Voters*, and *Rust v. Sullivan*, was "whether the restrictions left open adequate channels for speech."[247] The court viewed these cases as representing a "continuum of the availability of alternate channels with *League* on one end (no alternate channels), *TWR* [*Taxation with Representation*] on the other (alternate channels readily obtainable), and *Rust* in the middle (alternate channels theoretically obtainable)."[248] The court reviewed the LSC rules regulating whether grantees could establish affiliate organizations to engage in the restricted activities. The court determined that the restrictions were more burdensome than those at issue in *Rust* and most comparable to the outright prohibition found in *League of Women Voters*.[249] Thus, because the plaintiffs had a significant likelihood of success in prevailing on their unconstitutional conditions claim—that irreparable injury would result and the balance of hardships favored the plaintiffs—the court issued an injunction.[250]

On May 21, 1997, the LSC promulgated new regulations based on the court's injunction. On August 1, 1997, the LSC, joined by the Department of Justice (DOJ), moved for summary judgment in *Hawaii II*, arguing that the new regulations satisfied *Rust*'s requirements of establishing a separate organization for engaging in restricted activities.[251] In response, the plaintiff moved for summary judgment, arguing that *Rust* did not control this case and that, in any event, the new regulations did not conform to the *Rust* standard.[252]

First, the court rejected the plaintiff's attempt to distinguish *Rust*.[253] Significantly, the court rejected the argument that Title X was designed to communicate a governmental message while the LSC Act was not.[254] According to the court, "Congress does not control the analysis and advice of either a Title X doctor or a LSC lawyer except for prohibiting advice in

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[247] *Id.* at 1414.

[248] *Id.*

[249] *See id.* at 1415-16.

[250] *See id.* at 1419.

[251] Legal Aid Soc'y v. Legal Servs. Corp., 981 F. Supp. 1288 (D. Haw. 1997) [(*Hawaii II*)].

[252] *See id.* at 1293.

[253] The court appeared particularly annoyed that the plaintiffs had "argued rather vehemently in the motion for a preliminary injunction that *Rust* applied in this case [and] [n]ow that the LSC had attempted to comply with the dictates in *Rust*, however, the plaintiffs argue that *Rust* does not apply." *Id.*

[254] *See id.* at 1294.

certain areas such as abortion."[255] The court also rejected the plaintiff's argument that the LSC restricts litigation, a traditional sphere of expression, whereas *Rust* did not.[256] Although the court did not outright reject this distinction, it concluded that such restrictions were to be measured by the vagueness and overbreadth doctrines of the First Amendment; but because the plaintiff had not alleged the restrictions were vague or overbroad, they could not attempt to distinguish *Rust* on either of those bases.[257]

Next, the court reviewed the revised regulations and concluded that although they still appeared somewhat more restrictive than those at issue in *Rust*, they were constitutionally permissible because they allowed for adequate alternate channels.[258] The court rejected the plaintiffs' argument that the practical effects of the regulations foreclosed grantees from establishing separate organizations to engage in prohibited activities.[259] Further, the court interpreted the new regulations as allowing grantees to exercise control over affiliates as long as the "insularity" and legal separation requirements were met.[260] Based on these revised regulations, the court granted the LSC's and DOJ's motion for summary judgment and dissolved the injunction.

Finally, a suit was filed on January 14, 1997, in Brooklyn federal court, not only challenging the restrictions limiting the use of non-LSC funds, but also directly challenging the restrictions on federal funds.[261] On December 22, 1997, the district court denied the plaintiffs' motion for a preliminary injunction that sought to enjoin the LSC from implementing its program integrity requirements from affiliate organizations.[262] The court relied heavily on the decision in *Hawaii II*, but went on to hold that in implementing the requirements, Congress had an interest not only in prohibiting the use of federal funds for certain activities, but also in preventing the appearance of government endorsement of the prohibited activities.[263] The plaintiffs argued that the program integrity requirements were not narrowly tailored for the government's interest and that they thus suffered from vagueness and overbreadth problems.[264] The court rejected this argument, finding that the "program integrity requirements are appropriately tailored to advance the

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[255] *Id.*

[256] *See id.*

[257] *See id.*

[258] *See id.* at 1294-95.

[259] *See id.* at 1297.

[260] *Id.* at 1297-98.

[261] *See* Amended Class Action Complaint, Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (1997) (No. 97-CV-182); *see also* Rovella, *supra* note 218.

[262] *See* Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (1997).

[263] *See id.* at 338.

[264] *See id.* at 338-39.

Government's legitimate interest in preventing the appearance of endorsement . . . ."[265]

The court also held that the restrictions did not significantly impinge upon the attorney-client relationship:

> While this Court obviously has reverence for the majesty of the law, the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship, especially when contrasted with Title X's proactive aspects. Indeed, they simply proscribe the activities in which LSC recipients may engage. Moreover, the extent of the activities which LSC recipients are prohibited from engaging in cannot enter into the constitutional mix since it is bedrock law that Congress need not fund the exercise of constitutional rights, regardless of their magnitude.[266]

B. *A Constitutional Analysis of the New Legislation and Regulations*

The following Section applies the previously described unconstitutional conditions doctrine to the restrictions and regulations placed on grantees. This Section clarifies that the LSC is a governmental entity, identifies the constitutional rights implicated, and evaluates the constitutionality of the restrictions and regulations. The analysis used by the New York and Hawaii courts previously discussed are used as reference points throughout this analysis. This Section concludes with a summary of the analysis.

1. *The LSC Is a Governmental Entity for Constitutional Analysis*

It is important to note that the LSC is a governmental agency for purposes of constitutional analysis, notwithstanding that Congress created the LSC as a private, nonprofit corporation.[267] Although the LSC is a govern-

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[265] *Id.* at 342.

[266] *Id.* at 343 (citations omitted). After concluding that the new restrictions did not impinge on the attorney-client relationship, the court thanked the plaintiffs for commencing the litigation because it stood "as a testament to the continued vibrancy and vitality of the very First Amendment rights at the heart of this lawsuit—access to the courts, free and open public debate, and freedom to associate for the vindication of legal rights." *Id.* This is somewhat of an ironic conclusion in light of the proposed 1998 bill, which would "debar" a recipient from receiving an additional award of financial assistance from the LSC if the recipient were to file a lawsuit "naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant." H.R. CONF. REP. NO. 105-405, H10828 (1997), *reprinted in* 1998 U.S.C.C.A.N. 2440, 2510-12.

[267] *See* Legal Aid Soc'y v. Legal Servs. Corp., 961 F. Supp. 1402, 1408 (D. Haw.

mental entity, recipients of LSC funds clearly are not, and, consequently, legal aid attorneys working for organizations receiving LSC grants would not be considered government employees for purposes of constitutional analysis.[268] Grantees are independent nonprofit organizations incorporated within the state in which they provide services.[269] They have their own board of directors and operate independently from the LSC, except for the LSC restrictions that the grantees must follow.[270] Legal aid organizations receive funding from many other non-LSC sources, which further establishes their independence from the LSC.[271] Thus the LSC is considered a govern-

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1997) (citing Texas Rural Legal Aid v. Legal Servs. Corp., 940 F.2d 685, 699 (D.C. Cir. 1991)). The Supreme Court addressed a similar question of how to categorize a public-private corporation for First Amendment analysis in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). In *Lebron*, the Court noted that Congress created the National Railroad Passenger Corporation (commonly known as Amtrak) as a private corporation, and that Congress declared that it "will not be an agency or establishment of the United States Government." *Id.* at 391 (citing Rail Passenger Service Act of 1970 (RPSA), 84 Stat. 1330). The Court held, however, that "[w]here . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400. In fact, in *Lebron*, the Court specifically noted the similarities between Amtrak and other public-private corporations, such as the Corporation for Public Broadcasting and the Legal Services Corporation. *See id.* at 391.

[268] The relationships between the LSC and grantees are of an independent nature by design. Thus, the indicia of employment are not present to conclude that legal aid attorneys are government employees. *But see* 42 U.S.C. § 2996e(e)(2) (1994). This section states that "[e]mployees of the Corporation and staff attorneys shall be deemed to be State or local employees for purposes of chapter 15 of Title 5, except that no staff attorney may be a candidate in a partisan political election." *Id.* According to the LSC Act, "staff attorney"

> means an attorney more than one half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation or is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients eligible for assistance under the Act.

42 U.S.C. § 2996a(7) (1996).

Chapter 15 of Title 5, a part of the Hatch Act, *see* 5 U.S.C. § 1502(a) (1996), prohibits local and state government employees from influencing elections and taking part in political campaigns.

The definition of "staff attorneys" as including those attorneys who receive more than half of their salaries from LSC funds, in no way converts a legal aid attorney into a government employee for constitutional analysis. *See* Smith v. Ehrlich, 430 F. Supp. 818 (D.D.C. 1976) (holding as constitutional LSC regulations that prohibited staff attorneys from seeking election to either partisan or nonpartisan political offices).

[269] *See supra* note 267 and accompanying text.

[270] *See supra* notes 267-68 and accompanying text.

[271] *See supra* text accompanying note 267.

mental entity for constitutional analysis, but LSC funding recipients and their employees are not considered part of the government.[272]

2. *Identifying the Rights*

In order for the unconstitutional conditions doctrine to apply, there must be a "constitutional interest at issue [that] rise[s] to the level of a recognized right—indeed, a *preferred* right normally protected by strict judicial review."[273] The restrictions Congress placed on LSC grantees impinge on constitutionally protected rights. As the Hawaii federal district court concluded, the rights implicated include at a minimum those protected by the First Amendment:[274] the right to lobby and influence government, the right to freedom of association, and the right to access the courts. The Supreme Court also has recognized the attorney-client relationship as a special sphere deserving First Amendment protection because it involves highly cherished expressive and associational conduct.[275] Arguably, the restrictions also raise due process,[276] equal protection,[277] and federalism[278] issues, along

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[272] Establishing the status of the LSC and attorneys working in legal aid offices is important because the substantive constitutional analysis applied to government employees is different from that applied to nongovernment employees working for organizations receiving federal funding. *Compare* Connick v. Myers, 461 U.S. 138 (1983) (government employment analysis), *with* Rust v. Sullivan, 500 U.S. 173 (1991) (nongovernment employment analysis).

[273] Sullivan, *supra* note 123, at 1427.

[274] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
U.S. CONST. amend. I.

[275] *See, e.g., In re* Primus, 436 U.S. 412 (1978), NAACP v. Button, 371 U.S. 415 (1963).

[276] *See* Legal Aid Soc'y v. Legal Servs. Corp., 981 F. Supp. 1402 (D. Haw. 1997) (holding that restrictions did not impermissibly burden any fundamental right because "Congress' refusal to fund the restricted activities here leaves the indigent clients with the same choices they would have had absent the creation of the LSC"); *see also* Recent Legislation, *supra* note 119, at 1350-51 (discussing how the prohibition on challenging welfare laws denies equal protection and due process to LSC clients).

[277] *See* Recent Legislation, *supra* note 119, at 1300 (reviewing equal protection analysis); *see also* Maura Irene Strassberg, Note, *The Constitutionality of Excluding Desegregation from the Legal Services Program*, 84 COLUM. L. REV. 1630 (1984).

[278] The federalism question concerns whether the LSC can constitutionally apply restrictions to funds contributed by state and local governments. *See generally* Mark Hansen, *Loosening Congress' Purse Strings*, 83 A.B.A. J. 28 (1997), Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585, 629-30 (1997).

with a host of questions related to the professional and ethical responsibility attorneys have to their clients.[279] This Note only addresses the First Amendment rights implicated.

The restrictions prohibiting lobbying and influencing government implicate a right at the core of the First Amendment: the right to engage in classic political speech.[280] Because the restrictions prohibit speech on matters of great public concern, such as welfare reform, abortion, and redistricting, courts must review the 1996 OCRAA and regulations with great scrutiny.[281] By restricting grantees' ability to influence and lobby the government on behalf of the poor, Congress clearly implicated rights within the purview of the First Amendment.

Restricting the clients grantees may serve implicates the grantees' and clients' right to freedom of association and also may impermissibly intrude into the specially protected attorney-client sphere. "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[282] Moreover, some of the restrictions limiting the types of cases

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[279] *See* A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 399 (1996) (discussing the ethical obligations of lawyers whose employers receive funds to their existing and future clients when such funding is reduced and when remaining funding is subject to restrictive conditions) [hereinafter A.B.A. Opinion], *discussed in* Elizabeth K. Thorp & Kimberly A. Weber, *Recent Opinions from the American Bar Association Standing Committee on Ethics and Professional Responsibility*, 9 GEO. J. LEGAL ETHICS 1009, 1039 (1996); Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39 (1994).

[280] *See* Landmark Communications, Inc., v. Virginia, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) (holding the right of petition for all departments of the government); *see also* Texas v. Johnson, 491 U.S. 397 (1989) (holding that the defendant's act of burning the American flag was protected by the First Amendment); Spence v. Washington, 418 U.S. 405 (1974) (reversing a conviction for an improper use of American flags); Schact v. United States, 398 U.S. 58 (1970) (reversing a conviction for the unauthorized wearing of an army uniform); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (finding as insufficient a public official's libel action against critics of his official conduct). *See generally* ALEXANDER MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); SMOLLA, *supra* note 15, at 12-17.

[281] *See* Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968) (upholding teachers' right to speak freely on the allotment of funds).

[282] NAACP v. Alabama, 357 U.S. 449, 460-61 (1958); *see* Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987) ("[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment . . . .") (quoting Hishon v. King & Spaulding, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring)).

and the manner in which the cases may be litigated implicate a client's right to access the courts. Such a right was specifically upheld in *NAACP v. Button*[283] for the "advancement of beliefs and ideas."[284] The Court also has held that litigation involving purely personal matters is likewise protected:[285]

> [T]he First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."[286]

The Court's holdings appear to recognize a per se right to access the courts, regardless of whether the petition has larger social and political ramifications or is purely personal in nature.[287] Clearly, under *Button* and *In re Primus*, access to the courts on matters of political and social importance or to seek protection of constitutional rights are scrupulously protected.[288]

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[283] 371 U.S. 415 (1963). In *Button*, the Court held unconstitutional a Virginia statute that prohibited advocacy of litigation against the State and attorney solicitation of clients.

[284] *Id.* at 430. Justice Brennan, writing for the majority, wrote:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly lawful ends, against governmental intrusion . . . .Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . .And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances . . . .For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right "to engage in association for the advancement of beliefs and ideas."

Id. at 429-30; *see also In re* Primus, 436 U.S. 412 (1978).

[285] *See* United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[286] *Id.* at 223 (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)); *see also* United Transp. Union v. State Bar, 401 U.S. 576, 580 (1971) (reaffirming "the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable").

[287] "[T]he right to file a court action stands, in the words of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as his most 'fundamental political right, because preservative of all rights.'" Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J. concurring).

[288] The Court in *Legal Aid Society v. Legal Services. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997), appeared uncertain as to the scope of the right to access the courts but stated that "[a]t a minimal . . . the right of meaningful access must encompass the right

Therefore, the 1996 OCRAA restrictions prohibiting litigation involving redistricting, abortion, and welfare reform directly implicate this protected right. Furthermore, the ban on class actions, while technically only a procedural limitation, also implicates this right because class actions allow the poor to remedy widespread injustice and to effectuate broad social and political changes important to the poor.[289]

Because the restrictions on LSC grantees intrude into the protected attorney-client sphere and impact fundamental constitutional rights, such as the right to lobby and influence the government, the right to freedom of association, and the right to have meaningful access to the courts, the unconstitutional conditions doctrine is applicable.

3. *Evaluating the Constitutionality of the Restrictions*

The fact that fundamental rights are at stake is not dispositive in the unconstitutional conditions doctrine because the doctrine is not absolute.[290] Therefore, the remaining question is whether the congressional restrictions violate the Constitution according to the doctrine of unconstitutional conditions.

a. *Characterizing the Relationship Between the LSC and Funding Recipients*

Arguably, the most critical part of the doctrine of unconstitutional conditions analysis is how the relationship between the LSC and grantees is characterized.[291] In fact, this determination is likely to be dispositive of the constitutionality of many of the restrictions. If the grantees are characterized as independent actors, as were the funding recipients in *Rosenberger*, then more exacting standards apply to "the state['s] attempts to restrict the independent contributions of citizens to public discourse, even if those contributions are subsidized."[292] If, however, the grantees are government agents who have been enlisted to transmit a governmental message, as were the funding recipients in *Rust*, then the First Amendment protections are signifi-

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to vindicate constitutional rights." *Id.* at 1409.

[289] The author of this Note disagrees with the Court's conclusion in *Legal Aid Soc'y* that "[t]he Court . . . finds it imprudent to constitutionalize the rules of civil procedure absent any appellate precedent." *Id.* at 1410. One must wonder what meaningful access to the courts entails when the very procedure that gives "meaningful" access to the courts are restricted. The Court is inconsistent and illogical to conclude that a constitutional right to meaningful access to the courts exists, but that restrictions that limit such access do not implicate the right.

[290] *See supra* notes 101-02 and accompanying text.

[291] *See supra* notes 108-09 and accompanying text.

[292] *See* Post, *supra* note 123, at 155.

cantly curtailed because it is the government itself participating in the political marketplace.[293] Ultimately, whether LSC grantees fall within the *Rosenberger* or *Rust* characterizations is a "very specific, context-bound judgment, informed by the particular First Amendment considerations relevant to determining the boundaries of public discourse."[294]

The fact that grantees receive funding from the LSC is not determinative of the relationship, although it is an important consideration.[295] In the context of LSC grantees, the nature of the relationship can be best evaluated by looking at three criteria: (1) the purpose of the LSC Act, (2) the structure of the LSC, and (3) the special nature of the attorney-client relationship impacted by the restrictions.

First, the purpose of the LSC Act is to "provide equal access to the system of justice in our Nation for individuals who seek redress of grievances."[296] Providing high quality legal assistance to those who otherwise are unable to afford it "will serve best the ends of justice and assist in improving opportunities for low-income persons."[297] The declaration states that "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures."[298] To that end, the Act requires that attorneys providing legal assistance have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.[299] The plain language of the LSC Act's declaration of purpose clearly mandates that the legal services program be of an independent and autonomous nature, free from political pressures.

Second, Congress specifically established the LSC as a private, nonprofit corporation and not as a governmental agency.[300] Congress also created a

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[293] *See* Michael H. Hartmann, *Spitting Distance: Tents Full of Religious Schools in Choice Programs & The Camels Nose of State Labor-Law Application to Their Relations with Lay Faculty Members, and the First Amendment's Tether*, 6 CORNELL J.L. & PUB. POL'Y 553, 632 (1997).

[294] Post, *supra* note 123, at 157.

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> Subsidization is merely one of many possible connections between a speaker and the state. All of these connections, including subsidization, must be assessed to determine whether particular speakers in particular circumstances ought constitutionally to be regarded as independent participants in the processes of democratic self-governance, and hence whether their speech ought to receive the First Amendment protections extended to public discourse.

Id. at 162.

[296] 42 U.S.C. § 2996(1) (1994). For the entire declaration of purpose for the LSC Act, see *supra* note 16 and accompanying text.

[297] 42 U.S.C. § 2996(3) (1994).

[298] *Id.* § 2996(5).

[299] *See id.* § 2996(6).

[300] *See supra* text accompanying notes 267-68.

decentralized mechanism for delivering legal services to clients through local legal aid organizations. The legal aid organizations are entities independent from the LSC, that set their own priorities and are governed by a board of directors from the community. Therefore, the legal services program created by the LSC Act contains two levels of independence from government control: the LSC itself and the local legal aid organizations that receive LSC funding. The purpose and structure of the LSC Act support the conclusion that Congress did not fund the legal services program to advance a particular governmental position; rather, Congress funded the legal services program to protect the best interests of low-income individuals by providing them with an independent attorney, similar to an attorney that a person would receive if he or she could afford one.[301]

Third, the restrictions at issue impinge on the special attorney-client relationship—a relationship that has been given special constitutional protection to protect attorneys' independent judgment on behalf of their clients.[302] The Court thus has recognized that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."[303] Furthermore, the professional rules of conduct governing attorneys also require that attorneys exercise independent judgment,[304] act competently,[305] and represent clients zealously.[306] The attorney-client relationship, therefore, should be classified as "a traditional sphere of free expression [and association] [ ] fundamental to the functioning of our society."[307]

The above three criteria distinguish the nature of the LSC-grantee relationship from the government-doctor relationship at issue in *Rust*.[308] First,

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[301] In fact, during the legislative debates, supporters of the LSC bill cautioned against placing more restrictions on the activities of legal aid attorneys than those of private attorneys because it would create a double standard. *See* 119 CONG. REC. S40468 (1973) ("No attorney shall be forced to violate the canons of ethics by providing less than the full range of legal services to eligible clients.") (statement of Sen. Gaylord Nelson); *id.* at H20706 (1973) (statement of Rep. Lloyd Meeds).

[302] *See* Polk County v. Dodson, 454 U.S. 312 (1981) (confirming a public defender's professional independence).

[303] *Id.* at 321.

[304] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1996); *see also* Galowitz, *supra* note 95, at 68-72; A.B.A. Opinion, *supra* note 279, at 5-7.

[305] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1996).

[306] *See id.* Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

[307] Rust v. Sullivan, 500 U.S. 173, 200 (1991).

[308] Although the *Velazquez* court summarily concluded that the restrictions did not significantly impinge upon the attorney-client relationship, it never discussed the appropriate characterization of the relationship. Indeed, both the *Hawaii* and *Velazquez* courts seemed to assume that *Rust* controlled without even discussing the differences between

the purpose of Title X programs, as the Court noted in *Rosenberger*, is not "to encourage private speech but instead [to use] private speakers to transmit specific information pertaining to [the government's] own program."[309] The statutory language provides for the enlistment of public and private entities to assist the government in establishing "acceptable" family planning "projects."[310] The purpose of Title X was not to fund independent, autonomous doctors to provide family planning services, but, rather, to use private entities to communicate a specific governmental message.

Moreover, the structure of Title X funding is completely different from that of LSC funding. Because the purpose of Title X is to communicate a government message, the funds are administered through a governmental agency—the Department of Health and Human Services—and not through a specially created private corporation. This is very different from using the LSC to administer funds to legal services programs.

The Court in *Rust* also concluded that the Title X regulations did "not significantly impinge upon the doctor-patient relationship."[311] As the Court noted, the "doctor-patient relationship established by the Title X program [is not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[312] Such is not the case with the LSC Act, which purports to provide low-income individuals with comprehensive legal services, similar to the services provided by private attorneys.[313] Thus, the purpose of the Act is to provide low-income clients with attorneys who can provide comprehensive legal services. Unlike the limited Title X restrictions, the restrictions in the LSC Act and 1996 OCRAA are far more comprehensive and restrictive in their impact on the protected attorney-client relationship.[314]

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the doctor-government relationship in *Rust*, in which the government funded private agents to communicate a government message about family planning, and the legal aid attorney-government relationship, in which the government funds independent actors to provide legal services to needy clients. The courts' failure to adequately analyze this threshold question fatally flawed their subsequent constitutional analyses. As already noted, the way the recipient-government relationship is characterized is likely dispositive of the constitutional questions.

[309] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995); *see also* Recent Legislation, *supra* note 119, at 1350.

[310] 42 U.S.C. § 300(a) (1994). "The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to *assist* in the establishment and operation of voluntary family planning projects which shall offer a broad range of *acceptable* and effective family planning methods and services." *Id.* (emphasis added).

[311] *Rust*, 500 U.S. at 200.

[312] *Id.*

[313] *See supra* text accompanying notes 16-26.

[314] *See* Legal Aid Soc'y v. Legal Servs. Corp., 961 F. Supp 1402 (D. Haw. 1997); Varshavsky v. Geller, No. 40767/91, (N.Y. Sup. Ct. Dec. 24, 1996), *reprinted in*

Unlike *Rust*, the government-recipient relationship in *Rosenberger* provides a better comparison to the relationship at issue in the LSC Act. At issue in *Rosenberger* were restrictions placed on Student Activities Funds (SAF) at the University of Virginia. The purpose of the SAF was to support a wide range of extracurricular student activities that the University believed would enhance the educational environment.[315] Thus, the purpose was not to transmit a government message through the student organizations, but to encourage "a diversity of views from private speakers."[316]

The University's funding structure further supported the independent nature of the recipients. For example, to apply for SAF, a student group had to become a "Contracted Independent Organization" (CIO), which required, inter alia, that the CIO be independent of the University and that the University not be responsible for the CIO.[317] Finally, the restrictions on SAF impacted a specially protected sphere—the university setting.[318] The similarities between SAF and LSC funds are striking: Both were designed to facilitate the speech of private actors, not to communicate a governmental message; both were structured to ensure the independence of the recipients from the government financier; and both involved spheres deserving heightened constitutional protection.

Based on the purpose, structure, and special attorney-client relationship at issue in the LSC Act, the correct characterization of the government-grantee relationship is one in which the grantee is an independent actor. This characterization is important because it impacts the substantive constitutional analysis to be applied to the LSC restrictions.[319]

N.Y.L.J., Dec. 30, 1996, at 22 (col. 2).

[315] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 825 (1995).

[316] *Id.* at 834.

[317] *See id.* at 834-35. The Court concluded:

> The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. The University declares that the student groups . . . are not the University's agents, are not subject to its control, and are not its responsibility.

Id. at 834.

[318] *See id.* at 836. ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.")

[319] *See* text accompanying note 140.

b. *The Neutrality Principle*

Although grantees are independent actors, Congress may still set the parameters (i.e., establish a limited forum) as to how grantees spend federal funds. Therefore, content-based restrictions that are necessary to confine the forum "to the limited and legitimate purposes for which it was created may justify the [government] in reserving it for certain groups or for the discussion of certain topics" and thus may be constitutionally permissible.[320] However, the restrictions that target not just content (the boundaries of the forum), but specific views within the forum, are unconstitutional[321] regardless of whether alternative channels exist for grantees to express such views using non-LSC funds.

Many of the 1996 OCRAA restrictions are valid content-based restrictions that limit the forum within which funds may be used. Thus, restrictions that prevent grantees from engaging in redistricting litigation[322] and that prohibit the representation of aliens,[323] prisoners,[324] or tenants that have been charged with illegal drug activity and evicted from public housing projects all are permissible content-based restrictions that define the boundaries of the limited public forum.[325] Similar, but a bit more difficult, is the restriction prohibiting "training programs for the purpose of advocating a particular public policy or encouraging a political activity, a labor or anti-labor activity, a boycott, picketing, a strike, or a demonstration."[326] Although this restriction appears only to be content-based and consequently a valid limitation on how LSC funding may be used, one wonders if the viewpoint-neutral veneer accurately represents the underlying motivation, which likely was based on suppressing a particular viewpoint.

Two of the nineteen restrictions constitute viewpoint discrimination and consequently are unconstitutional. The most blatant of these is the restriction prohibiting "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system . . . ."[327] This restriction goes be-

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[320] *Rosenberger*, 515 U.S. at 827-31.

[321] *See id.*; FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'") (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 546 (1980)).

[322] *See* Omnibus Consolidated Recessions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(1), 110 Stat. 1321.

[323] *See id.* § 504(a)(11).

[324] *See id.* § 504(a)(15).

[325] *See id.* § 504(a)(17).

[326] *Id.* § 504(a)(12).

[327] *Id.* § 504(a)(16).

yond simply establishing the boundaries of LSC activities; it regulates the debate over welfare by effectively limiting the number of individuals available and likely to present viewpoints favorable to the poor. By conditioning funding on a grantee's agreement not to challenge welfare reform, Congress has engaged in unconstitutional viewpoint discrimination.

The second restriction that constitutes viewpoint discrimination is that which prohibits any litigation related to abortion.[328] Although at first blush this regulation appears to discriminate on content and not on viewpoint, "the distinction is not a precise one."[329] It is clear that the purpose of this restriction was Congress's opposition to abortion.[330] The fact that the Court upheld restrictions on abortion counseling in *Rust* is not necessarily determinative in the case of the LSC. *Rust* should be viewed as standing for the proposition that Congress engages in viewpoint discrimination, and may do so when it provides funds to government agents communicating a government message. *Rust* should not be viewed as standing for the proposition that prohibiting abortion-related counseling is not viewpoint discrimination at all. One hardly can argue that favoring child birth over abortion does not constitute viewpoint discrimination. The abortion restrictions in *Rust* were constitutional not because they did not discriminate on viewpoint, but because the doctors were communicating a pro-birth governmental message. LSC grantees, however, are independent actors, so Congress cannot constitutionally engage in viewpoint discrimination by prohibiting abortion-related litigation.[331] Consequently, the restriction prohibiting litigation related to abortion constitutes impermissible viewpoint discrimination.

c. *The Precision Principle*

The precision principle requires that regulations that infringe upon traditional spheres of free expression be precise and narrowly tailored.[332] Before determining whether the 1996 OCRAA restrictions and LSC rules are subject to the vagueness and overbreadth doctrine, two questions must be answered affirmatively. First, is the attorney-client relationship a traditional sphere protected from government regulations, even when subsidized by the

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[328] *See id.* § 504(a)(14).

[329] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

[330] Whether Congress's motivation in enacting the legislation should be used to determine if the regulations constitute viewpoint discrimination is unclear. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("[T]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.") (quoting McCray v. United States, 195 U.S. 27, 56 (1904)).

[331] *See supra* text accompanying notes 160-65.

[332] *See supra* text accompanying notes 158-70.

government?[333] Second, do the regulations and restrictions significantly impinge upon the attorney-client relationship?[334]

The first question must be answered affirmatively. "[T]he lawyer-client relationship . . . treads deeply in waters bound up in First Amendment sensibilities."[335] Indeed, the Court has scrupulously guarded the attorney-client relationship from excessive government regulation.[336] Thus, the attorney-client relationship is a special sphere that is fundamental to this country's system of justice and must be regulated only with the utmost caution.

The answer to the second question—whether the regulations significantly infringe upon the attorney-client relationship—depends in part on each individual restriction as well as the cumulative effect of the restrictions. It is important to recognize that effective and zealous lawyering is not easily dissected into piecemeal components. For example, advocating for a client may simply require the attorney to help the client complete an application to obtain government benefits; or it may require that the attorney go to a hearing to argue that the client is entitled to the benefits under the agency's regulations; or it may require that the attorney challenge the agency's interpretation of the law; or, it even may require that the attorney challenge the law itself.[337] There are no clear lines of demarcation that allow a lawyer to stop at a prescribed point without undermining the independent nature of the attorney-client relationship that is so vital to this country's system of justice. Thus, whether a restriction infringes upon the attorney-client relationship must be determined by examining whether the restriction adversely affects the basis of this important relationship—that an advocate will zealously represent the client's interest using every legitimate means available.

The first set of restrictions that impinges upon the attorney-client relationship is the broad set of restrictions prohibiting a legal services program attorney from lobbying and influencing government.[338] The restrictions, for all practical purposes, completely cut off legal aid attorneys from advocating for the rights of poor people at a larger systematic level and severely under-

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[333] *See* Rust v. Sullivan, 500 U.S. 173, 200 (1991).

[334] *See id.*

[335] Velazquez v. Legal Servs. Corp., 985 F. Supp. 323, 342 (1997); *see supra* notes 302-07 and accompanying text.

[336] *See supra* text accompanying notes 302-07.

[337] *See* 45 C.F.R. § 1639 (1996). The regulations discuss comments the LSC received regarding the proposed LSC rules prohibiting grantees from challenging an agency's regulation. One comment stated that "when representing clients before agencies, legal aid attorneys must often either challenge the agency's interpretation of the law or at least lay the foundation for such a challenge, should an effort to win benefits for the client under the agency's regulations fail." *Id.* "A point made by many comments was that, in order to represent clients properly in public benefits cases, an attorney must be able to challenge existing law." *Id.*

[338] *See supra* text accompanying notes 45-50.

mines their ability to represent individual clients.[339] In addition, the restrictions prohibiting legal aid attorneys from engaging in welfare reform, combined with the LSC's broad interpretation of what constitutes "welfare," further limits a grantee's ability to zealously advocate for a poor client.[340] Such broad restrictions on lobbying, influencing government, and engaging in welfare reform strike at the heart of an independent, zealous advocate.

The restrictions limiting class actions and the recovery of statutory attorneys' fees also directly undermine the effectiveness of the representation legal aid attorneys provide.[341] By prohibiting the use of these litigation devices, Congress has removed important tools necessary to advocate for poor clients.

Because the restrictions significantly infringe upon the attorney-client relationship, the government must have a substantial purpose for the restrictions and regulate the relationship in a precise manner.[342] Although the purpose of the restrictions prohibiting lobbying and limiting the use of class actions and the recovery of attorneys' fees is unclear form the 1996 OCRAA and from the rules promulgated by the LSC, it appears the restrictions reflect Congress's attempt to limit the perceived misuse of federal funds by legal aid attorneys. Congress clearly has a substantial purpose in ensuring that federal funds are used properly. Thus, the pertinent question is whether the 1996 OCRAA and accompanying LSC regulations are overbroad or vague.

The restrictions on class actions and the recovery of attorneys' fees are neither overbroad nor vague. In fact, they are quite straightforward, and the scope of the restrictions are easily understood. Accordingly, these restrictions satisfy the precision principle because the regulations are narrowly tailored to achieve a substantial purpose.

The restrictions on lobbying and influencing government, however, are anything but straightforward or easily understood. Of particular concern are the all encompassing definitions of grassroots lobbying, legislation, public policy, and rule making found in the LSC regulations.[343] Because of the indelible scope of these terms, the LSC rules are inordinate in magnitude. One cannot review the LSC rules and conclude they are precise and narrowly tailored. To the contrary, Congress and the LSC enacted and promulgated comprehensive restrictions against grantees lobbying and influencing the government. Indeed, Congress's intent was to silence the perceived "liberal" legal aid attorneys.[344] The restrictions, however, sweep too broadly

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[339] *See supra* text accompanying notes 50-60.

[340] *See supra* text accompanying notes 61-66.

[341] *See supra* text accompanying notes 75-82.

[342] *See* Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967).

[343] *See supra* text accompanying notes 35-50.

[344] *See* supra text accompanying notes 113-18.

and will impermissibly chill speech. These regulations go way beyond Congress's purpose in ferreting out misuse of federal funds and "reflect[ ] an impermissible attempt 'to allow [the] government [to] control . . . the search for political truth.'"[345]

The restrictions on influencing government, including the specific prohibition related to welfare-reform advocacy, are constitutionally deficient on overbreadth and vagueness grounds. If Congress and the LSC want to regulate the protected attorney-client relationship by attaching conditions to its funding, they must create regulations that further the government's interest in a much more precisely and narrowly tailored fashion.

d. *The Proportionality Principle*

The proportionality principle is based on the premise that any restrictions the government attaches to its funding must be in proportion to the government's financial contribution.[346] The question, therefore, is whether Congress's extension of the 1996 OCRAA restrictions to non-LSC funds combined with the LSC's rules regulating affiliate organizations violates the proportionality principle. The answer to this question depends upon whether grantees have adequate alternative channels for engaging in the prohibited activities. As previously discussed at length, the final regulations promulgated by the LSC in May of 1997 implemented "program integrity" standards. The LSC regulations were based on regulations promulgated by the Secretary of Health for the Title X programs that the Court in *Rust* upheld as constitutional.[347]

In *Hawaii II* and *Velazquez,* both courts decided that *Rust* was determinative of the issue, holding that the regulations did not violate the proportionality principle because they offered adequate alternative channels of communication similar to what was available for the Title X doctors.[348] *Rust,* however, is not controlling because the Title X doctors were government agents, not independent actors. In *Hawaii II,* the court errantly concluded that *Regan, League of Women Voters,* and *Rust* all represented a continuum of acceptable restrictions on affiliate organizations' ability to engage in restricted activities.[349] These cases are not continuums; rather, they represent different standards, depending upon the government-recipient relationship.[350] On the one hand, *Regan* and *League of Women Voters* rep-

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[345] League of Women Voters v. FCC, 468 U.S. 364, 384 (1984).

[346] *See* supra text accompanying notes 171-74.

[347] *See* supra text accompanying notes 190-205; Rust v. Sullivan, 500 U.S. 173 (1991).

[348] *See* Legal Aid Soc'y v. Legal Servs. Corp., 981 F. Supp 1288 (1997); Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (1997).

[349] *See Hawaii II,* 981 F. Supp. at 1291.

[350] Such a distinction makes sense. When the government is communicating its own

resent the Court's pronouncement of the appropriate standards for establishing an affiliate organization when the government attaches restrictions to funds used by independent actors. On the other hand, *Rust* represents the appropriate standard when the government attaches restrictions to funds used by private parties who are conveying a government message. Therefore, the extensive restrictions approved in *Rust* would not pass constitutional muster if imposed on independent actors.[351]

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message through private actors, the government has a much greater interest in ensuring that "there is no identification of the recipient with restricted activities and that the [affiliate] is not a sham or paper organization and is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities." *Velazquez*, 985 F. Supp. at 339. Conversely, when the government funds independent actors, the public at large is less likely to be confused that the government is endorsing the activities of the independent actors. Indeed, the only substantial interest Congress would have in regulating affiliate organizations would be to ensure that federal funds were not used by the affiliate.

[351] *See* Regan v. Taxation with Representation, 461 U.S. 540, 544 & n.6 (1983). Justice Blackmun specifically addressed the limited nature of the restrictions that could be placed on affiliate organizations, in that case section 501(c)(4) entities:

> Given this relationship between § 501(c)(3) and § 501(c)(4), the Court finds that Congress' purpose in imposing the lobbying restriction was merely to ensure that "no tax-deductible contributions are used to pay for substantial lobbying." Consistent with that purpose, "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." As long as the IRS goes no further than this, we perhaps can safely say that "[t]he Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.
>
> Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislations without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional.

Id. at 553 (citations omitted).

Thus, if *Regan*, rather than *Rust*, is the correct standard for measuring the constitutionality of LSC regulations on affiliate organizations, then the government cannot regulate affiliate organizations established by independent actors who receive federal funding other than by requiring that the affiliate be a separate legal entity and maintain records documenting that no federal funds were used for a prohibited activity.[352] Imposing additional requirements on affiliate organizations of independent actors (as compared to those of government agents) would be disproportionate to the government's funding and beyond its legitimate interest in these entities.[353] Congress may regulate how independent actors spend LSC funds, but it cannot regulate how independent actors spend non-LSC funds through affiliate entities. Therefore, the restrictions requiring that affiliate organizations satisfy program integrity standards before they can use non-LSC funds for restricted activities are disproportionate to the government's funding. Hence, every regulation that implicates a constitutional right is unconstitutional as applied to affiliate organizations.

CONCLUSION

Part III applied the unconstitutional conditions doctrine to the restrictions Congress and the LSC placed on grantees. The restrictions impact vital First Amendment rights, including freedom of speech, freedom of association, and the right to petition the government for redress of grievances. The restrictions also interfere with the constitutionally protected attorney-client relationship. Because legal aid attorneys are independent participants in the political marketplace and not instruments of the government, the restrictions must be reviewed with the strictest of scrutiny.

The two restrictions that prohibit welfare-reform advocacy and abortion-related litigation are unconstitutional because they constitute viewpoint discrimination. Additionally, the restrictions on lobbying and influencing government are impermissibly overbroad. Finally, LSC restrictions that require affiliate organizations to satisfy program integrity requirements unconstitutionally restrict grantees' use of non-LSC funds to engage in restricted activities through affiliate organizations; such restrictions violate the proportionality principle. Thus, although the purpose of the legal services program was to provide justice for the poor, many of these new restrictions unfortunately only create more injustice.

J. DWIGHT YODER

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[352] *See id.*

[353] The problem with the two court decisions that have addressed this issue is that both failed to answer the threshold question: What is a government-recipient relationship? By failing to answer this question, the courts blindly relied on *Rust*, and thus reached the wrong conclusion.