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In 1931, at the very dawn of First Amendment jurisprudence, Chief Justice Hughes presciently observed that "(t)he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people" was "a fundamental principle of our constitutional system."<sup>1</sup> Since that time, the First Amendment has been interpreted by courts primarily as a guarantor of the ongoing legitimacy of democratic self-governance in the United States. As Justice Cardozo remarked in 1937, freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom."<sup>2</sup>

To view the First Amendment "as the guardian of our democracy,"<sup>3</sup> however, is to adopt a particular image of the American polity. It is to imagine that democratic legitimacy flows from the accountability of the state to the public opinion of its population. From its inception, therefore, First Amendment doctrine has primarily sought to protect from government regulation an independent realm of speech within which public opinion is understood to be forged.

The consequence of this orientation is that traditional First Amendment doctrine has had rather little to say about the speech of the government itself.<sup>4</sup> In this Essay, I shall explore the corner of this perplexing territory in which are located the difficult constitutional questions raised by government subsidies for speech. Subsidized speech challenges two fundamental assumptions of ordinary First Amendment doctrine. It 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 government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas.

These two questions of social characterization underlie all constitutional cases of subsidized speech.<sup>5</sup> Like many First Amendment issues, they demand complex and contextual normative judgments about the boundaries of distinct constitutional domains in social space.<sup>6</sup> Yet they have never been explicitly addressed by the Court, which has instead chosen to address cases of subsidized speech primarily by relying upon two doctrines, which respectively prohibit unconstitutional conditions and viewpoint discrimination.

Both of these doctrines ignore the questions of social characterization that actually impel First Amendment analysis, and as a consequence, each doctrine

has grown increasingly detached from the real sources of constitutional decisionmaking. The doctrines have become formalistic labels for conclusions, rather than useful tools for understanding. 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."<sup>7</sup>

My thesis in this Essay is that cases of subsidized speech can be usefully analyzed only if we fashion a doctrine that explicitly addresses relevant processes of social characterization. I hope to establish this thesis by demonstrating its value in the comprehension of particular cases. In Part I of this Essay, therefore, I examine *FCC v. League of Women Voters*<sup>8</sup> to explore the consequences of characterizing government action as a regulation of speech located in the democratic social domain called "public discourse."<sup>9</sup> In Part II of this Essay I scrutinize the cases of *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>10</sup> and *Rust v. Sullivan*<sup>11</sup> to probe the implications of characterizing government action as a regulation of speech located in a different kind of social formation, which may be termed the "managerial domain."<sup>12</sup> In Part III of this Essay I discuss the recent controversy over funding restrictions imposed by statute upon the National Endowment for the Arts to assess the implications of characterizing government action as a regulation of public discourse or instead as a form of state participation in the marketplace of ideas.

#### SUBSIDIZED SPEECH AND PUBLIC DISCOURSE

A democratic government derives its legitimacy from the fact that it is considered responsive to its citizens. This form of legitimacy presupposes that citizens are, in the relevant sense, independent of their government. We would rightly regard a government that treated its citizens as mere instrumentalities of the state—"closed-circuit recipients of only that which the state chooses to communicate,"<sup>13</sup>—as totalitarian rather than democratic. One important function of the public/private distinction within American constitutional law is to mark this normative distinction between the independent citizen, who is deemed "private," and the state functionary, who is deemed "public."<sup>14</sup>

What it means in constitutional thought for a democratic government to be "responsive" to its citizens is a complex subject. To summarize arguments I have made elsewhere,<sup>15</sup> First Amendment doctrine envisions a distinct realm of citizen speech, called "public discourse,"<sup>16</sup> in which occurs a perpetual and unruly process of reconciling the demands of individual and collective autonomy. First Amendment jurisprudence conceptualizes public discourse as a site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive. That is why the First Amendment jealously safeguards public discourse from state censorship.

Because First Amendment restraints on government regulation of public discourse are meant to embody the value of democratic self-governance, they contain within them many powerful and controversial presuppositions. They assume, for example, the existence of a domain of democratic self-determination, in which persons are independent and autonomous.<sup>17</sup> Within the democratic domain of public discourse, persons must be given the freedom to determine their own collective identity and ends.<sup>18</sup> Outside of public discourse, however, where the value of democratic self-governance is not preeminent, First Amendment doctrine will reflect other constitutional values, and it will presuppose a quite

different notion of the legal subject.<sup>19</sup> The nature of First Amendment analysis, therefore, will depend on whether or not speech is conceptualized as within the democratic domain of public discourse.<sup>20</sup>

This is of particular importance in cases of subsidized speech. When the state supports speech, it establishes a relationship between itself and private speakers that can sometimes compromise the independence of the latter. Subsidization may thus transport speech from public discourse into other constitutional domains. But because there are many examples of subsidized speech that are unproblematically characterized as within public discourse, the mere fact of subsidization is not sufficient to remove speech from public discourse. Subsidization is only one factor that must be considered when making judgments about the characterization of speech.<sup>21</sup> In this Part of the Essay I explore the nature of these judgments, examining the process and consequences of classifying subsidized speech as within or outside of public discourse.

A. Unconstitutional Conditions, Subsidized Speech, and Public Discourse That subsidization simpliciter is not determinative of the classification of speech, and that such classification has fundamental and far-reaching consequences for First Amendment analysis, was recently recognized by the Court in its opinion in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>22</sup> which struck down a state university's policy of excluding religious expression from its subsidies of student speech. The Court observed: (W)hen the State is the speaker, it may make content-based choices. When 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.... (W)hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. 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.... The distinction between the University's own favored message and the private speech of students is evident in the case before US.<sup>23</sup>

The Court's point is that when the state itself speaks, it may adopt a determinate content and viewpoint, even "when it enlists private entities to convey its own message."<sup>24</sup> But when the state attempts to restrict the independent contributions of citizens to public discourse, even if those contributions are subsidized, First Amendment rules prohibiting content and viewpoint discrimination will apply. The reasoning of *Rosenberger* thus rests on two premises. First, speech may be subsidized and yet remain within public discourse; the mere fact of subsidization is not sufficient to justify classifying speech as within or outside public discourse. Second, 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.

This second premise may seem obvious, but it has important implications for the doctrine of unconstitutional conditions. That doctrine, as characterized by one eminent commentator, "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."<sup>25</sup> Thus in *Perry v. Sindermann*<sup>26</sup> the Court held that a state college system could not fire a teacher due to his public criticisms of the system, because "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, . . . (i)t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech."<sup>27</sup> Of course this formulation is essentially circular, because it does not specify the nature of the First Amendment rights to be protected, and in particular, it fails to specify whether the parameters of those rights are contingent upon the granting of the benefit.<sup>28</sup> The most common way of interpreting the unconstitutional conditions doctrine, therefore, is to hold that it prohibits the government from doing "indirectly what it may not do directly,"<sup>29</sup> so that First Amendment rights are defined independently of the provision of the benefit.

In cases of subsidized speech, however, the provision of a benefit can sometimes convert a citizen into a public functionary and thereby alter the nature of the relevant First Amendment rights and analysis. The abstract principles underlying the unconstitutional conditions doctrine simply do not address this possibility. Sophisticated efforts to repair the doctrine by incorporating pertinent but generic criteria like "baselines"<sup>30</sup> or "systemic effects"<sup>31</sup> also fail to account for the fact that the categorization of the status of a speaker will ordinarily be a very specific, context-bound judgment, informed by the particular First Amendment considerations relevant to determining the boundaries of public discourse.

With regard to questions of subsidized speech, therefore, the doctrine of unconstitutional conditions, as Cass Sunstein has noted, is "too crude and too general to provide help in dealing with contested cases."<sup>32</sup> The doctrine serves primarily to remind us that First Amendment analysis does not end merely because the government has chosen to act through the provision of a subsidy. The doctrine recalls the truth of the first premise that we observed in the passage from *Rosenberger*: Speech may be subsidized and yet nevertheless remain within public discourse, so that even though the state may retain the "greater" power to terminate the subsidy (and perhaps also the speech), it does not follow that it also retains the "lesser" power to control the speech in ways that are otherwise inconsistent with First Amendment restraints on government regulations of public discourse.

The public forum cases provide the most obvious illustration of how persons can receive government benefits and nevertheless remain within public discourse. These cases hold that speech occurring on certain kinds of government property, like streets and parks, will be "subject to the highest scrutiny."<sup>33</sup> Chief Justice Rehnquist has acknowledged that "this Court has recognized that the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' or have been 'expressly dedicated to speech activity.'"<sup>34</sup> Publications that receive the "subsidy" extended by the United States to second-class mail provide another example of subsidized speech that receives significant First Amendment protection.<sup>35</sup> Receipt of the subsidy does not remove such publications from

the safeguards otherwise accorded public discourse.<sup>36</sup>

These examples demonstrate that the presence or absence of a subsidy is not determinative of whether speech will be classified as within or outside the domain of public discourse. Subsidized speech that is classified as public discourse will receive similar kinds of First Amendment protections as are extended to public discourse generally. It follows from this that (then) Justice Rehnquist could not have been correct when he observed in *Regan v. Taxation with Representation* that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."<sup>37</sup> Rehnquist's observation rests on the fallacy that subsidization is always sufficient to determine the status of speech, whereas there are circumstances in which subsidized speech will be classified as within public discourse and in which the selective withdrawal of subsidies will be deemed an improper regulation of that discourse. Consider, for example, the fatal constitutional difficulties that would arise if a state were to exclude speech about nuclear power or abortion from a public forum, or if Congress were to withhold second-class mailing subsidies from magazines that discuss these issues.<sup>38</sup>

If subsidized speech can sometimes be classified as public discourse, it can also, as Rosenberger recognizes, be deemed equivalent to the speech of the state itself. Such speech will not be conceptualized as requiring protection from the government, but will instead be regarded as state action, and hence subject to the same array of constitutional restraints and prerogatives that we accord to the government.<sup>39</sup> Some have claimed that the mere fact of a state subsidy is sufficient to justify classifying speech as state action. For example, a government official recently testified that "when the government funds a certain view, the government itself is speaking. It therefore may constitutionally determine what is to be said."<sup>40</sup> We know from the public forum and U.S. mail cases, however, that this assertion is false. Government funding is not by itself sufficient to establish state action in other contexts,<sup>41</sup> and there is no reason why we should reach a different conclusion within the context of subsidized speech.

#### B. *FCC v. League of Women Voters*: Subsidized Speech and the Constitutional Characterization of Speakers

One of the striking peculiarities of First Amendment jurisprudence is that speakers can be assigned intermediate positions between private participants in public discourse and state actors. The clearest and most illuminating example of the Court's creation of such an intermediate status may be found in the context of the broadcast media. In 1969, in *Red Lion Broadcasting Co. v. FCC*,<sup>42</sup> the Court upheld FCC regulations that would have been plainly unconstitutional if applied to participants in public discourse.<sup>43</sup> At issue in *Red Lion* was the fairness doctrine, which required broadcasters to give adequate coverage to opposing views of public issues, as well as subsidiary FCC rules requiring that those personally attacked be given a right to reply. The Court began its reasoning with the premise that broadcast frequencies were scarce: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."<sup>44</sup> The Court thereupon characterized broadcast licenses as conferring a "temporary privilege"<sup>45</sup> to use designated frequencies on the condition that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his

community and which would otherwise, by necessity, be barred from the airwaves."<sup>46</sup>

Red Lion thus conceptualized broadcasters as public trustees,<sup>47</sup> rather than as independent and private participants in public discourse. As a consequence, the Court interpreted the First Amendment as protecting not the broadcasters' independent contributions to public discourse, but instead the speech facilitated by broadcasters. The Court carefully refrained from attributing First Amendment rights to broadcasters: "(T)he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of the broadcasters, which is paramount."<sup>48</sup>

Four years later, however, members of the Court began to have second thoughts. Four Justices in *CBS, Inc. v. Democratic National Committee*<sup>49</sup> held, in a complex and fractured decision, that although broadcasters were "public trustees," their speech was not that of the government itself, and hence that the behavior of broadcasters did not constitute state action for purposes of triggering constitutional requirements.<sup>50</sup> These Justices were concerned to craft an intermediate position for broadcasters, one that envisioned an "essentially private broadcast journalism held only broadly accountable to public interest standards."<sup>51</sup>

This compromise was ratified by the full Court in 1981, when it declared that "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public (duties).'"<sup>52</sup> In stark contrast to Red Lion, the Court went out of its way to refer to the need to "properly balance() the First Amendment rights of . . . the public . . . and broadcasters."<sup>53</sup> It thus signified that while broadcasters would be seen in some respects as public fiduciaries, without independent First Amendment rights, they would be regarded in other respects as participants in public discourse, with attendant constitutional protections. This resolution seems plainly necessary to explain why the Court has persistently attributed the full spectrum of First Amendment rights and protections to broadcast journalists when they are sued for defamation and invasion of privacy.<sup>54</sup>

I mention this compromise because it provides the necessary background for grasping an extraordinarily complex and fascinating case involving subsidized speech, *FCC v. League of Women Voters*.<sup>55</sup> The case involved the constitutionality of section 399 of the Public Broadcasting Act, which prohibited "editorializing" by any "noncommercial educational broadcasting station" receiving grants from the Corporation for Public Broadcasting (CPB), "a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations."<sup>56</sup> Section 399 was justified on the ground that public deliberation could be distorted by potential government pressure on the editorial policies of government-supported broadcast stations.

Because this justification turned on an empirically based theory of potential danger to the structure of public deliberation, one might have expected the Court, as Justice Stevens urged in dissent, to "respect" the "judgment" of Congress.<sup>57</sup> But Justice Brennan, writing for the Court, introduced a new variable into the equation:

(W)e have . . . made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area. Unlike common carriers, broadcasters are "entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public (duties).'"<sup>58</sup>

By specifically invoking the First Amendment rights of broadcasters, Brennan signalled that broadcasters could be conceptualized as independent contributors to public discourse and accordingly could be protected by independent judicial review.

If broadcasters were to be regarded as public trustees without independent First Amendment rights in some circumstances, and as constitutionally protected private participants in public discourse in other circumstances, how ought they be classified with respect to a prohibition on their ability to editorialize? Brennan's response was clear and unequivocal: "(T)he special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press, of which the broadcasting industry is indisputably a part, carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs."<sup>59</sup>

Broadcast editorials, like those of the press generally, were thus categorized constitutionally as "part and parcel of 'a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open.'"<sup>60</sup> Broadcasters, when disseminating editorials, were to be classified as independent contributors to public discourse; like the press generally, they were to be regarded as possessing the self-determining agency of private citizens.

Noncommercial educational stations, however, are not equivalent to private broadcasters; they are supported in part by federal financial assistance channelled through CPB. It was therefore possible to argue that noncommercial educational stations were public functionaries, even if broadcasters generally could not be so characterized. Indeed, in *CBS, Inc. v. Democratic National Committee*, nearly a decade before, Justice Douglas had made exactly this point.<sup>61</sup> He contrasted the independent status of commercial broadcasters to CPB's noncommercial grantees, whom he regarded as owned and managed by a federal agency and hence as instrumentalities of the state constrained by the First Amendment to act as common carriers.<sup>62</sup>

Justice Brennan rejected this characterization of noncommercial stations. He pointed to "the elaborate structure established by the Public Broadcasting Act"<sup>63</sup> that was specifically designed to "protect the stations from governmental coercion and interference."<sup>64</sup> Brennan concluded that the structure of the Act "ensured . . . that these stations would be as insulated from federal interference as the wholly private stations."<sup>65</sup> The status of the noncommercial stations would thus be classified as equivalent to that of broadcasters generally.

Notice, then, that before the opinion in *League of Women Voters* can even begin to engage in what would ordinarily be regarded as First Amendment analysis, it must accomplish at least three predicate acts of characterization: with regard to broadcasters; with regard to broadcasters' editorials; and with regard to noncommercial broadcasters' editorials. Each time, the opinion opts

for characterizing section 399 as a government regulation of public discourse.<sup>66</sup> These characterizations enable Brennan to use a familiar arsenal of First Amendment doctrines to decide the case. Brennan attacks section 399 for its "substantial interference with broadcasters' speech,"<sup>67</sup> for its contentbased discrimination,<sup>68</sup> for its vagueness,<sup>69</sup> for its "patent overinclusiveness and underinclusiveness,"<sup>70</sup> for the weakness of its justifications,<sup>71</sup> and for its failure to accomplish its ends by using "less restrictive means that are readily available."<sup>72</sup> All of these doctrinal methods are appropriately applied to regulations of public discourse; none was used in *Red Lion* because in that case broadcasters were broadly conceived of as public functionaries.

The specific question of subsidized speech is relevant to only one of the three predicate acts of characterization that make the decision in *League of Women Voters* possible. The case illustrates that although the fact of government support is relevant to classifying a speaker as within or outside public discourse, it is not determinative. The subsidy question differs in neither form nor function from the other issues of characterization posed by the case. 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.

Once subsidized editorials are mapped onto the domain of public discourse, and once section 399's prohibition is characterized as a restriction of that discourse, Justice Rehnquist's dissent, which focuses only on the specific issue of subsidy, is radically undermined. Rehnquist argued that section 399 should be understood as a simple congressional decision "that public funds shall not be used to subsidize noncommercial, educational broadcasting stations which engage in 'editorializing.'"<sup>73</sup> Reiterating the theme of his opinion in *Regan v. Taxation with Representation*,<sup>74</sup> Rehnquist rejected "the notion that, because Congress chooses to subsidize some speech but not other speech, its exercise of its spending powers is subject to strict judicial scrutiny."<sup>75</sup> But, as we have seen, selective congressional subsidies of magazines in second-class mail would indeed be subject to strict judicial scrutiny.<sup>76</sup> This indicates that the thrust of Rehnquist's dissent is quite beside the point once the government regulation at issue is characterized as a restriction on public discourse.

The criteria for establishing whether speech ought to be characterized as public discourse are complex, contextual, and obscure,<sup>77</sup> and particularly so in cases of subsidized speech. I am confident that there can be no simple empirical or descriptive line of demarcation.<sup>78</sup> Ultimately, speech will be assigned to public discourse on the basis of 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.<sup>79</sup> Whether explicitly addressed or not, such judgments are essential predicates to all cases of subsidized speech.

## II. SUBSIDIZED SPEECH AND MANAGERIAL DOMAINS

Public discourse must be distinguished from domains that I have elsewhere called "managerial."<sup>80</sup> Within managerial domains, the state organizes its resources so as to achieve specified ends. The constitutional value of managerial domains is that of instrumental rationality, a value that

conceptualizes persons as means to an end rather than as autonomous agents. Within managerial domains, therefore, ends may be imposed upon persons.<sup>81</sup> Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon. Yet managerial domains are organized along lines that contradict the premises of democratic self-governance. For this reason, First Amendment doctrine within managerial domains differs fundamentally from First Amendment doctrine within public discourse. The state must be able to regulate speech within managerial domains so as to achieve explicit governmental objectives.<sup>82</sup> Thus the state can regulate speech within public educational institutions so as to achieve the purposes of education;<sup>83</sup> it can regulate speech within the judicial system so as to attain the ends of justice;<sup>84</sup> it can regulate speech within the military so as to preserve the national defense;<sup>85</sup> it can regulate the speech of government employees so as to promote "the efficiency of the public services (the government) performs through its employees";<sup>86</sup> and so forth.<sup>87</sup>

As a result of this instrumental orientation, viewpoint discrimination occurs frequently within managerial domains. To give but a few obvious examples: the president may fire cabinet officials who publicly challenge rather than support administration policies; the military may discipline officers who publicly attack rather than uphold the principle of civilian control over the armed forces; public defenders who prosecute instead of defend their clients may be sanctioned; prison guards who encourage instead of condemn drug use may be chastised. Viewpoint discrimination occurs within managerial domains whenever the attainment of legitimate managerial objectives requires it.<sup>88</sup>

I stress this point because if there is one constitutional principle that the Court has continuously reiterated as restraining the regulation of subsidized speech, it is that such regulation cannot discriminate on the basis of viewpoint.<sup>89</sup> Yet it is quite common for subsidized speech to be located within managerial domains. The general principle forbidding viewpoint discrimination must therefore be false with respect to such subsidized speech. A. Viewpoint Discrimination, Subsidized Speech, and Managerial Domains The Court's recent opinion in *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>90</sup> amply displays the confusion caused by the Court's announced prohibition on viewpoint discrimination. In an opinion by Justice Kennedy, the Court held that "the requirement of viewpoint neutrality in the Government's provision of financial benefits"<sup>91</sup> rendered unconstitutional the University of Virginia's refusal to extend subsidies to student speech promoting religious views. But the Court had already held in other contexts that "(a) university's mission is education" and hence that a public university is endowed with the "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."<sup>92</sup> A public university is therefore a managerial domain dedicated to the achievement of education, and, as one might expect, public universities routinely regulate the speech of faculty and students in ways required by that mission. Justice Kennedy, realizing this, used the language of public forum doctrine, the only doctrinal category currently possessed by the Court capable of expressing the requirements of managerial domains, to observe that a school can create a "limited public forum" by reserving its resources "for certain groups or for the discussion of certain topics."<sup>93</sup> In this way Justice Kennedy authorized the University of Virginia to distinguish between speakers and speech as necessary to serve its mission. He thus authorized such commonsense and necessary practices as chemistry departments' restricting their grants to students studying chemistry, or English departments' restricting their grants to students studying English. But, Justice Kennedy insisted, "we have

observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."<sup>94</sup>

This distinction between content and viewpoint discrimination is simply untenable within the context of a managerial domain. In ordinary language, we would say that a content-based regulation is one that is keyed to the meaning of speech, whereas a viewpoint-based regulation is one that intervenes into a specific controversy in order to advantage or disadvantage a particular perspective or position within that controversy.<sup>95</sup> Justice Kennedy clearly adopts this sense of the distinction in *Rosenberger*, for he notes that "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination," and that in the particular case before him "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."<sup>96</sup>

If the distinction between viewpoint and content discrimination is understood in this way, however, it is irrelevant to the regulation of speech within managerial domains. In such settings, speech is necessarily and routinely constrained on the basis of both its content and its viewpoint. Academic evaluations of students and faculty are regularly based upon viewpoint. Historians who deny the Holocaust are not likely to receive appointments to reputable departments; students who deny the legitimacy of the taxing power of the federal government are not likely to receive high grades in law schools. The same principles apply to university decisions concerning the subsidization of speech. So, for example, no First Amendment issue would be raised if a graduate student who proposed to study the mythical combustible element phlogiston were to be refused a research grant by the chemistry department of a public university, however much the student were to complain about discrimination against her view of the causes of chemical reactions. The constitutionality of the refusal would instead turn on whether the chemistry department's criteria for awarding grants were related to its legitimate educational mission. That the department had both the purpose and effect of discriminating against the student's particular viewpoint would properly be deemed immaterial.

This argument suggests that the Court's effort to distinguish content from viewpoint discrimination is fundamentally confused, at least within managerial domains. I suspect that in fact the Court deploys the distinction to express a quite different point, which can perhaps be understood if one imagines a case in which a chemistry department awards research grants only to students who oppose abortion rights. Although we might be tempted to say about this case that the department's criteria for awarding grants are outrageously viewpoint discriminatory, what we would actually mean is that the criteria are completely irrelevant to any legitimate educational objective of the department.

We may hypothesize, then, that the Court's use of the viewpoint/content distinction, when applied within managerial domains, actually expresses the difference between those restraints on speech that are instrumentally necessary to the attainment of legitimate managerial purposes, and those that are not. If we interpret *Rosenberger* in this way, we can read the decision as implicitly resting upon the conclusion that the exclusion of speech promoting religious views is irrelevant to any legitimate educational purposes served by the university's grant program.<sup>97</sup> To pursue this question, however, would lead to

a full-scale analysis of constitutionally permissible and impermissible educational objectives, a path I do not propose now to pursue.<sup>98</sup>

B. *Rust v. Sullivan*: Subsidized Speech and the Boundaries of Managerial Domains

Instead I shall turn to the more fundamental issue of the principles that ought to inform First Amendment decisions to assign subsidized speech to managerial domains. These principles are of fundamental importance because First Amendment standards applicable to such domains differ so dramatically from those governing public discourse. I shall use as the focus of my inquiry the "extraordinary-some would say shocking-decision"<sup>99</sup> of *Rust v. Sullivan*.<sup>100</sup>

*Rust* was certainly a controversial decision. It sparked hostile hearings in the United States Senate,<sup>101</sup> fiercely negative public attention,<sup>102</sup> and sharply critical academic commentary.<sup>103</sup> It involved a challenge to regulations issued in 1988 by the Department of Health and Human Services (HHS) to implement Title X of the Public Health Service Act. The Act authorized HHS to subsidize family planning clinics, but it stated that "(n)one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."<sup>104</sup> The regulations prohibited Title X clinics and their employees from providing "counseling concerning the use of abortion as a method of family planning or provid(ing) referral for abortion as a method of family planning."<sup>105</sup> They also prohibited Title X clinics and their employees "from engaging in activities that 'encourage, promote or advocate abortion as a method of family planning."<sup>106</sup>

The regulations were attacked under the unconstitutional conditions doctrine, because "they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling."<sup>107</sup> But the Court, citing *League of Women Voters and Regan*, defended the regulations on the grounds that "our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."<sup>108</sup>

The Court's response to the plaintiffs' unconstitutional conditions argument is unconvincing. It would be unconstitutional for the government to condition access to the "subsidy" of second-class mailing privileges on the waiver of all advocacy of abortion within the mailed matter, even if magazines were free to advocate abortion outside "the scope of" the United States mail. Whether restrictions on subsidies apply only to funded speech or generically to recipients of the subsidies is thus not constitutionally determinative.

The Court could, however, have offered a more convincing response to the unconstitutional conditions argument. In both *League of Women Voters* and the hypothetical case of withdrawing second-class mailing privileges, the speech at issue can be characterized as public discourse. But it is highly questionable whether the speech of the Title X clinics and their employees could also be classified as public discourse. It is in fact superficially plausible to locate that speech instead within a managerial domain established by Title X.

There is much evidence that the Court in *Rust* was actually driven by the perception that the speech restricted by the HHS regulations should be located in a managerial domain. The Court repeatedly asserted that "(t)he challenged regulations" do no more than "implement the statutory prohibition . . . . They are designed to ensure that the limits of the federal program are observed."<sup>109</sup> The argument, if fully articulated, would be that Congress enacted Title X to accomplish certain purposes, that these purposes are legitimate, and that the HHS regulations function within this managerial domain to regulate speech so as to achieve these purposes. The doctrine of unconstitutional conditions is powerless against this argument, because the doctrine lacks any mechanism for determining the domain to which speech should be allocated and hence for adequately describing the nature of the "rights" that are to be protected. The argument, however, is flatly incompatible with the Court's own precedents that viewpoint discrimination is always and everywhere unconstitutional. The HHS regulations were plainly guilty of "impermissibly discriminating based on viewpoint because they prohibit 'all discussion about abortion as a lawful option-including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy-while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'"<sup>110</sup>

Faced with this awkward inconsistency, the Court simply blinked. It rejected the plaintiffs' charge of viewpoint discrimination on the grounds that: This 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. To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.<sup>111</sup> Nothing could more vividly illustrate the failure of the Court's purported prohibition on viewpoint discrimination than this passage. The HHS regulations plainly discriminate on the basis of viewpoint, if by viewpoint discrimination is meant, as Justice Kennedy meant in *Rosenberger*, to constrain speech on only one side of a disputed subject.<sup>112</sup> By upholding the HHS regulations, therefore, the Court essentially confessed to the irrelevance of the criterion of viewpoint discrimination within the context of managerial regimes. It instead subtly but significantly shifted the meaning of viewpoint discrimination along the lines that I suggested in our discussion of *Rosenberger*.<sup>113</sup> The Court in *Rust* in effect stated that regulations within managerial domains would not be deemed viewpoint discriminatory so long as they were necessary to accomplish legitimate managerial ends.

If the analysis I have so far offered is correct, therefore, *Rust* is an entirely defensible decision so long as it is assumed that the speech restricted by the HHS regulations is appropriately characterized as located within the boundaries of a managerial regime dedicated to the achievement of legitimate ends. But is this assumption well founded? Putting aside the question of whether the ends of the HHS regulations are legitimate,<sup>114</sup> the question I wish to explore is whether the speech regulated in *Rust* ought in fact to be assigned to a managerial domain.

Ultimately the allocation of speech to managerial domains is a question of normative characterization. What is at stake is whether we wish to consign speech to a social space where "the attainment of institutional ends is taken as an unquestioned priority."<sup>115</sup> This represents a serious contraction of our

ordinary understanding of freedom of expression, and it therefore requires extraordinary justification. I have argued in detail elsewhere that such restrictions on speech can be justified only where those occupying the relevant social space actually inhabit roles that are defined by reference to an instrumental logic.<sup>116</sup>

So, for example, persons in a government bureaucracy assume various institutional roles—secretaries, clerks, case workers, supervisors—all defined by reference to the organizational rationality of the domain. Similarly, persons within universities act the part of students or professors or graduate teaching assistants, by which they reveal their acquiescence in the instrumental logic of education. By contrast, the history of public forum doctrine can be read to illustrate how courts came to realize that the diversity of roles and expectations that persons actually bring to their use of government parks and streets precludes their subjection to state managerial authority. The same point can be made about the United States mail. Even though the Postal Service is clearly a government-owned and operated organization, persons have a "practical dependence . . . upon the postoffice (sic),"<sup>117</sup> so that they assimilate the mail to the rich and complex spectrum of roles and expectations that they inhabit in their everyday lives. Thus, while managerial authority over the Postal Service may be appropriate, that authority does not extend to members of the general public who use the mail, because, as Justice Holmes famously observed, "the use of the mails is almost as much a part of free speech as the right to use our tongues."<sup>118</sup>

We may ask, then, about the nature of the roles inhabited by persons regulated by the HHS regulations at issue in *Rust*. For the sake of simplicity, I shall examine only the core dyadic relationship of physician and patient that all sides take to be at the center of the case, and I will therefore consider the constitutionality of those aspects of the HHS regulations that prohibit physicians from offering advice or referrals about abortion in the course of their consultations with their patients, even when, in the medical judgment of the physician, it would be appropriate to do so.

Physicians are of course professionals, and it is well known that professionals do not fit well into the instrumental rationality of organizations.<sup>119</sup> This is fundamentally because professionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards.<sup>120</sup> "(P)rofessionals participate in two systems—the profession and the organization—and their dual membership places important restrictions on the organization's attempt to deploy them in a rational manner with respect to its own goals."<sup>121</sup>

This point has been accepted by the Court in the context of lawyers. Thus, for example, the Court has held that although a public defender is employed by the state, the conduct of a public defender does not constitute state action because

a public defender is not amenable to administrative direction in the same sense as other employees of the State.... (A) defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "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."<sup>122</sup>

Although the Court has found, in contrast, that the conduct of a prison physician does constitute state action, it has justified this holding on the explicit ground that a doctor's "professional and ethical obligation to make independent medical judgments (does) not set him in conflict with the State and other prison authorities."<sup>123</sup> This obligation to make independent medical judgments<sup>124</sup> sets limits to the managerial authority of a physician's employer, just as it does to the managerial authority of a lawyer's employer, because "(a) physician's professional ethics require that he have 'free and complete exercise of his medical judgment and skill.'"<sup>125</sup> "If the employer were to control the independent judgment in the decisionmaking process and the performance of the professional's duties, the employer's control might conflict with the professional's primary and unequivocal duty to exercise his or her independent judgment."<sup>126</sup>

It is far from clear, then, that physicians, even if they have accepted employment in Title X clinics, occupy roles defined by reference to a purely organizational logic, particularly in situations where that logic seeks to override the necessary exercise of independent professional judgment. And this is of course precisely what the HHS regulations attempted to do.<sup>127</sup>

We would reach the same conclusion if the issue were analyzed from the perspective of the patient. The expectations of patients are symmetrical to those of physicians. In a world where physicians routinely exercise independent judgment, patients come to expect and rely upon that judgment. Those served by Title X clinics adopt the role of patients and hence signal their expectation that they will receive competent and responsible professional service. Except in the most unusual of circumstances, patients expect the independent judgment of their physicians to trump inconsistent managerial demands.

If this analysis is correct, the Court in *Rust* lacked justification for its implicit decision to allocate medical counselling to the managerial domain of the Title X clinic. Neither the role of physician nor that of patient warrant any inference of acceptance of such a purely instrumental orientation.<sup>128</sup> For this reason, the viewpoint discrimination inherent in the HHS regulations cannot be justified by reference to managerial authority..

The matter is complicated, however, because the HHS regulations constrain private conversations between doctors and patients, and this speech is plainly not part of public discourse. It is therefore not self-evident that viewpoint discrimination is automatically forbidden. The matter can perhaps best be conceptualized as a regulation of professional speech. Sometimes such regulation is equivalent to the direction of professional practice. There is, for example, no constitutional difference between forbidding doctors from prescribing a certain drug and forbidding them from using it. In such a case, the First Amendment probably does not impose any distinctive constraints on the state's general power to regulate the practice of medicine. But the HHS regulations pose a different constitutional problem, for they are aimed specifically and explicitly at prohibiting the disclosure of information; they are not directed at medical practice.<sup>129</sup> There was never any question or possibility that doctors at Title X clinics would actually perform abortions. What the HHS regulations seek to interdict is the provision of facts about the possibility or

availability of abortion as a family planning option.

The First Amendment is surely implicated whenever the state seeks to proscribe the flow of information qua information.<sup>130</sup> Although there is at present no well-developed doctrine setting forth the exact test to be used to evaluate viewpoint discriminatory regulations of this type in the context of professional speech,<sup>131</sup> it would be fair to say that the First Amendment should at a minimum require that any such restriction have a substantial justification. The most obvious justification, and the only one actually articulated by the Court in *Rust*, is that the government wished to create family planning clinics that did not include abortion, and that the HHS regulations served this end.<sup>132</sup> But if my argument is correct that physician-patient relationships in Title X clinics are not subject to automatic managerial direction, this justification is constitutionally insufficient. The mere fact that the government has used subsidies to accomplish a purpose ought not to provide adequate constitutional grounds for the kind of restrictions at issue in *Rust*.

Viewpoint discriminatory regulations that prohibit the dissemination of information are ordinarily justified by a showing that the foreclosed information will lead to some harm that the government has a right to prevent. Thus if the government were to prohibit doctors subsidized by the Veterans Administration from discussing a certain drug, the constitutionality of the prohibition would normally turn on some showing that the drug was harmful and that the provision of information would increase the likelihood of harm. But this whole class of justifications seems unavailable to the government in *Rust*, because they would require that the government characterize abortion as a positive harm. The right to choose abortion is constitutionally protected, however, on the grounds that its exercise is "central to personal dignity and autonomy."<sup>133</sup> Surely the solecism of characterizing the exercise of such a right as a harm is both obvious and fatal.<sup>134</sup>

In fact, without purporting to do a complete analysis of the HHS regulations, I do not see how the regulations can be supported by any convincing justifications. My tentative conclusion would therefore be that the regulations ought to be found unconstitutional. The larger point I wish to stress, however, is that a proper analysis of the case requires a firm appreciation of both the power and limits of managerial domains within First Amendment jurisprudence. The fact that *Rust* involves subsidized speech is largely secondary.

### III. FIRST AMENDMENT CHARACTERIZATIONS OF GOVERNMENT ACTION

There is an important and controversial class of cases in which the fact of government subsidization is central to constitutional analysis. These cases do not turn on the assignment of speech to particular social domains, but depend instead on the characterization of government action. The essential question posed by these cases is whether conditions on government subsidies should be classified as regulations imposed upon persons, or whether they should instead be classified as internal directives guiding the conduct of state institutions. The topic is large and complex, and at best I will be able to offer only a few preliminary observations. These can most usefully be developed in the context of the specific issues raised by the recent controversy surrounding congressional restrictions on grants to artists offered by the National Endowment for the Arts (NEA).<sup>135</sup>

## A. The NEA Controversy: Constitutional Characterizations of Funding Criteria

Congress created the NEA in 1965 "to develop and promote a broadly conceived national policy of support for the . . . arts in the United States."<sup>136</sup> The NEA is authorized to award grants to "individuals of exceptional talent engaged in or concerned with the arts."<sup>137</sup> By statute, applications for grants must be submitted "in accordance with regulations issued and procedures established" by the NEA Chair.<sup>138</sup> Although the NEA attempted to insulate these procedures "from partisan political considerations"<sup>139</sup> by ceding de facto authority to "panels of experts, usually peers of the applicant consisting of museum professionals or artists involved in the same discipline,"<sup>140</sup> the work of artists subsidized by the NEA came under severe ideological attack in the late 1980s.<sup>141</sup>

The upshot was that Congress eventually qualified the NEA's granting authority, providing that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."<sup>142</sup> In 1992 this qualification was challenged by four individual performance artists, as well as by the National Association of Artists' Organizations. In *Finley v. NEA*,<sup>143</sup> a federal district court declared the "'decency' clause . . . void for vagueness under the Fifth Amendment and . . . overbroad under the First Amendment."<sup>144</sup>

The constitutional issues posed by *Finley* contrast neatly with those presented by *League of Women Voters*. The decisive question in *League of Women Voters* was whether the editorials of noncommercial broadcasters should be characterized as public discourse. Once this question was answered affirmatively, it was relatively unproblematic to characterize section 399's prohibition as directly restricting public discourse. In *Finley*, however, the artistic work supported by NEA grants may for the most part unproblematically be regarded as part of public discourse.<sup>145</sup> But by contrast it is not at all clear whether the decency clause struck down by *Finley* should be understood as a direct regulation of the speech of NEA grantees, or instead as a rule directed at the internal operation of the NEA.<sup>146</sup> Unlike *League of Women Voters*, therefore, *Finley* poses the question of how to characterize government action.

An analogous ambiguity of characterization would arise if, for example, Congress were to enact a statute prohibiting "indecent" magazines from receiving the subsidy of second-class mailing privileges. Accepting as uncontroversial premises that the Postal Service is an organization subject to direction by Congress, that those using the mail must comply with postal regulations, and that magazines flowing through the mail are public discourse, we must nevertheless face the question of how the ban on indecent magazines should be characterized: as a regulation of public discourse or as a rule directed at the internal operation of the Post Office.

The question exposes an unexplored assumption in the way in which I have so far presented the relationship between public discourse and managerial domains. I have spoken as if one could draw a sharp distinction between the state and its citizens, as though the realm of democratic self-determination functioned in isolation from systems of government intervention and support. But of course this is not the case under contemporary conditions; instrumental organizations of government presently infiltrate almost all aspects of social life. Organizational theorists have long recognized that institutional boundaries are open and porous. "The organization is the total set of interstructured

activities in which it is engaged at any one time and over which it has discretion to initiate, maintain, or end behaviors. . . . The organization ends where its discretion ends and another's begins."<sup>147</sup> For this reason one can always ask whether the internal rules of a state organization should constitutionally be categorized as equivalent to the regulation of ambient domains of social life. We would almost certainly view a statute barring indecent magazines from second-class mailing subsidies as a direct regulation of public discourse rather than as an internal guideline of the Post Office. To appropriate the vocabulary of Meir Dan-Cohen, we would classify it as a "conduct rule" for the government of citizens, rather than as a "decision rule" for the internal direction of government officials.<sup>148</sup> I strongly suspect that our reason for doing so is that magazines are so completely dependent on the operation of the mail that the statute would as a practical matter function to disallow magazines branded as indecent.<sup>149</sup> In such a case we might even go so far as to agree with Owen Fiss's observation that "the effect of a denial" of a subsidy "is roughly equivalent to that of a criminal prosecution."<sup>150</sup>

But this equivalence, if it exists, is practical, not theoretical. It derives from the particular way in which subsidies for second-class mailing privileges have infiltrated their social environment. We can easily imagine counterexamples. Consider, for instance, the Kennedy Center, which the federal government subsidizes to "present classical and contemporary music, opera, drama, dance, and other performing arts."<sup>151</sup> These criteria for the allocation of subsidies exclude political and academic speech. Such speech is of course public discourse, yet its dependence upon the Center is so slight that we would not be tempted to read the effects of the government's exclusions as "roughly equivalent to that of a criminal prosecution." We would interpret the exclusions instead as decision rules for the internal direction of the Center's administrators. The exclusions would be constitutionally characterized as instrumental regulations confined to a managerial domain, rather than as general regulations of public discourse.<sup>152</sup>

Cases of subsidized speech thus typically raise two independent issues of constitutional characterization. The first refers to the characterization of speech, and it requires us to determine whether subsidized speech is within public discourse or whether it is within some other constitutional domain. The second refers to the characterization of government action, and it requires us to determine whether standards allocating state subsidies should be regarded as conduct rules or as decision rules.

The characterization of government action entails judgments that are contextual and multidimensional. The nature of the action is certainly one factor to be considered. It matters whether a government allocation rule actually forbids behavior (like section 399 in *League of Women Voters*) or whether it simply constrains the provision of a subsidy (like the statute establishing the Kennedy Center). The former appears far more analogous to the regulation of conduct than the latter. Also relevant are the many considerations identified in the rich academic discussion of unconstitutional conditions doctrine. Seth Kreimer's herculean efforts to assess the allocation of government benefits by reference to the triple baselines of "history," "equality," and "prediction" strike me as indispensable.<sup>153</sup> Kreimer's baselines reveal, for example, how subsidies can come to be experienced like entitlements because they have become so integrated into the fabric of everyday life. The case of the traditional public forum illustrates how we tend to characterize standards allocating such "entitlements" as conduct rules.<sup>154</sup> Kathleen

Sullivan's magisterial explication of the ways in which the allocation of government benefits "determine the overall distribution of power between government and rightholders generally"<sup>155</sup> is equally indispensable. Sullivan's work underscores situations in which public discourse has become practically dependent upon government organizations. Thus the symbiotic connection of magazine publications to second-class mailing subsidies helps to explain why we tend to characterize the allocation of such subsidies as direct regulations of public discourse.

#### B. The Constitutional Distinction Between Conduct Rules and Decision Rules

We must decide, therefore, how the NEA "decency clause" should be characterized: as a conduct rule directly regulating public discourse or instead as a decision rule directing NEA officials to intervene in public discourse to achieve a distinct objective. It is noteworthy that the court in *Finley* does not explore this question. It instead merely assumes that because artistic expression is part of public discourse, the decency clause ought to be regarded as equivalent to the regulation of public discourse. The court characterizes the clause as an attempt "to suppress speech that is offensive to some in society."<sup>156</sup> *Finley* therefore uses standard First Amendment doctrines prohibiting vagueness and overbreadth to conclude that the clause is unconstitutional. The conclusion is indeed unobjectionable on the assumption that these doctrines are appropriately applied, but this assumption would not be correct if the decency clause were to be categorized as a decision rule for the guidance of NEA decisionmakers.

The doctrine of vagueness, for example, is not ordinarily enforced in the context of decision rules, for "(t)he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers."<sup>157</sup> This can be seen most dramatically in the context of the FCC, which is authorized by statute to grant, review, and modify licenses subject to the highly indeterminate standard of "public convenience, interest, or necessity."<sup>158</sup> It would surely be strange to hold that a "decency" standard is unconstitutionally vague, but that a "public interest" standard is not.

The *Finley* court's appeal to overbreadth theory would be similarly problematic if the decency clause were to be regarded as a decision rule. *Finley* correctly cites precedents standing for the proposition that conduct rules designed to censor indecent public discourse should be struck down as unconstitutionally overbroad.<sup>159</sup> These precedents, however, do not control with regard to decision rules that administer managerial domains. We know, for example, that within managerial domains, the Supreme Court has specifically upheld the proscription of "indecent" speech where it has deemed such regulation necessary for the accomplishment of legitimate purposes. The inculcation of "the habits and manners of civility" within a high school has been held to constitute one such purpose.<sup>160</sup> If the NEA decency clause is seen as a decision rule, the precise constitutional question posed, therefore, is whether the government can organize itself in order to intervene in public discourse so as to promote the value of decency. This is a difficult question that must be directly and substantively analyzed; it cannot be settled by offhand references to overbreadth.

This analysis suggests that significant constitutional consequences follow from the classification of the NEA decency clause as a conduct rule or as a decision rule. To conceptualize the clause as a conduct rule regulating public

discourse is to subject it to the usual First Amendment standards restricting such regulations. What is striking, however, is that these standards would render unconstitutional not merely the clause itself, but also the larger criterion of "artistic excellence." It would be flatly unconstitutional for the state to regulate public discourse in a way that penalizes art deemed insufficiently excellent.<sup>161</sup> Imagine, for example, a congressional statute that seeks to improve public culture by excluding from second-class mailing subsidies magazines with short stories deemed by the Postal Service inadequate when measured by a standard of "artistic excellence."

The most general statement of this point is that regulations of public discourse must meet stringent criteria of neutrality to ensure that public discourse is not subordinated to community values, and NEA grant criteria would be no exception. To conceptualize the criteria as regulations of public discourse would therefore probably impose upon the NEA the obligation to "parcel out its limited budget on a purely content-neutral, first-come-first-served basis as governments must do in allocating use of a public forum."<sup>162</sup> Such an obligation would create powerful disincentives for the investment of government support, because that support could no longer be oriented toward the advancement of specific values.<sup>163</sup>

First Amendment analysis would follow a very different trajectory, however, if we were to classify the NEA decency clause as a decision rule, which is to say as an internal policy guideline directing the NEA to intervene into public discourse to encourage and facilitate excellent art that is also decent.<sup>164</sup> The state may participate in public discourse to accomplish purposes that the First Amendment forbids the state from seeking to accomplish directly by regulating public discourse.<sup>165</sup> Thus the government can operate the Kennedy Center to encourage "music, opera, drama, dance, and other performing arts," although it could not directly regulate public discourse to accomplish the same end.<sup>166</sup> Even if the state cannot directly regulate public discourse so as "to ensure that a wide variety of views reach the public,"<sup>167</sup> the FCC can nevertheless constitutionally establish a managerial domain that includes broadcasters, and it can promulgate the fairness doctrine within that domain in order to serve the purpose of ensuring that "the public receive . . . suitable access to social, political, esthetic, moral, and other ideas and experiences."<sup>168</sup> Or, to bring the matter closer to the precise question that we are discussing, the state can surely intervene into public discourse to promote "excellent art," whether through the establishment of public orchestras or museums or through the provision of NEA grants, even if the government could not directly regulate public discourse to achieve that purpose.

So long as the allocation criteria for state subsidies are conceptualized as decision rules addressed to the administrators of state organizations, they can be justified by reference to a far broader array of purposes than would be permissible if they were regarded as conduct rules regulating public discourse.<sup>169</sup> The basic reason for this asymmetry is that the state is prohibited from imposing any particular conception of collective identity when it regulates public discourse,<sup>170</sup> but the state must perforce exemplify a particular conception of collective identity when it acts on its own account.<sup>1</sup> Just as the President can speak out in favor of a particular vision of community values,<sup>172</sup> so can the government organize itself through institutions to support and nourish that vision.

The constitutional importance of empowering the state to express and sustain shared beliefs is what I believe Chief Justice Rehnquist sought to express in his often-cited observation in *Regan* that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."<sup>173</sup> Although Rehnquist's formulation is unfortunately overbroad and decontextualized, the core of his insight is that when the government is authorized to act in its own name as a representative of the community, its decision to promote one value cannot by itself carry an internal constitutional compulsion simultaneously to support other values.<sup>174</sup>

It follows from this conclusion that viewpoint discrimination alone will never be a sufficient ground for striking down decision rules.<sup>175</sup> Whenever the state acts to support a particular conception of community identity, it will engage in viewpoint discrimination with respect to that conception. So, for example, if the NEA allocates grants to support artistic excellence, it must adopt a perspective about the meaning of that value; if the value is contested, the NEA's perspective will necessarily be viewpoint discriminatory from the standpoint of those who hold a different interpretation of the value.<sup>176</sup>

### C. First Amendment Limitations on Decision Rules

We now face something of a conundrum, however, for if decision rules that guide government interventions into public discourse can exemplify and advance particular community values, and if they can therefore discriminate on the basis of viewpoint, what general First Amendment limitations, if any, can be applied to them? The only plausible source for such limitations would lie in what I have elsewhere called the "collectivist" theory of the First Amendment, which was the basis of the Supreme Court's reasoning in *Red Lion*.<sup>177</sup> In that case the Supreme Court held that the constitutionality of the FCC's fairness doctrine should be assessed in terms of its consistency with "the ends and purposes of the First Amendment," which the Court defined in terms of the necessity to "preserve an uninhibited marketplace of ideas" and to ensure that the public "receive suitable access to social, political, esthetic, moral and other ideas and experiences."<sup>178</sup> Surely decision rules inconsistent with these ends and purposes ought to be unconstitutional.

*Red Lion*, however, involved the regulatory authority of the state. At issue was the FCC's promulgation of rules restricting the expression of broadcasters, albeit that the broadcasters' speech was itself regarded as outside of public discourse. Even on the assumption that direct managerial regulation of expression should be unconstitutional if it unduly constricts the diversity and vigor of broadcasters' speech,<sup>179</sup> it is not apparent how this conclusion can be translated to the context of decision rules that do not directly regulate speech but instead serve as guidelines for government intervention into public discourse.

Consider, for example, the difficulty we would face in applying the *Red Lion* standard to the subsidies at issue in *Finley*. In contrast to regulation, subsidies create speech. By hypothesis each subsidy that is awarded increases the absolute quantity of public discourse.<sup>180</sup> How, then, could granting subsidies ever be construed as constricting expression? To apply *Red Lion*, therefore, we would have to interpret the collectivist theory as prohibiting not merely the outright reduction of speech, but also the distortion of public discourse. Subsidies that emphasize one perspective or another, one value or another, might be thought to skew public discourse, to deform artificially its

natural diversity and spontaneous heterogeneity, and to be unconstitutional for these reasons.

The problem with this line of analysis, however, is that it is not obvious how to give useful content to the concept of "distortion" once it is accepted that the government may allocate grants to support particular values. Every government intervention in public discourse will change the nature of that discourse. If the state gives prize money to fund a competition for the best essay on environmental protection rather than on geography, or if it supports research on the history of America rather than on that of ancient Macedonia, or if it issues grants to excellent art, or to local art, or to performance art, it will have had both the purpose and effect of influencing the shape of public discourse. Such influence is the necessary consequence of abandoning the standards of content and viewpoint neutrality that we ordinarily impose on state regulations of public discourse.

We could attempt to circumvent this difficulty by arguing that while some kinds of distortion of public discourse are inevitable and tolerable, other kinds are not. Imagine, for example, if Congress were to enact a statute requiring the NEA to distribute grants only to art supportive of the party in control of Congress. Our immediate and strong intuition is that such a statute should be struck down as unconstitutional. Surely this intuition indicates that there are limits to the kinds of distortion that we would be willing to accept.

The constitutional grounds of this intuition, however, are somewhat puzzling. The intuition cannot rest merely on the fact that the goal and effect of the statute is to shape the content of public discourse, because uncontroversial allocation criteria also have these characteristics. NEA grants distributed on the basis of artistic excellence have exactly the purpose and effect of shaping the content of public discourse. Nor can the intuition rest on the notion that government action seeking to reaffirm the political status quo is presumptively unconstitutional, for the speech of government officials often has precisely this purpose, particularly during reelection campaigns.

Perhaps, then, our intuition rests on some ground of difference between government speech and government grants to private persons. The grounds for distributing the latter, we might say, must be reasonable, by which we mean that they must be justifiable by reference to some common value. Grants to achieve artistic excellence are reasonable because as a culture we share commitments to the worth of artistic merit. Grants to support research in history or to support the performance of opera are rational because we recognize and accept the value of these endeavors.

But what value would underwrite our hypothetical statute? It may advance the interests of the party in power to receive federally funded artistic support, but that is not a shared value. We value instead the fairness of the political process as a whole, which we sharply distinguish from the particular interests or preferences of specific parties who participate in that process. We may even go further and observe that awarding grants to art supportive of the political party in power would impair the fundamental fairness of the political process. Such grants might be thought analogous to purchasing votes.

These conclusions suggest that our intuition about the unconstitutionality of the hypothetical statute does not stem from any generic commitment to the vigor and diversity of public discourse, as in the collectivist theory articulated

in Red Lion, but rather from specific views about the distinct realm of partisan politics.<sup>181</sup> No doubt this realm embraces far more than simple contretemps between Republicans and Democrats; its boundaries may even include disputes that are (so to speak) foregrounded or framed for decision by an electorate or legislature.<sup>182</sup> We would certainly wish to place definite constitutional limitations on the power of government to dispense subsidies to intervene in such disputes, and we would probably express those limitations in terms of the distinction between preferences and values, and in terms of specifically political norms of fundamental fairness.

We can test this analysis by imagining a congressionally authorized prize to be awarded annually to the best "patriotic" work of art. Whatever we may ultimately conclude about the legitimacy of such a prize, it is fair to say that we would not strongly and immediately intuit that it should be unconstitutional. A decision rule allocating government subsidies to patriotic art, even though supportive of the political status quo, is in every material respect analogous to a decision rule allocating government subsidies to excellent art. Both artistic excellence and patriotism transcend the specifically political, because neither can be said to be disputable in a manner framed for decision; both embody shared values, not preferences; and neither would violate fundamental norms of political fairness. If the NEA decency clause were measured by these standards, I suspect that it would easily pass muster. Decency is not a matter of partisan politics. It is a shared value, not a preference. And the value of decency is not only consistent with fundamental norms of political fairness, it is in some respects presupposed by public discourse itself.<sup>183</sup>

We can learn from our examination of the hypothetical statute, then, that there are discrete pockets of constitutional concern that establish limits to the decision rules that may be used to allocate government subsidies. This is useful to know, and if we were to engage in a thorough canvass of the subject we would wish to search out these pockets and identify them. But this insight does not advance our effort to derive a general standard from the collectivist theory of Red Lion that will enable us to assess the constitutionality of specific decision rules.

The most significant and sustained effort to accomplish this task is by Owen Fiss in his recent book *The Irony of Free Speech*.<sup>184</sup> Fiss proposes a constitutional standard that would prohibit decision rules allocating government subsidies "in such a way as to impoverish public debate by systematically disfavoring views the public needs for self-governance."<sup>185</sup> The question, of course, is how such unconstitutional decision rules can be identified, and to his credit, Fiss directly confronts this issue. In doing so, however, he is drawn in two incompatible directions, so that his analysis ultimately offers a lesson quite different from that which he intends.

In certain moods Fiss embraces an ideal of government neutrality, which he strives to realize by proposing criteria for assessing managerial purposes that are defined in purely procedural terms.<sup>186</sup> He argues that the state ought to fund private speech based on its "relative degree of exclusion. . . . Arguably, all unorthodox ideas have claim under the First Amendment to public funding, but perhaps those most unavailable to the public have the greatest claim."<sup>187</sup> Fiss also contends that "financial need" ought to be an additional factor for constitutional consideration.<sup>188</sup>

The attraction of these procedural criteria is that they are content neutral. They depend upon an implicit egalitarian norm that would promote (something like) equal access for all ideas, and that would thus give extra assistance to ideas that are excluded because of their obscurity or lack of financial support. The source of this norm lies within the equal protection jurisprudence of which Fiss is an acknowledged master.<sup>189</sup> But that jurisprudence carries within it certain important assumptions. It presumes, for example, that the norm of equality is to be applied to units-like individuals or groups-that are finite in number. It also presumes that there is a metric of equality, whether it be "educational opportunity" or "dignity," with respect to which each of these units should be regarded as the equal of every other.

These assumptions, however, are inapplicable in the context of ideas. The number of potential ideas is infinite, not finite. This implies that a principle aspiring to provide equal access to all ideas is impossible either to conceive or to apply. Moreover, there is no common metric-whether it be called "opportunity for public discussion" or "intrinsic worth"-with respect to which each of these infinite ideas should be regarded as equal to every other. Many ideas that are "unavailable" for public consideration are excluded because they are long dead or decisively repudiated. No one would now take seriously ideas of human sacrifice, or phlogiston, or the droit du seigneur, and so forth, ad infinitum. When the government creates decision rules to allocate subsidies for speech, it need not and should not be under a constitutional obligation to resuscitate and subsidize each of these ideas merely because they are without financial support, excluded, or otherwise "unavailable to the public."

Meiklejohn was therefore quite incorrect to claim that there is an "equality of status in the field of ideas."<sup>190</sup> There is instead a constitutional equality of status among persons who propound ideas.<sup>191</sup> Because we believe in an equality of status among speakers, we do not permit the state to regulate public discourse so as to favor the contributions of some persons more than others, even if the state believes that the ideas of some are worthier of public attention or space on the public agenda.<sup>192</sup> But because we do not believe in an equality of status among ideas, we permit the government to advance and accentuate discrete and specific ideas when it itself speaks.<sup>193</sup>

Fiss is keenly aware of this difficulty, and he is consequently also drawn to content-based criteria for the constitutional assessment of decision rules for government subsidies. He believes that the First Amendment should require government officials affirmatively "to ensure the fullness and richness of public debate,"<sup>194</sup> and hence to make decisions "analogous to the judgments made by the great teachers of the universities of this nation every day of the week as they structure discussion in their classes."<sup>195</sup> Fiss fully recognizes that to fulfill this goal would require "a sense of the public agenda, a grasp of the issues that are now before the public and what might plausibly be brought before it, and then an appraisal of the state of public discourse."<sup>196</sup>

Fiss's proposal to evaluate decision rules for their affirmative contribution to the fullness and richness of public debate is flatly inconsistent with his proposal to evaluate decision rules based upon viewpoint neutral criteria, like those underlying a mechanical egalitarianism. If the agenda of public discourse were fixed, one might (perhaps) imagine a viewpoint neutral rule mandating ventilation of all sides of existing issues. But of course the agenda of public discourse is fiercely contested and controversial. Indeed, "(p)olitical conflict is not like an intercollegiate debate in which the opponents agree in advance

on the definition of the issues.... He who determines what politics is about runs the country, because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power."<sup>197</sup> To impose on government officials a constitutional duty to allocate subsidies based upon their sense of a proper public agenda is therefore to require them to adopt particular perspectives within intensely contested controversies.

This is not fatal, however, for we have already seen that decision rules are often and appropriately viewpoint-based. In fact, a constitutional standard mandating that decision rules for the allocation of subsidies be evaluated according to their effect on ensuring the quality of public discourse seems to me theoretically and constitutionally attractive. The only question that it raises, and it is not an insignificant question, is how such an affirmative standard could institutionally be applied by courts. Decisions to disburse subsidies are always made in the context of scarcity, and they are highly polycentric.<sup>198</sup> Subsidies can be granted according to a virtually infinite set of possible criteria. Even if a given set of criteria is accepted, there are innumerable potential grantees and limitless permutations by which funds may be distributed among any particular set of grantees.

In such circumstances Fiss's proposed standard could not plausibly function as a set of determinate restrictions on government action; it would instead have to be conceived as an aspirational goal toward which government officials should aim. From the perspective of a reviewing court, therefore, the standard would require judicial evaluation of whether the goal could have been better achieved through a different set of allocation rules. As this will always be the case, the adoption of Fiss's proposed standard would lead either to substantial judicial preemption of, or substantial judicial deference to, decision rules for allocating subsidies.

Given these choices, it is readily predictable that courts will choose the latter option. They would be right to do so, for judicial preemption of the allocation criteria for government subsidies would itself operate as a significant disincentive to government investment in subsidies. Imagine, for example, what a court would actually do if the NEA budget were slashed to ten million dollars, and if Congress were to decide that the entire budget ought to be devoted to opera, or to museum outreach programs, or to innovative ballet companies, or to some combination of the three. No matter what selection Congress makes, it will always be possible for a court legitimately to reason that public discourse could have been made richer by a different choice. If courts were routinely to take advantage of this fact to alter congressional funding priorities for the NEA, it is unlikely that Congress would long continue to support the NEA.

Fiss seems to assume that, contrary to this analysis, he has created a standard that will operate as a determinate restriction on government decision rules. He writes that allocation criteria like "family values" would be facially unconstitutional because of their "pernicious effects on debate by simply reinforcing orthodoxy."<sup>199</sup> But Fiss's reasoning in these passages relies on the mechanical, content-neutral norm of egalitarianism which I have argued must be abandoned as both theoretically and practically inadequate. Once the viewpoint discrimination entailed by Fiss's affirmative standard is firmly assimilated, it is not at all clear how a court could decide that the criterion of "family values" should be set aside as obviously unconstitutional. If Congress were to conclude that public debate would be enriched if greater attention were to be

paid to the commonly shared values of the nuclear family—for example, by funding art on "children of divorce"—a court would have neither more nor less grounds on which to disagree than if Congress were to decide that the NEA ought to devote its entire (reduced) budget to opera.

The fact that family values are popular and commonly shared, or, in Fiss's demeaning term, "orthodox," would not be grounds for abandoning a posture of judicial deference because, as we have seen, these attributes are precisely what authenticate the government's support of family values as reasonable and legitimate. Allocation criteria that are idiosyncratic and without roots in a common culture would be vulnerable to the charge of arbitrariness. If a congressional statute were to mandate that the NEA award grants only to redheaded artists, a court might well move beyond deference to strike down the statute as irrational. But the court's ruling would actually depend upon its perception that the statute could not be justified by reference to shared and "orthodox" values.

These considerations suggest that even if Fiss's proposed affirmative standard were accepted—and I think that it should be—courts could not and should not use it to set aside decision rules for allocating subsidies except in extreme and marginal cases.<sup>200</sup> Subsidies that literally overwhelm public discourse, that seriously rupture foundational notions of a functioning marketplace of ideas, can and should be set aside. But these will, by definition, be highly exceptional circumstances. It is in fact most likely that courts will recognize such exceptional circumstances not by reference to the affirmative standard of a rich public discourse, but rather by the negative criterion that Mark Yudof long ago articulated, which identifies the fear that government decision rules will operate "to falsify consent" by fashioning "a majority will through uncontrolled indoctrination activities."<sup>201</sup> But whichever way the problem is analyzed—whether from the perspective of a public discourse that is insufficiently rich or from one that is artificially narrow—the NEA decency clause does not appear to constitute the kind of rare and exceptional case that would or should be found unconstitutional.<sup>202</sup>

#### D. The NEA Controversy Revisited: The Conflict Between Democratic Self-Governance and Community Self-Definition

It seems, then, that we are faced with the unpalatable choice of either placing the NEA in a constitutional straitjacket or else liberating it to engage in a wide range of content-based interventions—interventions that many of us may find both misguided and offensive. We do not appear to have the option of picking and choosing, of constitutionally constraining the NEA to decision rules that we happen to find amenable or of constitutionally empowering the NEA to promulgate conduct rules that we happen to find wise.

It is worth pausing for a moment to reflect upon why we must choose between these unattractive options. "The fault," as Shakespeare might have remarked, "is not in our stars, (b)ut in ourselves."<sup>203</sup> It is precisely because we wish to use the First Amendment to establish a realm of public discourse in which persons are regarded as autonomous and self-determining that we impose strict constitutional requirements of neutrality on state regulation of public discourse. And it is precisely because we wish our government to exemplify and to advance the particular norms of our community that we relax these requirements when the state is acting on its own account to support the nation's arts.

We face, in other words, a conflict between two constitutional values: that of democratic self-governance and that of community self-definition.<sup>204</sup> It is the function of constitutional law systematically to describe the internal architecture of values like these, to embody that architecture in social space, to articulate its practical ramifications, and, in cases of conflict between values, to adjudicate their proper boundaries.<sup>205</sup> To characterize the decency clause as a decision rule or as a conduct rule is, in effect, to fix the boundary between two constitutional values.<sup>206</sup>

Where we set that boundary will depend in part upon the manner in which the decency clause affects the production of art within the public discourse enveloping the NEA. We would be more likely to classify the clause as a conduct rule, and hence to subject it to the constraints of a constitutional regime of democratic self-governance, if we were to regard the clause as imposing community norms on public discourse. Conversely, we would be more likely to classify the clause as a decision rule—and hence to be constitutionally legitimized, if we were to view the clause as merely encouraging a shared and important community value.

A brief review of the evidence suggests an ambiguous picture. Unlike section 399 in *League of Women Voters*, the decency clause does not prohibit behavior; it merely regulates the availability of subsidies. Although the NEA is a relatively new organization, some artists may have begun to feel entitled to its subsidies; but this sense of entitlement does not seem to be shared by the general public.<sup>207</sup> Although the NEA is an important and influential player in the world of art production, the actual extent of this world's practical dependence on the NEA is uncertain.<sup>208</sup>

To this equivocal evidence must be added one further consideration: The constitutional consequences of characterizing the decency clause as a conduct rule are dramatically disabling. Such a characterization would impose on the NEA crippling requirements of content neutrality, requirements that would provide strong disincentives for congressional support. Because I set a high value on encouraging and empowering the government to establish institutions designed to further norms like artistic excellence, I would myself lean toward giving ample scope to the value of community self-definition in the context of NEA subsidies, and I would therefore be quite cautious in characterizing the decency clause as a conduct rule.

It is not my intention, however, to press these preliminary observations toward definitive conclusions. My point is instead to stress that a full understanding of the legal dimensions of the NEA controversy will require a strong grasp of the importance and implications of the characterization of government action. Whether courts ultimately come to regard the NEA decency clause as a conduct rule or as a decision rule, their decision ought to be informed by a comprehension of the constitutional significance and consequences of this characterization.

#### IV. CONCLUSION

At the beginning of this Essay, I observed that the doctrines of unconstitutional conditions and viewpoint discrimination are incoherent because they are excessively abstract and formal, detached from the actual levers of decision. We can now summarize the jurisprudential causes of this observation.

First Amendment rights of freedom of expression are methods of structuring legal interventions that define and enforce the consequences of constitutional values. Because these values are particular to specific social domains, so are First Amendment rights.<sup>209</sup> The doctrines of unconstitutional conditions and viewpoint discrimination, however, purport to apply universally, to control all aspects of social space. When courts are asked to employ the doctrines in situations where the doctrines do not correspond to relevant constitutional values, courts must deform and evade the doctrines, twisting them into ever more confused, arbitrary, and irrelevant shapes.

To rehabilitate First Amendment doctrine means to fashion it to address the actual values that move our constitutional decisionmaking. Even then doctrine may not compel specific outcomes in particular cases. What we have a right to expect from doctrine is that it force us to confront and to clarify the constitutional values that matter to us. My ambition in this Essay is to have articulated in cases of subsidized speech two doctrinal inquiries that seem to me useful in this way. The first involves the characterization of speech, and it requires us to determine the domain to which the subsidized speech at issue in a particular case should be assigned. We must decide whether to classify subsidized speech as within public discourse or as within some other domain like that of management or professional speech. As we locate subsidized speech in social space, so we identify the constitutional value that we attach to the speech and the concomitant set of constitutional constraints that we will apply to its regulation.

The second inquiry involves the characterization of government action, and it requires us to determine whether the standards allocating government subsidies should be understood as regulations of subsidized speech or instead as internal directives to state officials dispensing subsidies. If we classify the standards as regulations, we shall subject them to the full array of constitutional constraints required by the domain in which the subsidized speech is located. But if we instead regard the standards as internal directives, we shall cede to the government a far freer hand in exemplifying and advancing national values.

Footnote:

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1. *Stromberg v. California*, 283 U.S. 359, 369 (1931).
2. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).
3. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).
4. Steven Shiffrin, in *Government Speech*, 27 *UCLA L. REV.* 565, 569-70 (1980), credits Laurence Tribe and Mark Yudof for most prominently noting this proposition. See also Laurence Tribe, *Toward a Metatheory of Free Speech*, 10 *Sw. U. L. REV.* 237, 244-5 (1978); Mark Yudof, *When Governments Speak: Toward a*

Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863 (1979).

Footnote:

5. I do not, of course, mean to imply that these two questions of social characterization exhaust the constitutional issues that can be posed by cases of subsidized speech. I mean only to claim that such cases will, at a minimum, require a response to these two questions.

6. For a general discussion, see Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

7. William T. Mayton, "Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments, 3 WM. & MARY BILL RTS. J. 373, 376 (1994); see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 682 (1992); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 544-45 (1995); Michael J. Elston, Note, *Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art*, LAW & CONTEMP. PROBS., Summer 1993, at 327, 333, 341-42, 358; Gary Feinerman, Note, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369, 1378 (1991); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185, 196 (1992). See generally RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 183 (1992).

8. 468 U.S. 364 (1984).

Footnote:

9. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 6-10 (1995).

10. 115 S. Ct. 2510 (1995).

11. 500 U.S. 173 (1991).

12. See POST, *supra* note 9, at 4-6.

13. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

14. For a full discussion, see POST, *supra* note 9, at 188-89, 280-82. The public/private distinction, of course, bears many different kinds of meanings, only one of which I am exploring here.

15. See Robert Post, *Between Democracy and Community: The Legal Constitution of Social Form*, 35 NOMOS 163 (John W. Chapman & Ian Shapiro eds., 1993).

16. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

Footnote:

17. See Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1128-33 (1993).

18. See *id.* at II 111-19.

19. See Post, *supra* note 6, at 1277.

20. On the boundaries of public discourse, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 667-84 (1990).

21. On the highly contextualized nature of such judgments, see *id.*

22. 115 S. Ct. 2510 (1995).

Footnote:

23. *Id.* at 2518-19 (citations omitted).

24. *Id.* at 2518; see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 12-4, at 807-OS (2d ed. 1988); Cole, *supra* note 7, at 702-04 (enumerating justifications for government-supported speech). But cf. JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 106-07 (1995). I defer to Part III the question of whether the First Amendment places any constraints on government expression of such viewpoints.

25. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

26. 408 U.S. 593 (1972).

Footnote:

27. *Id.* at 597.

28. See Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 388-93 (1995).

29. Sullivan, *supra* note 25, at 1415; see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1921 (1995) (discussing indirect limitations of state powers under Tenth Amendment).

30. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359-74 (1984); Sullivan, *supra* note 25, at 1489.

31. Sullivan, *supra* note 25, at 1490.

32. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620 (1990); see also William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 244 (1989) (analyzing doctrine in relation to religion clauses).

## Footnote:

33. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).
34. *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (citations omitted).
35. See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946); see also *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (finding public campaign financing permissible subsidy); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 234-35 (1983) (listing examples of government speech subsidies).
36. See *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding First Amendment limits Congress's power to regulate mail); see also *United States v. Van Leeuwen*, 397 U.S. 249, 251-52 (1970); *Sherbert v. Verner*, 374 U.S. 398, 404-OS (1963); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-56 (1946); *Tollett v. United States*, 485 F.2d 1087, 1090 (8th Cir. 1973); *O'Brien v. Leidinger*, 452 F. Supp. 720, 725 (E.D. Va. 1978); *United States v. Lethe*, 312 F Supp. 421, 425-26 (E.D. Cal. 1970).
37. 461 U.S. 540, 549 (1983). Justice Rehnquist did observe 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 (citations omitted). However, as the examples offered in the following paragraph in the text indicate, constitutional restraints on governmental use of subsidies to regulate speech in public discourse would apply to discrimination that is content-based as well as viewpoint-based.

## Footnote:

38. Cf. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (invalidating state prohibition of policy-oriented speech on monthly bills of public utilities).
39. For a good discussion of government participation in the system of freedom of expression, see *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114-21 (1973); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 697-716 (1970). On the extreme difficulty of these questions, see Shiffrin, *supra* note 4, at 572-605; Yudof, *supra* note 4, at 871-72. The obvious differences between the speech of private persons and the speech of the state have recently featured prominently with respect to the Court's Establishment Clause jurisprudence, which has tended to stress, as Justice O'Connor has put it, the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2522 (1995) (applying *Mergens* distinction).
40. *First Amendment Implications of the Rust v. Sullivan Decision: Hearing on First Amendment Implications of the Rust v. Sullivan Decision Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 102d Cong. 11 (1991) (hereinafter *Hearings*) (statement of Leslie H. Southwick, Deputy Ass't Att'y Gen., Civil Div., U.S. Dep't of Justice).

41. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding acts of privately operated school whose income is derived primarily from public sources are not state action); *Polk County v. Dodson*, 454 U.S. 312 (1981) (holding that public defender's actions do not constitute state action).

42. 395 U.S. 367 (1969).

43. See *FCC v. National Citizens' Comm. for Broad.*, 436 U.S. 775, 800 (1978).

Footnote:

44. *Red Lion*, 395 U.S. at 388.

45. *Id.* at 394.

46. *Id.* at 389.

47. See *id.* at 389-90.

48. *Id.* at 390.

49. 412 U.S. 94 (1973).

50. Such an outcome, Chief Justice Burger noted, would subordinate "(j)ournalistic discretion" to "the rigid limitations that the First Amendment imposes on Government." *Id.* at 121. Other Justices noted that it would convert broadcasters into "common carriers" and "thus produce a result wholly inimical to the broadcasters' own First Amendment rights." *Id.* at 140 (Stewart, J., concurring); see also *id.* at 149-65 (Douglas, J., concurring). Justices White, Powell, and Blackmun did not reach the question of state action. See *id.* at 146-48. Justices Brennan and Marshall would have found that the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives. *Id.* at 173 (Brennan, J., dissenting).

Footnote:

51. *Id.* at 120.

52. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)); see also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

53. *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981); see also *id.* at 396.

54. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); cf. *Herbert v. Lando*, 441 U.S. 153 (1979) (analyzing proposed privilege under substantive First Amendment doctrine).

55. 468 U.S. 364 (1984).

56. *Id.* at 366.

57. *Id.* at 416 (Stevens, J., dissenting); see also *FCC v. National Citizens' Comm. for Broad.*, 436 U.S. 775, 801-02 (1978).

## Footnote:

58. *League of Women Voters*, 468 U.S. at 378 (citations omitted). Brennan's position represents an impli

cit reversal of his earlier opinion in *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973).

59. *League of Women Voters*, 468 U.S. at 382 (citation omitted).

60. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

61. See 412 U.S. at 149-50 (Douglas, J., concurring).

62. See *id.* (Douglas, J., concurring).

63. *League of Women Voters*, 468 U.S. at 388-89.

## Footnote:

64. *Id.* at 389.

65. *Id.* at 394. For a good discussion of the success of this insulation, see YUDOF, *supra* note 35, at 124-35.

66. For a cross-cultural perspective on this characterization, see MONROE E. PRICE, *TELEVISION: THE PUBLIC SPHERE AND NATIONAL IDENTITY* 35 (1995).

67. *League of Women Voters*, 468 U.S. at 392.

68. See *id.* at 384.

69. See *id.* at 392-93.

70. *Id.* at 396.

71. See *id.* at 391, 396.

72. *Id.* at 395.

## Footnote:

73. *Id.* at 403 (Rehnquist, J., dissenting).

74. 461 U.S. 540 (1983).

75. *League of Women Voters*, 468 U.S. at 405.

76. See *supra* notes 35-38 and accompanying text; cf *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983) (holding that use tax on ink and paper targeting small group of newspapers "places a heavy burden on the State to justify its action"). Strict scrutiny would occur

"even where . . . there is no evidence of an improper censorial motive."  
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987).

77. In the case of broadcasters, for example, the rationale of scarcity, upon which the Court has repeatedly relied, is now surely no more than a fiction. See LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 200-09 (1987). Even the Court has itself come close to admitting this. See *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994); *League of Women Voters*, 468 U.S. at 376 n. 11. This implies that the actual rationale for characterizing broadcasters as public trustees has not yet been articulated by the Court.

78. See Post, *supra* note 20, at 667-84.

79. Although the scarcity rationale presents itself as a simple empirical fact, that fact cannot, even if true, itself explain the special quasi-public status conferred on broadcasters. All that follows from scarcity is that the state must find some allocation rule to distribute scarce broadcast frequencies. One possible allocation would be to sell frequencies on the open market, just as the government sells scarce state-owned land. The owners of frequencies would then be regarded as purely private speakers. Such a scenario is surely possible, which indicates that its rejection must turn on normative considerations rather than on the bare fact of scarcity.

Footnote:

80. See, e.g., Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

81. See POST, *supra* note 9, at 4-6, 10-15.

82. See Post, *supra* note 80, at 1767-75.

83. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 318 (1990) (analyzing instrumental regulation of speech within universities).

84. See Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 201-06 (analyzing instrumental regulation of speech within court system).

85. See *Brown v. Glines*, 444 U.S. 348, 354 (1980).

86. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)); see Post, *supra* note 80, at 1814 n.351.

87. For a more detailed analysis of the management of speech within government institutions, see Post, *supra* note 80, at 1767-84.

88. For a theoretical discussion of viewpoint discrimination in nonpublic forums, see *id.* at 1824-32.

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89. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2147-48 (1993); *Regan v. Taxation with Representation*, 461 U.S. 540,

548 (1983); SMOLLA, *supra* note 7, at 184.

90. 115 S. Ct. 2510 (1995).

91. *Id.* at 2519.

92. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981); cf. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") (citation omitted). For a fuller analysis of free speech within the university, see Post, *supra* note 83, at 317-25.

93. *Rosenberger*, 115 S. Ct. at 2516-17.

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94. *Id.* at 2517.

95. See Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 218 (1982); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197-200 (1983); Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1692 (1995).

96. *Rosenberger*, 115 S. Ct. at 2517. The difference between viewpoint and content discrimination is, in Justice Kennedy's account, intrinsically unstable and therefore always potentially arbitrary. References to religious speech may refer to either content or viewpoint discrimination, depending upon the circumstances that are deemed salient. In the context, say, of a course on the history of religious thought, the category of "religious speech" may refer merely to the meaning of speech. But in the context of a dispute between advocates of evolution and partisans of creationism, the category may refer to a particular viewpoint. It is not the category of religious speech that is determinative, therefore, but the social situation in which the category is deployed. As Elena Kagan rightly observes:

The very notion of viewpoint discrimination rests on a background understanding of a disputed issue. If one sees no dispute, one will see no viewpoints, and correspondingly one will see no viewpoint discrimination in any action the government takes. Similarly, how one defines a dispute will have an effect on whether one sees a government action as viewpoint discriminatory.

Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SuP. CT. REV. 29, 70 (footnote omitted). The problem with Justice Kennedy's opinion is that he does not explain how to characterize the social situation in which a regulation is to be categorized as either viewpoint-based or content-based.

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97. There is some language in the opinion that suggests the Court might also have had in mind that the student speech supported by the grants was part of

public discourse and that the grant program was therefore not part of the managerial operation of the University. The Court refers repeatedly to the "distinction between the University's own favored message and the private speech of students." *Rosenberger*, 115 S. Ct. at 2519. But this characterization of the grant program is contrary to the University's own assertion that the grants were designed "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" *Id.* at 2514 (citation omitted). In fact, the University of Virginia would have a good deal of explaining to do to the taxpayers of the state were its program not fashioned to further the University's actual educational relationship with its students.

A more plausible explanation of the Court's underlying logic, therefore, is that the Court interpreted the actual justification for the University's exclusion of religious speech to rest on the University's desire to avoid violating the Establishment Clause. The Court's holding that the Establishment Clause would not be violated by grants subsidizing religious speech removed this rationale, see *id.* at 2420-24, leaving the exclusion without managerial justification and hence vulnerable to characterization as viewpoint discrimination.

98. I have sketched the outlines of such an analysis elsewhere. See Post, *supra* note 83, at 317-25.

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99. Fitzpatrick, *supra* note 7, at 185.

100. 500 U.S. 173 (1991).

101. See Hearings, *supra* note 40.

102. See Cole, *supra* note 7, at 684 n.34.

103. For a sample of academic commentary critical of the Rust decision, see SMOLLA, *supra* note 7, at 218-19; Cole, *supra* note 7; 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); Fitzpatrick, *supra* note 7; Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue, 46 RUTGERS L. REV. 1473, 1579-1612 (1994); 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); Thomas Wm. Mayo, Abortion and Speech: A Comment, 46 SMU L. REV. 309 (1992); 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); Loye M. Barton, Note, The Policy Against Federal Funding for Abortions Extends into the Realm of Free Speech After Rust v. Sullivan, 19 PEPP. L. REV. 637 (1992); Ann Brewster Weeks, Note, The Pregnant Silence: Rust v. Sullivan, Abortion Rights, and Publicly Funded Speech, 70 N.C. L. REV. 1623 (1992). But see William W. Van Alstyne, Second Thoughts on Rust v. Sullivan and the First Amendment, 9 CONST. COMMENTARY 5 (1992).

104. Rust, 500 U.S. at 178 (quoting 42 U.S.C. 300a-6 (1991)).

105. Id. at 179 (quoting Grants for Family Planning Services, 42 C.F.R. 59.8(a)(1) (1989)).

106. Id. at 180 (quoting Grants for Family Planning Services, 42 C.F.R. 59.10(a) (1989)). The regulations were suspended at the direction of President Bill Clinton in 1993. Clinton observed that the regulations "endanger() women's lives and health by preventing them from receiving complete and accurate medical information and interfere() with the doctor-patient relationship by prohibiting information that

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medical professionals are otherwise ethically and legally required to provide to their patients." William J. Clinton, President's Memorandum on the Title X "Gag Rule," 1993 PUB. PAPERS 10 (Jan. 22, 1993).

107. Rust, 500 U.S. at 196.

108. Id. at 197.

109. Id. at 193; see also id. at 195 n.4 ("The regulations are designed to ensure compliance with the prohibition of 1008 that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning.").

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110. Id. at 192 (quoting Brief for Petitioners at II, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 891391)). This was also the basis of much criticism of Rust. See, e.g., Hearings, supra note 40, at 19 (statement of Lee C. Bollinger) ("It is one of the most deeply held principles of the First Amendment that the government not discriminate on the basis of viewpoint, and that is what the regulation at issue in Rust v. Sullivan does."); see also Weeks, supra note 103, at 165862 (condemning Rust for viewpoint discrimination).

111. Rust, 500 U.S. at 194.

112. See Cole, supra note 7, at 688 n.47; Wells, supra note 103, at 1730-32; Weeks, supra note 103, at 1661-62.

113. See supra Section I.A.

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114. For arguments that they are not, see Redish & Kessler, supra note 7, at 576-77; Shane, supra note 103, at 1601-03. For the Court's argument to the contrary, see Rust, 500 U.S. at 192-93.

115. Post, supra note 80, at 1789 (footnote omitted). The argument of this and the following paragraph is fully developed in id. at 1788-809.

116. See id.

117. *Leach v. Carlile*, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting).

118. *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

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119. See PETER M. BLAU & W. RICHARD SCOTT, *FORMAL ORGANIZATIONS* 62-63 (1962); see also ROY G. FRANCIS & ROBERT C. STONE, *SERVICE AND PROCEDURE IN BUREAUCRACY* 154-56 (1956) (discussing competing principles of bureaucracy and professionalism).

120. For a good discussion, see W. Richard Scott, *Professionals in Bureaucracies-Areas of Conflict*, in *PROFESSIONALIZATION* 265-75 (Howard M. Vollmer & Donald L. Mills eds., 1966).

121. *Id.* at 266.

122. *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (citations omitted) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976)).

123. *West v. Atkins*, 487 U.S. 42, 51 (1988).

124. "Medical ethics as well as medical practice dictate independent judgment . . . on the part of the doctor." Paul D. Rheingold, *Products Liability-The Ethical Drug Manufacturer's Liability*, 18 *RUTGERS L.J.* 947, 987 (1964); cf. FRANCIS & STONE, *supra* note 119, at 156 (arguing that in professional mode of

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organization highly skilled professionals must be responsible for their decisions and able to perform on their own).

125. *Lurch v. United States*, 719 F.2d 333, 337 (10th Cir. 1983) (quoting *PRINCIPLES OF MEDICAL ETHICS* 6, reprinted in *AMERICAN MED. ASS'N JUDICIAL COUNCIL, OPINIONS AND REPORTS* 5 (1977)). The physician's duty to exercise independent judgment ultimately stems from the basic principle that "(t)he patient's welfare and best interests must be the physician's main concern. . . . The physician's obligations to the patient remain unchanged even though the patient-physician relationship may be affected by the health care delivery system or the patient's state." *American College of Physicians Ethics Manual* (3d ed.), reprinted in 117 *ANNALS INTERNAL MED.* 947, 948 (1992) (hereinafter *Ethics Manual*); see also Council on Ethical and Judicial Affairs, *Am. Med. Ass'n, Ethical Issues in Managed Care*, 273 *JAMA* 330, 331 (1995) ("The foundation of the patient-physician relationship is the trust that physicians are dedicated first and foremost to serving the needs of their patients.").

126. *Quilico v. Kaplan*, 749 F.2d 480, 484-85 (7th Cir. 1984); accord *Ezekiel v. Michel*, 66 F.3d 894, 902 (7th Cir. 1995) ("(E)ach and every licensed physician . . . must fulfill his ethical obligations to exercise independent judgment when providing treatment and patient care . . ."); *Lilly v. Fieldstone*, 876 F.2d 857, 859 (10th Cir. 1989) ("It is uncontroverted that a physician must have discretion to care for a patient and may not surrender control over certain medical details."); *Kelley v. Rossi*, 481 N.E.2d 1340, 1343 (Mass. 1985) (affirming importance of physician discretion). Justice Holmes, with

characteristic pith, stated the point in this way: "There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer." *Pearl v. West End St. Ry.*, 176 Mass. 177, 179 (1900).

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127. It is clear that there is a potential conflict between the HHS regulations and ethical medical practice. Doctors are under an "ethical duty to disclose relevant information about reproduction . . . . (T)he physician does have a duty to assure that the patient is offered information on the full range of options . . . .Ethics Manual, supra note 125, at 950. "A pregnant woman should be fully informed in a balanced manner about all options, including raising the child herself, placing the child for adoption, and abortion. . . . The professional should make every effort to avoid introducing personal bias." AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS (ACOG), STATEMENT OF POLICY 2 (Jan. 1993); see ACOG, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 61 (1989); ACOG, STATEMENT OF POLICY: FURTHER ETHICAL CONSIDERATIONS IN INDUCED ABORTION 3 (Dec. 1977); COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS

8.08 (1994) ("The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.").

The Court's assertion that "the Title X program regulations do not significantly impinge upon the doctor-patient relationship," *Rust v. Sullivan*, 500 U.S. 173, 200 (1991), can properly be said to border on the "disingenuous." *Cole*, supra note 7, at 692; see *Rust*, 500 U.S. at 211 n.3 (Blackmun, J., dissenting). The Court supports its assertion on two grounds. It states, first, that the HHS regulations do not require "a doctor to represent as his own any opinion that he does not in fact hold." *Rust*, 500 U.S. at 200. While this may be true, the regulations do prevent doctors from offering information that may be medically relevant and necessary to disclose. The Court states, second, that 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." *Id.* This assertion, however, merely assumes what must be demonstrated, which is that the physician-patient relationship within a Title X clinic is so obviously

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subordinated to managerial imperatives that it no longer conforms to ordinary understandings of that relationship. Although such an alteration is certainly possible, it is also most unusual, and the Court offers no evidence to support its claim that it has occurred within Title X clinics. A modicum of social awareness would surely dictate a different conclusion. See *Cole*, supra note 7, at 692; *Roberts*, supra note 103, at 598-600.

128. That is not to say, of course, that the government would be barred from creating special clinics in which all concerned were clear that what appeared at first blush to be "physicians" were actually merely state employees, fully subject to an administrative direction competent to override good and ethically required medical practice. The First Amendment would not constitutionally prohibit such a scheme. What the First Amendment forbids is the attempt to

hire what all concerned understand to be physicians and then to attempt to regulate their speech as though they were merely employees.

129. I realize that this distinction is a matter of degree, because good medical practice often requires the provision of information. As used in this Essay, however, the distinction goes primarily to the justification for government regulation.

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130. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334, 355-59 (1991); Wells, *supra* note 103, at 1764 ("If the First Amendment stands for anything, it stands for the principle that the government cannot 'deliberately deny() information to people for the purpose of influencing their behavior.'" (quoting Strauss, *supra*, at 355)); see also 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507-08, 1510-14 (1996) (plurality opinion).

131. See Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 *B.U. L. REV.* 201 (1994); Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 *WM. & MARY BILL RTS. J.* 787, 852-74 (1996).

132. Nor did the government suggest any other justification for the Title X regulations. See Brief for Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991) (No. 89-1391).

133. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

134. The Court in *Rust* repeatedly refers to *Maher v. Roe*, 432 U.S. 464 (1977), as standing for the proposition that the state can choose to subsidize "services related to childbirth" but not "nontherapeutic abortions," because "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" *Rust*, 500 U.S. at 192-93 (quoting *Maher*, 432 U.S. at 474 (omission in original)). The argument in this Essay is not inconsistent with this proposition; it merely requires us to make the distinction between government decisions refusing to fund the medical practice of abortion, because childbirth is viewed as a positive good, and government decisions

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precluding the dissemination of information about abortion, because abortion is viewed as a positive harm. For an interesting discussion of abortion as a "vice," see Wells, *supra* note 103, at 1758-62.

135. For a sample of the literature discussing the NEA controversy, see Cole, *supra* note 7, at 73943 (arguing that NEA funding restrictions undermine First Amendment); Elizabeth E. DeGrazia, *In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts*, 12 *CARDOZO ARTS & ENT. L.J.* 133 (1994) (suggesting structural reforms to grantmaking authority of NEA); Owen M. Fiss, *State Activism and State Censorship*, 100 *YALE L.J.* 2087 (1991) (analyzing exercise of state power in context of Mapplethorpe controversy and NEA); John E. Frohnmayer, *Giving Offense*, 29 *GONZ. L. REV.* I (1993-94) (discussing NEA

controversy); Jesse Helms, *Tax-Paid Obscenity*, 14 NOVA L. REV. 317 (1990) (same); Robert M. O'Neil, *Artistic Freedom and Academic Freedom*, LAW & CONTEMP. PROBS., Summer 1990, at 177 (criticizing NEA funding restrictions as violation of freedom of expression); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209 (1993) (analyzing meaning of "content" in context of NEA controversy); Lionel S. Sobel, *First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist*, 41 VAND. L. REV. 517 (1988) (arguing that First Amendment imposes standards by which courts may evaluate constitutionality of government subsidies of cultural and artistic expression); Sunstein, *supra* note 32, at 610-15 (analyzing First Amendment implications of government funding of arts); MaryEllen Kresse, *Comment, Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?*, 39 BUFF. L. REV. 231 (1991) (analyzing Mapplethorpe controversy); George S. Nahitchevansky, *Note, Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like*, 56 BROOK. L. REV. 213 (1990) (arguing that funding decisions should be accorded higher standard of review as their restrictive effect increases); cf. Alvara Ignacio Anillo, *Note, The National Endowment for the Humanities: Control of Funding Versus Academic Freedom*, 45 VAND. L. REV. 455 (1992) (discussing similar issues surrounding National Endowment for the Humanities grants to scholars).

## Footnote:

136. 20 U.S.C. 953(b) (1994).

137. *Id.* 954(c).

138. *Id.* 954(d).

139. *Note, Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969, 1972 (1990).

140. Fiss, *supra* note 135, at 2094. For a good description, see DeGrazia, *supra* note 135, at 139-41.

141. In 1989, Congress passed a temporary restriction on grants funded during fiscal year 1990, providing that grants could not be extended to support work "which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." Act of Oct. 23, 1989, Pub. L. No. 101-121, 304(a), 103 Stat. 701, 741 (1990). The certification procedure used by the NEA to enforce the restrictions of this section was declared unconstitutional in *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

142. 20 U.S.C. 954(d)(1) (1994). The statute also declared that "obscenity is without artistic merit, is not protected speech, and shall not be funded." *Id.* 954(d)(2). For a good history of these events, see John H. Garvey, *Black and White Images*, LAW & CONTEMP. PROBS., Autumn 1993, at 189 (1993). In this Essay I do not examine the restrictions on NEA granting authority imposed by 954(d)(2).

143. 795 F. Supp. 1457 (C.D. Cal. 1992). An appeal of Finley is still pending.

144. *Id.* at 1476.

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145. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 115 S. Ct. 2338, 2345 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

146. To paraphrase Laurence Tribe, it is not clear whether the decency clause is an instance of the government's adding its own voice or whether it is an example of the state's silencing the voices of others. See *TRIBE*, *supra* note 24, at 807.

147. JEFFREY PFEFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS* 32 (1978).

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148. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984). Kathleen Sullivan uses the vocabulary of "sovereign regulator" and "private art patron" to capture this distinction. See Kathleen M. Sullivan, *Artistic Freedom, Public Funding, and the Constitution*, in *PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS* 80, 82 (Stephen Benedict ed., 1991).

149. Cf. Milton C. Cummings, Jr., *To Change a Nation's Cultural Policy: The Kennedy Administration and the Arts in the United States, 1961-1963*, in *PUBLIC POLICY AND THE ARTS* 141, 141 (Kevin V. Mulcahy & C. Richard Swaim eds., 1982) (claiming that second-class postal rate was "profoundly important for" and "a major cause of" growth of American magazines).

150. *Fiss*, *supra* note 135, at 2097.

151. 20 U.S.C. 76j (1994); see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 238 (1987) (Scalia, J., dissenting).

152. This would be true even if the restrictions would in a particular case have the effect of making "work unavailable to the general . . . public." *Fiss*, *supra* note 135, at 2097. The decisive question would be the effect of the restrictions on the relevant aspects of public discourse, not on particular speakers.

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153. *Kreimer*, *supra* note 30, at 1351-74.

154. See *id.* at 1359-63.

155. *Sullivan*, *supra* note 25, at 1490.

156. *Finley v. NEA*, 795 F. Supp. 1457, 1475 (N.D. Cal. 1992). For a similar perspective on the restrictions on NEA grants imposed by the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121,

304(a), 103 Stat. 701, 741 (1989), see Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 *CARDOZO ARTS & ENT. L.J.* 79, 128-31 (1994).

## Footnote:

157. *Mahler v. Eby*, 264 U.S. 32, 41 (1924). For a good discussion of the vagueness doctrine in the context of decision rules, see Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *COLUM. L. REV.* 369, 397-408 (1989).

158. 47 U.S.C. 307(a) (1994). For the Supreme Court's unsympathetic response to the charge that the standard is unconstitutionally vague, see *NBC v. United States*, 319 U.S. 190, 225-26 (1943); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137-38 (1940); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 379-80 (1969) (discussing statutory authority of FCC to promulgate regulations).

159. See *Finley*, 795 F. Supp. at 1475-76.

160. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

## Footnote:

161. A central principle of First Amendment jurisprudence is that public discourse cannot be regulated in ways that censor speech to enforce community standards. See *POST*, supra note 9, at 134-96. It is because of this principle that a conduct rule imposing a "decency" standard would be found unconstitutional. But this principle would also require that a conduct rule imposing an "excellence" standard be found unconstitutional.

162. *Finley*, 795 F. Supp. at 1475; see *YUDOF*, supra note 35, at 234-35. The Court in *Finley* ineffectually tries to escape this conclusion by analogizing "funding for the arts to funding of public universities." *Finley*, 795 F. Supp. at 1475. The court reasoned that: In both settings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable.... Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not. Analogously, professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of "decency" are not.

*Id.* (citations omitted). Even if we put to one side the court's strange notion that a criterion of "decency" is "wholly subjective" in ways that a criterion of "artistic excellence" is not, the court's attempt to equate the NEA with a public university is fundamentally incompatible with its desire to characterize and assess the decency clause as a conduct rule addressed to public discourse. This is because public universities are managerial domains dedicated to the purpose of education, see supra Section I.A, which is why universities may regulate speech in a "content-based" manner designed to accomplish heuristic purposes.

163. See *YUDOF*, supra note 35, at 24243. In light of this conclusion it is fascinating to note that with respect to both public fora and the United States mail, where allocation rules for government subsidies are unproblematically characterized as conduct rules, it is neither practically nor politically

feasible for the government to withdraw its subsidies.

164. Government efforts to intervene in public discourse can of course infringe upon many different constitutional provisions. Such efforts, for example, may violate the Establishment Clause or the Equal Protection Clause. They may be arbitrary and irrational and thus run afoul of the Constitution's hostility to "naked preferences." See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). In this Essay, I consider only those restrictions that would be specifically placed on the decency clause, viewed as a decision rule, by the freedom of speech provisions of the First Amendment.

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165. The Supreme Court has explicitly drawn an analogous conclusion in the area of the dormant Commerce Clause, holding that the government may aim at certain purposes when it acts as a "market participant" that are prohibited to it when acting as a "market regulator." See *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-40 (1980).

166. Thus a state which permitted "music, opera, drama, dance, and other performing arts" to be performed in a park that was a public forum could not simultaneously exclude academic or political speech.

167. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247-48 (1974) (footnote omitted). 168. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); see *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990) (endorsing FCC regulation aimed at increasing broadcast diversity), overruled in part by *Adarand Constructors Co. v. Peña*, 115 S. Ct. 2097, 2111 (1995). 169. A contrary conclusion would prohibit most constructive interventions by an activist state. See generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 230 (1993).

170. See Post, *supra* note 17, at I4-23.

171. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2519 (1995); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995) (arguing that state inevitably supports public symbols that carry particular ideological messages).

172. As Melville Nimmer once observed, "Surely there is something fundamentally wrong with a doctrine that would find presumptively illegitimate Theodore Roosevelt's view of the presidency as a 'bully pulpit,' and Franklin Roosevelt's exercise of leadership via the 'fireside chat.' Our government officials are properly expected to lead as well as to reflect public opinion." MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH*, 4.09(D), at 4-96-97 (1984).

Footnote:

173. *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983).

174. See, e.g., EMERSON, *supra* note 39, at 698 (recognizing necessity of government expression); Cole, *supra* note 7, at 702-03 (emphasizing importance of government freedom to control content of its speech); Donald W. Hawthorne,

Subversive Subsidization: How NEA Art Funding Abridges Private Speech, 40 U. KAN. L. REV. 437, 451 (1992) (recognizing government's nonneutral promotion of ideas); Redish & Kessler, *supra* note 7, at 560-62 (expressing importance of government's role as educator and communicator).

175. Needless to say, traditional academic opinion is strongly to the contrary. See, e.g., SMOLLA, *supra* note 7, at 196 (characterizing straightforward viewpoint discrimination as constitutionally invalid); O'Neil, *supra* note 135, at 191 (same); Sobel, *supra* note 135, at 525 (same); Sullivan, *supra* note 148, at 89-90 (same); Sunstein, *supra* note 32, at 611-12 (same). But see SUNSTEIN, *supra* note 169, at 231-32 (setting out permissible parameters of viewpoint discrimination).

176. For a discussion of the viewpoint discriminatory aspects of current NEA funding criteria, see PRICE, *supra* note 66, at 184-86; Daniel Shapiro, Free Speech and Art Subsidies, 14 LAW & PHIL. 329, 346-53 (1995).

177. See Post, *supra* note 17, at 114-23.

Footnote:

178. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).

179. For example, an FCC rule prohibiting broadcasters from covering the Whitewater scandal would surely be unconstitutional because its purpose and effect would be to restrict the marketplace of ideas, even if broadcasters' speech is not regarded as part of public discourse.

180. Martin Redish and Daryl Kessler acutely observe that subsidies are sometimes provided on the condition that a recipient refrain from speaking in ways that the recipient would, in the absence of the subsidy, be free and able to do. They refer to this phenomenon as "negative subsidies" and convincingly argue that such subsidies should be regarded with constitutional suspicion. Redish & Kessler, *supra* note 7, at 558-59; see SMOLLA, *supra* note 7, at 189 (arguing that "the more lax constitutional treatment given to the government when it participates in the speech market should not be extended to the government when it is in fact engaged in market regulation, under the pretext of mere participation"). Chief Justice Rehnquist's discussion of the unconstitutional conditions doctrine in *Rust* is in fact an attempt to reduce the doctrine to a prohibition of negative subsidies. See *Rust v. Sullivan*, 500 U.S. 173, 197 (1991); *supra* text accompanying notes 108-11.

In the vocabulary that I have proposed in this Essay, we can conceptualize negative subsidies as an effort to leverage decision rules into conduct rules, and we can conclude that they should therefore be evaluated according to the standards appropriate to conduct rules. The Court has imposed similar limitations on a state's ability to leverage market participation into market regulation in the context of the dormant Commerce Clause. For a review of these cases, see *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 94-99 (1984).

Footnote:

181. See SUNSTEIN, *supra* note 169, at 231-32. Shiffrin, *supra* note 4, at 612-17, 622-32; Steven Shiffrin, Government Speech and the Falsification of Consent, 96 HARV. L. REV. 1745, 1750-51 (1983) (reviewing YUDOF, *supra* note

35).

182. For an interesting case study on the proper scope of official lobbying for public referenda, see *Burt v. Blumenauer*, 699 P.2d 168 (Or. 1985).

183. For further discussion of the preconditions of public discourse, see POST, *supra* note 9, at 135-48.

184. OWEN FISS, *THE IRONY OF FREE SPEECH* (1996).

Footnote:

185. *Id.* at 42.

186. See *id.* at 42-43. As Fiss notes:

The ideal of neutrality in the speech context not only requires that the state refrain from choosing among viewpoints, but also that it not structure public discourse in such a way as to favor one viewpoint over another. The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard. Fiss, *supra* note 135, at 2100.

187. Fiss, *supra* note 184, at 44.

188. *Id.*

189. Fiss refers specifically to this jurisprudence: "Just as some minority groups may be more disadvantaged than others, some unorthodox ideas may be more hidden from public view than others." *Id.* On the general tendency to import Equal Protection norms into First Amendment analysis, see Post, *supra* note 6, at 1267-70.

Footnote:

190. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948).

191. See Post, *supra* note 83, at 290-91.

192. See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (invalidating state prohibition of policy-oriented speech on monthly bills of public utilities); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*) ("(T)he concept that government may restrict the speech of some elements of our society in order to enhance the relative value of others is wholly foreign to the First Amendment

193. This objection would prove fatal even if Fiss's egalitarian criteria were interpreted to apply only to the ideas of persons participating within public discourse. Although the potential number of such ideas may not be infinite, Fiss could not defend this (modified) egalitarian thesis on the ground that a rich and full public debate requires subsidization of all views articulated within public discourse that happen to be underfinanced or generally unavailable. It could not plausibly be maintained that public debate would be richer if the views of Nazis or Stalinists were subsidized, even if such views were unorthodox, marginalized, and not commonly accepted. Surely it would be

bizarre to contend that such views must be supported to ensure a better and more informed public dialogue. Nor could a modified egalitarian thesis be defended on the principle that the state ought to treat all persons within public discourse equally, as that principle would instead require the state to refrain from treating people differently, even if their ideas had different degrees of acceptance and exposure. The modified egalitarian thesis would therefore have to be justified by some variant of the notion that the First Amendment requires equality among ideas. But there is no particular reason to accept this proposed equality, and good reasons to reject it.

194. Fiss, *supra* note 184, at 41.

195. Fiss, *supra* note 135, at 2101.

Footnote:

196. *Id.*; see Fiss, *supra* note 184, at 44-5.

197. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 68 (1st ed. 1960). As William H. Riker concisely observes: "Just what is a political issue is itself a political issue." *AGENDA FORMATION* 3 (William H. Riker ed., 1993).

198. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 393-405 (1978) (discussing concept of polycentric tasks and adjudication).

Footnote:

199. Fiss, *supra* notes. 184, at 37

200. Cf. YUDOF, *supra* note 35, at 259 (judicial review of government supported speech appropriate primarily in "egregious" cases); Frederick Schauer, *Is Government Speech a Problem?*, 35 *STAN. L. REV.* 373, 378 (1983) (reviewing YUDOF, *supra* note 35)

201. YUDOF, *supra* note 35, at 15.

202. Fiss does not in fact believe that the decency clause should be set aside as unconstitutional. See FISS, *supra* note 184, at 38.

203. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2.

Footnote:

204. On the fundamental constitutional value of community self-definition, see POST, *supra* note 9, at 1-18, 51-88, 177-96.

205. We are, of course, free to alter our constitutional commitments and to pursue different values, but, on pain of incoherence, frustration, and hypocrisy, we are not free to ignore the consequences of the values we have chosen.

206. On the tension between these two values, viewed from the perspective of an increasingly international system of communication, see PRICE, *supra* note

66, at 233-46.

207. For example, one commentator has observed:

The NEA is several years younger than Madonna. Still, early in its brief existence it achieved the status of entitlement for those who found themselves for the first time beneficiaries of federal largess, or, in most of their cases, smallness. The dollar amounts may be minuscule by comparison with others flung hither and yon by Uncle Sam . . . but the amount of indignation that can be mustered by those liable to lose these nickels and dimes is truly spectacular. Not merely spectacular, but it has more snuffles and sobs than "Camille." Jonathan Yardley, NEA Funding: Dollars and Nonsense, WASH. POST, Jan. 23, 1995, at B2; see also Tim Miller, An Artist's Declaration of Independence to Congress (July 4, 1990), in CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS 244, 244-45 (Richard Bolton ed., 1992); Newt Gingrich, Cutting Cultural Funding: A Reply, TIME, Aug. 21, 1995, at 70; Jeff Jacoby, Endowment of Arrogance, BALTIMORE SUN, Aug. 9, 1995, at 17A; John Frohnmayer's Final Act, WASH. TIMES, Feb. 24, 1992, at E2 (discussing Frohnmayer's resignation as NEA chairman).

208. In 1995, the NEA's grant-making funds totaled approximately \$ 138 million. See National Endowment for the Arts Office of Policy, Research, and Technology, Table Summarizing NEA Funding (Nov. 1995) (on file with the Yale Law Journal). In that same year, \$ 265.6 million was appropriated through state art agencies, and an estimated \$ 650 million was allocated by local governments. See NINA

Footnote:

KRESSNER COBB, PRESIDENT'S COMM. ON ARTS & HUMANITIES, LOOKING AHEAD: PRIVATE SECTOR GIVING TO THE ARTS AND THE HUMANITIES 5 (1995). Furthermore, foundation funding for the arts in 1992, the most recent year for which complete data are available, totaled approximately \$ 1.36 billion. See id. Finally, according to one survey, corporate funding for the arts in 1994 totaled \$ 875 million. See id. Figures for individual giving to the arts are not readily available, but simply extrapolating from these estimates of government, foundation and corporate donations, it is likely that NEA support for the arts is about 5% of total donations.

This estimate may understate the extent of NEA influence, because the NEA is the single largest donor to the arts and because NEA grants are often highly leveraged through requirements for matching funds. See id. at 18-20. The NEA's national prestige also creates independent leverage, so that, as the President's Committee on the Arts and Humanities stated: "The funding patterns demonstrate a complex national cultural structure in which private and public donor sectors reinforce each other, funding different pieces and parts, exercising different priorities within the whole.... (T)he public and private sectors 'operate in synergistic combination.'" Id. at 4.

It is also the case, however, that the estimate of 5% may strikingly overstate the extent of NEA influence because it does not account for income earned by artists and arts organizations directly through ticket sales, art purchases, and the like. We know, for example, that in disciplines like music, dance, and theater earned income can account for between 50% and 60% of total revenues. See President's Committee on the Arts and Humanities, Chart

Displaying Sources of Operating Income for Various Disciplines (1994) (on file with the Yale Law Journal). For an argument that "the pervasive role the NEA plays in the art world and the funding mechanisms on which artists and museums depend" gives to it "the ability to effectively silence artists who express disfavored views," see Hawthorne, *supra* note 174, at 438. For a contrary view, see ALICE GOLDFARB MARQUIS, ART LESSONS: LEARNING FROM THE RISE AND FALL OF PUBLIC ARTS FUNDING 246-53 (1995).

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Legal Times

May 13, 1996

SECTION: Pg. 1

LENGTH: 1984 words

HEADLINE: At Justice, Contenders Vie For Sensitive Legal Post

BYLINE: BY CHARLES FINNIE

BODY:

A three-way, behind-the scenes contest has broken out to head the Justice Department's influential Office of Legal Counsel -- where legal judgments critical to the Clinton administration could be made this election year.

According to Justice Department and White House officials, the leading candidates to succeed Walter Dellinger are top antitrust Deputy Assistant Attorney General Joe Klein, Associate Deputy Attorney General Seth Waxman, and George Washington University law Professor Beth Nolan.

An associate White House counsel, Elena Kagan, has also received close attention, but no longer is considered in the first tier, one top Justice Department official says.

The person chosen by President Bill Clinton and Attorney General Janet Reno is likely to take over from Office of Legal Counsel Assistant Attorney General Dellinger before July, when Dellinger becomes acting solicitor general.

"The president and the White House relied a lot on Walter's office," says one top Justice Department lawyer, who requests anonymity. "There's a desire to have somebody succeed him with the same stature and confidence."

The Office of Legal Counsel (OLC) provides often sensitive legal guidance to the Justice Department, to the White House, and to the executive agencies on new policy initiatives. The office also formulates the department's response to key Supreme Court rulings and major legislation.

In the next few months, the new legal counsel may face several politically charged issues. Among them: assessing the legal implications of congressional proposals to curb affirmative action on the federal level and responding to congressional demands for White House documents in the travel office investigation.

Under both Republican and Democratic administrations, the office has been open to charges of partisanship -- of allowing a president's policies to drive its opinions.

Dellinger, widely respected by Democrats and Republicans and generally liked because of his engaging sense of humor, has not been immune to the criticism. His successor will face similar on-the-job scrutiny.

Legal Times, May 13, 1996

"It's important for the department to step to the plate to defend the constitutional prerogatives of Congress as well as the White House," says Republican lawyer Michael Carvin.

The temptation to hew to the president's political agenda is always there, says Carvin, who was a deputy assistant attorney general for legal counsel in Ronald Reagan's first administration. Now a partner at D.C.'s Shaw, Pittman, Potts & Trowbridge, Carvin notes that the kind of issue that could put the next legal counsel on the hot seat arose just last week when Rep. William Clinger Jr. (R-Pa.) clashed with White House Counsel John "Jack" Quinn over the administration's failure to turn over subpoenaed documents.

Clinger's House panel investigating the 1993 White House travel office firings voted to hold the White House in contempt of Congress, after negotiations over release of the documents broke down and Quinn said that the White House would claim executive privilege.

Carvin says the policy decision to invoke that privilege would be made by the president and Quinn, but the Office of Legal Counsel probably would be called on to provide a legal rationale.

Republican lawyer Timothy Flanigan, who became OLC assistant attorney general during the end of the Bush administration, said he faced the same political circumstance that awaits Dellinger's successor -- a White House and Congress controlled by opposing political parties

Flanigan, of counsel at Mayer, Brown & Platt, predicted the next OLC head will be called "to help the president do things by himself by executive order?"

The decision about who will next walk the political-legal tightrope's head of the OLC may be complicated by the fact that each of the three main candidates boasts highly influential supporters.

The contenders either did not return telephone calls or declined comment for this article.

Klein, the principal deputy assistant attorney general for antitrust matters, has the closest political ties to the president. According to a top administration official, Klein also has Vice President Albert Gore Jr.'s endorsement to succeed Dellinger.

Before joining the Antitrust Division a year ago, Klein served as deputy counsel to the president under the three former White House counsel -- Bernard Nussbaum, Lloyd Cutler, and Abner Mikva.

In 1992, Klein performed legal work for the Clinton-Gore campaign. Until then, however, he was best known in Washington for being one of the founders of Onek, Klein & Farr, a firm that during its heyday was considered the city's premier Supreme Court litigation boutique.

Despite Klein's heavyweight credentials and the vice president's support, he is not considered a shoo-in to succeed Dellinger, says one top administration official.

Legal Times, May 13, 1996

On the other hand, Dellinger was sometimes criticized for trimming to the political winds.

One critic, a former Republican OLC lawyer who requests anonymity, says that Dellinger's handling of some matters had a "politically perfunctory" quality.

The lawyer cites Dellinger's opinion challenging a short-lived legislative requirement that members of the U.S. armed forces who test positive for the AIDS virus be discharged.

This lawyer says that Dellinger tried to have it both ways on the rule and on an early administration policy on removing openly gay people from the armed services.

Dellinger found no "rational basis" for the statute barring HIV-positive soldiers, although the administration claimed its controversial "Don't Ask, Don't Tell" policy that excludes many gay people from the service passed the test of rationality.

"My view was the [HIV] law is stupid," the lawyer says. "But the OLC legal conclusions were mutually exclusive."

Other Republicans fault Dellinger's work on a Clinton executive order banning federal contracts with firms that employ replacement workers. The order was later rejected by the U.S. Court of Appeals for the District of Columbia,

Dellinger's Capitol Hill testimony that a proposed balanced-budget constitutional amendment is legally unenforceable also raised eyebrows. Dellinger was unavailable for comment.

Because the OLC chief often works at the intersection of law and partisan politics, the choice of Dellinger's successor will be watched closely in political as well as legal circles.

For two of the candidates, Klein and Nolan, their association with one of the most controversial legal figures of the Clinton administration, Bernard Nussbaum, could make their selection particularly sensitive.

No administration lawyer has drawn more Republican fire than Nussbaum, President Clinton's first White House counsel. Continuing COP suspicions of his conduct may diminish the chances of Klein or Nolan, both of whom worked under Nussbaum.

Republican lawmakers accuse White House lawyers from those days of a number of improprieties. They include obtaining information about a Resolution Trust Corp. investigation of an Arkansas thrift with ties to the Clintons; thwarting Federal Bureau of Investigation access to the office of the late former Deputy Counsel Vincent Foster; and failure to disclose details of a briefing to the Clintons' personal lawyers.

But under the administration's plans for filling the OLC post, the new occupant will not require Senate confirmation, which serves to mute concern about a COP assault on the eventual selection.

Legal Times, May 13, 1996

No confirmation hearing is required because Dellinger -- who is replacing the outgoing solicitor general, Drew Days III, in an "acting" capacity -- will technically retain his present title of OLC assistant attorney general.

The same circumstances mean Dellinger would not require confirmation for his new administration role, either.

Republican lawyer Theodore Olson, the OLC assistant attorney general during the Reagan administration's first term, argues that association with the Nussbaum-led White House counsel's office should not be a factor.

"I think people should be judged individually," Olson says, adding that he counts Nolan a close friend.

If service under Nussbaum is viewed with disfavor, it may be that Nolan is inoculated from potential partisan sniping, while Klein is not.

Before first joining the GW faculty, Nolan, a Democrat, served from 1981 to 1985 as an OLC deputy assistant attorney general under Olson, a Republican.

Her principal responsibility: Interpreting the government's conflict of interest statutes

"She would be wonderful," says Olson, a partner in the D.C. office of Los Angeles' Gibson, Dunn & Crutcher. "She's very intelligent, extremely conscientious. I have the greatest respect for her integrity. I can't think of anyone I would endorse more enthusiastically."

One top Justice Department lawyer says one unlikely alternative to any of the candidates would be to elevate one of the current crop of OLC deputies.

Another Justice Department official says that whatever the decision, it will be made soon because the person will need some time to overlap with Dellinger before he leaves for the solicitor general's office.

GRAPHIC: Pictures 1 through 3, The leading candidates to take over at the Office of Legal Counsel are Beth Nolan, Joel Klein, and Seth Waxman.; Picture 4, While Walter Dellinger won kudos for his OLC tenure, critics said he was political.  
PATRICE GILBERT

LANGUAGE: ENGLISH

LOAD-DATE: May 23, 1996

LEVEL 1 - 126 OF 133 STORIES

## The Associated Press

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August 12, 1994, Friday, PM cycle

SECTION: Washington Dateline

LENGTH: 771 words

HEADLINE: Mikva's Political Skills To Be Tested As Clinton's New Counsel

BYLINE: By JAMES ROWLEY, Associated Press Writer

DATELINE: WASHINGTON

BODY:

A former Illinois legislator, five-term congressman and a federal appellate judge, Abner J. Mikva is about to embark at age 68 on a fourth career: White House counsel.

After 15 years on the federal bench, Mikva is returning to the political playing field to serve the first Democratic president since he left Congress to become a judge.

"You are the most important client a lawyer could dream of serving," Mikva told President Clinton Thursday at a White House news conference to announce his appointment to succeed Lloyd Cutler.

Clinton called Mikva a man of "uncompromising integrity and judgment" who was "the right person for this job."

Friends, former law clerks and aides praised Mikva's political skills as particularly appropriate for the position of White House counsel - a job Cutler was tapped to fill temporarily when Bernard Nussbaum resigned under fire earlier this year.

While Nussbaum's critics charged he was politically tone deaf, Mikva's friends say he has unusually good instincts.

"He has extraordinary political judgment," said Elena Kagan, a former law clerk who teaches law at the University of Chicago, from which Mikva was graduated in 1951 as editor in chief of the law review.

Mikva "has wonderful instincts in terms of what the right thing to do is, politically, ethically, legally," said Alan Morrison, who argued many cases before Mikva as director of the Public Citizen Litigation Group.

He also is praised for what friends say is an unusual ability to get along with all kinds of people, regardless of their political viewpoints.

"There is nothing more essential in his world view is people respecting other people, the ability to disagree without being disagreeable," said former aide

The Associated Press, August 12, 1994

Kenneth Adams.

"His opponents respect and like him," adds former Rep. Robert Kastenmeier, D-Wis.

Indeed, Mikva has a flare for showmanship rarely found in the sober ranks of the federal judiciary.

He once penned a critical review in TV Guide of "The People's Court," saying Judge Joseph Wapner was "doing for the law what 'Dynasty' does for monogamy."

"If we judges have to rely on you to improve our image, I want a change of venue," Mikva wrote.

Last year, he appeared briefly in the movie "Dave," a tale of Washington skullduggery, playing the chief justice who swears in a new president. The credits listed Abner Mikva playing "Justice Abner Mikva."

Despite a sunny personality, Mikva's life as a judge is not free of conflict. A leader of the court's liberal wing, Mikva's relations with Republican judges has sometimes been strained.

A discussion with fellow judges that included Kenneth Starr, now the Whitewater independent counsel, became so heated that Laurence Silberman told Mikva: "If you were 10 years younger I would be tempted to punch you in the nose."

Silberman, who recounted the incident in 1991 to dispute a report he threatened to hit his colleague, wrote that "Judge Mikva did not become 10 years younger, our tempers receded and we continued our discussion of the case."

Republican judges accused Mikva two years ago of squelching an investigation of who leaked the draft of an unpublished opinion Judge Clarence Thomas had written while his nomination was pending in the Senate.

The Thomas opinion dealt with affirmative action and both Mikva and his Republican colleagues deplored the leak.

But Mikva issued a statement that "by once again calling attention to the matter, however, judges who feel compelled to air this disagreement injure the court further."

A law clerk for Supreme Court Justice Sherman Minton, Mikva practiced law in Chicago and served a decade in the Illinois Legislature before his election to the House in 1968.

He served two terms representing the south side of Chicago, vocally opposing the Vietnam War and proposing strict handgun control. He won three elections to a North Shore district seat beginning in 1974, but eventually decided his political future in the heavily Republican district was shaky. Mikva sought a judgeship "when it became clear that (Jimmy) Carter was going to be a one-term president," Adams said.

But during Senate confirmation, conservative Republicans objected to Mikva's gun-control stance, arguing he would legislate from the bench. Mikva argued

The Associated Press, August 12, 1994

that he knew the difference between judging and legislating and finally won confirmation on a 58-31 vote.

Mikva will resign from the bench shortly before taking over from Cutler on Oct. 1. Since he sits on a court that deals with important governmental actions, Mikva won't vote on any cases that involve the Clinton administration, Cutler said.

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June 13, 1994, MONDAY, Late Sports Final Edition

SECTION: FINANCIAL; BUSINESS APPOINTMENTS; Pg. 46

LENGTH: 630 words

BODY:

Great Lakes Chemical Corporation elected Dr. Richard H. Leet a director.

Chicago Youth Centers appointed Alan G. McNally of Harris Bank and Harris Bankcorp a director.

Health o meter Products re-elected Lawrence Zalusky, Robert W. Miller and Thomas R. Shepherd of Thomas H. Lee Co. directors.

Elmhurst College elected Frederick C. Ford of Draper and Kramer and James S. Yerbic of Duchossois Industries trustees.

Administrative Conference of the United States appointed Joan Z. Bernstein of Chemical Waste Management Corporation and Elena Kagan of the University of Chicago Law School members.

Hiffman Shaffer Anderson promoted Richard E. Hulina to president, retail division and senior executive vice president; Keith Bank to principal and executive vice president, retail division; and Edward M. Zifkin to vice president, retail brokerage and director, retail leasing.

Timothy L. Brown joined Coronet Insurance Company as executive vice president and chief operating officer.

Kemper Financial Services promoted J. Patrick Beimford Jr. and Gary A. Langbaum to executive vice presidents; and David H. Butler to first vice president.

Frank J. Corbett Inc. promoted Elaine Eisen and Neil A. James to senior vice presidents and management supervisors; and Lori A. Kewin to vice president, agency services.

Fiduciary Management Associates named Lloyd J. Spicer senior vice president and portfolio manager.

Gail Carter joined Schafer Condon as senior vice president and group account director.

Kemper Securities appointed Don Andrews, Leslie A. Sammarco and Renan Sugarman vice presidents and senior attorneys.

Deerbank Companies promoted William Fisher to vice presi Lloyd J. Lightfoot Spicer

Chicago Sun-Times, June 13, 1994

dent; David Quinn to assistant vice president; and Lisa Bertagna to manager, commercial real estate.

LaSalle National Corporation named Craig R. Schmidt vice president and deputy manager, loan review division.

Dennis R. Oster joined PlainsBank of Illinois as vice president, commercial banking.

Serta Inc. promoted Al Klancnik to vice president, operations; and Linda Stadler to director, sales support.

David M. Webster joined A.T. Kearney as vice president and general counsel.

Christina Fitzgerald joined Anderson Schroud Group as vice president, property management.

Horace Mann Educators Corporation named Ann Caparros vice president and general counsel.

Sharon A. Alister joined Wertheim Schroder & Co. as vice president, private investors.

The Quaker Oats Company named James T. McConnaughay vice president, supply chain.

Paul E. Pliester joined Mesirow Financial as vice president, preferred trading.

William J. Burda Jr. joined LaSalle Bank Lake View as vice president.

TCF Bank promoted Marci L. Semiche to assistant vice president and accounting manager; Lou Campos assistant vice president; and Dave Swislow to assistant controller.

LaSalle National Bank named Dale R. Kluga first vice president and deputy division head; Peter R. Blindt and Heather D. Curtis vice presidents; G. Paul Fogle, Jay C. Goldner, C. John Mostofi, Mark T. Ostrowski, Denise L. Kuziw, Beth Max, Sarah E. Turoff and Pamela L. Bryant assistant vice presidents; J. Brett Rose investment officer; Pamela D. Eskra to asset based lending officer; and Isabel C. Kelly systems officer.

Columbia College Chicago named Jean H. Lightfoot dean of students.

Chicago Cable Marketing Council named Trish Ball executive director.

Illinois Financial Services Association named Zack Stamp executive director.

Taylor-Johnson promoted Donna Hamaker to director, advertising.

OakGrisby Inc. named Bruce Albelda director, marketing.

General Instrument Corporation named Michael M. Ozburn director, industry affairs.

Chicago Sun-Times, June 13, 1994

Norton, Rubble and Mertz named Susan Cieslak media director.

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LEVEL 1 - 128 OF 133 STORIES

Copyright 1994 Chicago Tribune Company  
Chicago Tribune

January 16, 1994 Sunday, FINAL EDITION

SECTION: TEMPO; Pg. 1; ZONE: C

LENGTH: 2039 words

HEADLINE: IN HIS COURT;  
MIKVA BRINGS A POLITICIAN'S PERSPECTIVE TO THE FEDERAL BENCH

BYLINE: By Michael Kilian, Tribune Staff Writer.

DATELINE: WASHINGTON

BODY:

Abner Mikva is still somebody nobody sent.

The one-time liberal activist from Chicago's Hyde Park has had as long and rewarding a public career as any honest Illinois politician could want. He has been a state legislator representing the South Side, a member of Congress representing Chicago and then the North Shore, a federal judge and, since 1991, chief judge of the U.S. Court of Appeals for the District of Columbia.

"Mifka," as Mayor Richard J. Daley used to mispronounce his name, was even viewed during the Carter administration as next in line for a Supreme Court vacancy. But before one came, the country had settled into 12 years of Republican rule.

Still, Mikva has found more than just leftovers at the D.C. appeals court, which is often called the "baby Supreme Court," reflecting its status as the second most important court because its caseload is so dominated by the review of federal laws and actions. As chief judge, Mikva, who joined the court in 1979, may well have more influence than he ever did as a legislator.

For all his tenure and stature, the sport-coat-wearing Mikva still seems much the same rough-edged, plain-spoken, shiny-eyed, feistily independent, unabashed liberal he was when he and Chicago politics first met up.

That was during the elections of 1948. As a University of Chicago kid wanting to work in the reform campaigns of Paul Douglas for U.S. senator and Adlai Stevenson for governor, he walked into 8th Ward Regular Democratic Organization headquarters ready to sign up. The response, enshrined in a chapter of professor Milton Rakove's 1979 oral history on Illinois politics, "We Don't Want Nobody Nobody Sent," went like this:

"I came in and said I wanted to help," Mikva told Rakove. "Dead silence. 'Who sent you?' the committeeman said. I said, 'Nobody.' He said, 'We don't want nobody nobody sent.' Then he said, 'We ain't got no jobs.' I said, 'I don't want a job.' He said, 'We don't want nobody that don't want a job. Where are you from, anyway?' I said, 'University of Chicago.' He said, 'We don't want nobody from the University of Chicago.' "

Chicago Tribune, January 16, 1994

Eight years later, after the first statewide reapportionment in decades created a Hyde Park legislative district with no incumbents, Mikva avenged this churlishness by getting elected to the Illinois House, where he served for 10 years. Among those campaigning for him in that 1956 contest was Eleanor Roosevelt, whose picture still hangs above his desk.

Mikva, who will turn 68 on Friday, now has diminished prospects of joining his former Appeals Court colleagues-Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg-on the nation's highest bench, even with a Democrat in the White House.

"As one of my friends said, 'How does it feel to be too old, too white, too male and too liberal?' " Mikva said in an interview. He laughed, which he often does, then became philosophical, as he also often does.

"It's like saying to someone, 'Shouldn't you be president?' There are times when I think I would have been a good president-not often-and there are times when I think I would have been a good Supreme Court justice, but there are nine of them in the whole, wide world, and it's a combination of timing and politics and age and attitude and history. I saw Ruth the other night. She's doing well, and enjoying it. I'm chief judge here, and enjoying it."

#### Activist to pragmatist

There are few judicial jobs of such consequence as Mikva's. Unlike the other 11 federal circuit courts of appeals, the District of Columbia's is considered a national rather than regional court. Half the caseload of the court involves challenges to federal agency actions, and the government is a party in some fashion to about 90 percent of the cases, including criminal appeals.

"We frame the questions for the Supreme Court," Mikva said.

Recently, Mikva wrote majority appeals court panel opinions involving gays in the military and the debate over the North American Free Trade Agreement, rejecting a demand from environmental groups that the president be directed to produce an impact statement before proceeding with adoption of NAFTA.

"To order the president to do something before he submitted something to Congress-that's a relationship that's so clearly political . . . the court should not get involved," Mikva said. "This is something that should play out on the political stage."

In his early days, Mikva was routinely called a "bomb thrower," "a bleeding heart," "an ultraliberal" and "a left-wing labor lawyer." In addition to representing the steelworkers union and other labor groups as a young partner in Arthur Goldberg's Chicago law firm, Mikva was an early and vocal champion of abortion rights and gun control, and a trenchant foe of the death penalty.

Given his convictions and long-standing reputation, one would have expected Mikva to be a liberal activist much like his predecessor as chief judge, David Bazelon, who served on the court for three decades and gave it a decidedly liberal stamp. But Mikva surprised many by being less an activist than a pragmatist-by imposing upon the judicial process the experience, attitudes and understanding he gained in 20 years as a state and federal lawmaker.

Chicago Tribune, January 16, 1994

"Judge Bazelon was not a great fan of the legislative branch," said Mikva, whose office window offers a broad view of the U.S. Capitol. "I've had an altogether different view of how to interpret statutes and also a different view on how the court should function."

#### A congressman's touch

For example, during the interview Mikva criticized the Supreme Court for stepping in with its sweeping and divisive abortion decision in 1973, *Roe vs. Wade*, when state legislatures throughout the country were already moving to change abortion laws. In contrast, he said the 1954 Warren Court was right in moving against segregated schools with its *Brown vs. Board of Education* decision, because no legislature in the nation was doing anything about segregated schools, "including Illinois'."

The legal community seems in agreement that Mikva has brought a congressman's touch to the court, but not everyone applauds the result (some, such as his conservative former appeals court colleague Robert Bork, declined to comment at all).

Mark Tushnet, associate dean of the Georgetown University Law School and a professor of constitutional law, said, "His work is well-respected, but some constitutionalists might say he is too political; that he hasn't left behind enough of his past experience."

Attorney Robert S. Bennett, a well-known litigator in the Skadden, Arps, Slate, Meagher & Flom law firm and counsel to embattled U.S. Rep. Dan Rostenkowski (D-Ill.), called Mikva's political input a plus: "I think the court is very fortunate to have a member who came to the court from Congress-the real world-and brings an appreciation of the real world's ways to it."

Elena Kagan, assistant professor at the University of Chicago Law School, was a law clerk for Mikva. "He demanded a lot, but he was completely fair and was extremely tolerant," she said. "I learned a lot from him: how government works, how it can be expected to work . . . things I wasn't taught at (Harvard) Law School."

The conservative Washington Times, published by the Unification Church, recently accused Mikva of rigging court panel selections so that he and liberal Carter appointees Patricia Wald and Harry Edwards would hear three cases involving "the most critical constitutional issues to come before the . . . court in a year," including the matter of gays in the military. Scoffed Mikva, "It's all done by computer."

There's a computer-with CD-ROM-at his long, curving, highly functional desk, but he likes to do much of his work standing at a lectern set by the window with the view of the Capitol. He and his wife, Zoe, live on Capitol Hill-and enjoy an active Washington social life, counting numerous members of Congress, past and present, and even muckraking author Kitty Kelley among their many friends. But they think of themselves as Chicagoans.

#### 'A rootless city'

"Chicago is a state of mind," he said. "It's not a place. This (Washington) is a rootless city. Everybody here is from someplace else."

Chicago Tribune, January 16, 1994

Mikva's parents were Ukrainian Jews, his father a Milwaukee life-insurance agent who lost his job in the Depression and never really regained full employment.

"I remember being on what was then called 'outdoor relief,' " Mikva said. "The books we had were stamped, 'Property of Milwaukee County Outdoor Relief.' They never gave you cash, everything was in kind: clothing that was recognizable as relief clothing, blue stocking caps and big, bulky shoes. Food that you'd pick up in a wagon."

He went to the University of Wisconsin, transferring to Washington University in St. Louis to be near Zoe, whom he had met on a blind date. Mikva served in World War II as a navigator in the Army Air Corps, then enrolled in the U. of C. Law School, graduating cum laude in 1951 and serving as a law clerk for U.S. Supreme Court Justice Sherman Minton.

"I originally wanted to be an accountant," he said. "She (Zoe) said, 'What do you want to be an accountant for? All they do is make money.' "

Elected to the Illinois House at 30, he found himself in Springfield with a handful of fellow liberal independents-Bob Mann, Leland Rayson, Bob Marks, Howard Katz, Paul Simon and lifelong friend Tony Scariano-who proved to be thorns in the sides of Daley and Republican Gov. William Stratton.

"Abner was the leader," said Scariano, now an Illinois Appellate Court judge. "We used to have a lot of fun giving people like Paul Powell (then-Illinois secretary of state) a hard time."

A sense for 'neighborhood'

Mikva still spends "a good piece of every summer" at his lakeshore retreat near New Buffalo, Mich. It was there that he used to encounter his longtime nemesis, Daley, who had a summer home nearby.

"It astounded him that this radical Hyde Park liberal was a family man," Mikva said. "He never could pronounce my last name right. He used to call me 'Ab,' and Zoe 'Mrs. Ab.' "

The Mikvas have three daughters, all married: Mary Mikva, a Chicago lawyer; Laurie Mikva, a Champaign attorney; and Rachel Mikva Rosenberg, a Chicago rabbi.

"There was nothing in her (Rachel's) background that would have led her in that direction," he said, "except that she was determined she wasn't going to be a lawyer. Her two sisters bored her silly when they started talking about the law, so she found ancient law instead."

The Mikvas have five grandchildren, "one of the great joys of life."

"We go back to the old neighborhood and swing our grandchildren in the same playground swings we used to swing her (Rachel) on," Mikva said. "It's given me a perspective on community that I never had until I had grown children and grandchildren. I put in the first 'open occupancy' fair-housing bill in the state legislature. It caused a great deal of commotion. I never quite understood the opposition to it."

Chicago Tribune, January 16, 1994

"But I thought about that as I was swinging my grandchildren on these old swings. There's an expectation that is broken whenever neighborhoods change, especially if you're a poor family. You think your children are going to grow up within walking distance and your grandchildren are going to grow up there. It's like the little villages my parents came from in the Ukraine."

The Mikvas make use of an odd Illinois law that allows him, as a transplanted federal employee, to vote by absentee ballot from his old address in Evanston, which he represented for three terms in Congress.

"We try to vote only once," he said, making fun of the old Democratic machine, which now seems long gone.

"There may be a few wards left on the Southwest Side, and maybe on the Northwest Side, where there's still something resembling the old precinct-captain organization," he said. "But the endorsement of the machine is now almost a wash. It costs you as much as it helps. Look at the people from the West Side running against the organization-the South Side." He paused, and smiled. "They're now taking people nobody sent."

GRAPHIC: PHOTOS 2; PHOTO (color): Judge Abner Mikva in his office. He has a view of the Capitol, where he used to make laws as a congressman from Illinois.; PHOTO: Judge Abner Mikva at work in his chambers. Though he lives in Washington, he and his wife cast Illinois absentee ballots. "We try to vote only once," he says, making fun of the old Democratic machine. Tribune photo by Ernie Cox Jr.

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September 7, 1987  
Correction Appended

SECTION: Pg. 4

LENGTH: 1632 words

HEADLINE: Boutiques Lose Appeal for 1986 Clerks

BYLINE: Reported by Susan Hollinger, LJ Pendlebury, and Lisa Schkolnick

BODY:

D.C.'s Arnold & Porter and Wilmer, Cutler & Pickering appear to be the big winners in the annual sweepstakes for Supreme Court and D.C. Circuit clerks.

Arnold & Porter has two Supreme Court clerks and one D.C. Circuit clerk signed on so far.

Wilmer, Cutler has snagged four D.C. Circuit clerks, including one "almost Supreme" clerk -- Edward Foley, who was slated for a Powell clerkship until the justice unexpectedly retired from the Court.

D.C.'s Covington & Burling has so far netted one Supreme Court clerk and has another offer outstanding, according to H. Edward Dunkelberger Jr., a partner and spokesman for the firm. Covington also has one D.C. Circuit clerk arriving next month.

Absent so far from the list of destinations for Supreme Court clerks are such perennial D.C. favorites as Williams & Connolly; Miller, Cassidy, Larroca & Lewin; Onek, Klein & Farr; and Shea & Gardner.

Yet 10 Supreme Court clerks are still in the process of making up their minds.

About half of the Supreme Court clerks are joining firms. Arnold & Porter; Los Angeles' Gibson, Dunn & Crutcher, and New York's Davis Polk & Wardwell are the leaders so far, with two clerks apiece. Although several New York firms offer generous (\$ 10,000 or more) sign-on bonuses to Supreme Court clerks, so far Davis Polk is the only New York firm to have attracted any this year. Several clerks opted to join large firms in their home cities.

Seven of the 34 Supreme Court clerks are taking public-interest jobs or teaching. George Mason University School of Law, on an aggressive hiring spree in order to become a home to the conservative law-and-economics movement, snagged one of Scalia's clerks, Lee Liberman, a highly regarded former Justice Department attorney.

The absence of formerly popular D.C. boutiques from the list of destinations does not seem to bother these firms. Joel Klein, at Onek, Klein, says his firm interviewed a few of this year's Supreme Court clerks, but made no offers. "You'll hear from us next year," Klein predicts. "We were a little tentative in hiring this year . . . . This crop didn't excite us." The firm hires only one

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or two associates a year.

Stephen Braga, head of the hiring committee at Miller Cassidy, reports that his firm made two offers to Supreme Court clerks, neither of which was accepted. "Of the people we interviewed at the Supreme Court and the Circuit Court, we liked the circuit people better." So far, the firm has signed one D.C. Circuit clerk.

Meanwhile, Wilmer, Cutler far outpaced its rivals in D.C. Circuit clerk hirings.

And Judge Abner Mikva placed all three of his clerks in Supreme Court chambers, while Chief Judge Patricia Wald and Judge Stephen Williams, a new member of the bench, each are sending up two. Only one of Supreme Court nominee Robert Bork's clerks is ascending to the Supremes.

#### Wilmer, Cutler Attracts Four Departing D.C. Circuit Clerks

##### Chief Judge Patricia Wald

CLERK	LAW SCHOOL	NEXT POSITION
Danny Ertel	Harvard	Justice Harry Blackmun
Edward Foley	Columbia	Wilmer, Cutler & Pickering (D.C.)
Abner Green	Michigan	Justice John Paul Stevens
Nina Swift-Goodman	Georgetown	Zuckerman, Spaeder Gold- stein, Taylor & Kolker (D.C.)

##### Judge Robert Bork

Richard Cordray	Chicago	Justice Byron White
Douglas Mayer	Columbia	Mayer, Brown & Platt (D.C.)
Rebecca Swenson	Duke	Arnold & Porter (D.C.)

##### Judge James Buckley

William Levin	Yale	Undecided
Joseph Schmitz	Stanford	Paul, Hastings, Janofsky & Walker (D.C.)
Michael Socarras	Yale	Cravath, Swaine & Moore (New York)

##### Judge Harry Edwards

Sanford Caust-Ellenbogen	New York Univ.	Teaching at Ohio State Univ.
Andrew Roth	Michigan	Wilmer, Cutler & Pickering (D.C.)
Mary LaFrance	Duke	Fried, Frank, Harris, Shriver & Jacobson (D.C.)

##### Judge Douglas Ginsburg

Steven Aitken	Harvard	Office of Management and Budget
Robert Gordon	Harvard	Undecided (D.C.)
James Swanson	UCLA	Undecided

##### Judge Ruth Bader Ginsburg

Mark Greenberg	California (Berkeley)	Further study, Magdalen College (Oxford Univ.)
David Post	Georgetown	Wilmer, Cutler & Pickering (D.C.)
Jay Alexander	Stanford	Miller, Cassidy, Larroca & Lewin (D.C.)

##### Judge Abner Mikva

Elena Kagan	Harvard	Justice Thurgood Marshall
Ann Kappler	New York	Justice Harry Blackmun

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Harry Litman	California (Berkeley)	Justice Thurgood Marshall Judge Spottswood Robinson
Margaret Jenkins	Boston Univ.	Wilmer, Cutler & Pickering (D.C.)
R. Charles Miller	Pennsylvania	Chief Justice William Rehnquist
Reva Seigel	Yale	Teaching of Univ. of California Law (Berkeley)
Brian Anderson	Stanford	Judge Laurence Silberman Dept. of Education, Office of General Counsel
Steven Bunnell	Stanford	Miller, Cassidy, Larroca & Lewin (D.C.)
John Lewis	Texas	Undecided
Steven Catlett	Columbia	Judge Kenneth Starr Justice Sandra Day O'Connor
Peggy Meriwether	California (Berkeley)	Further study at Oxford Univ.
Richard Seamor	Duke	Covington & Burling (D.C.) Judge Stephen Williams
William Mooz	Colorado	Cogswell and Wehrle (Denver)
Joshua Rosenkranz	Georgetown	Justice William Brennan
Robert Tiller	Virginia	Justice Antonin Scalia

Note: This table may be divided, and additional information on a particular entry may appear on more than one screen.

Most Supreme Court Clerks Opt for Big Firms, Not Boutiques

CHAMBERS	NAME OF CLERK	LAW SCHOOL
Chief Justice William Rehnquist	David Leitch	Virginia
	William Lindsay	California (Berkeley)
	Laura Little	Temple
Justice William Brennan Jr.	Mark Haddad	Yale
	Dean Hashimoto	Yale
	Milton Regan	Georgetown
	Virginia Seitz	New York (Buffalo)
Justice Byron White	David Burcham	Loyola Univ.
	Samuel Dimon	Michigan
	Mary Sprague	Yale
	Richard Westfall	Denver
Justice Thurgood Marshall	Glen Darbyshire	Georgia
	Rosemary Herbert	Yale
	Eben Moglen	Yale
	Margaret Raymond	Columbia
Justice Harry Blackmun	Beth Brinkmann	Yale
	Ellen Deason	Michigan
	James Fanto	Pennsylvania
	Chai Feldblum	Harvard
Justice Lewis Powell Jr.	Leslie Gielow	Michigan
	Andrew Leipold	Virginia
	Robert Long	Yale
	Ronald Mann	Texas
Justice John Paul Stevens	Ronald Lee	Yale
	Lawrence Marshall	Northwestern

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Justice Sandra Day O'Connor	Charles Blanchard	Harvard
	Daniel Bussel	Stanford
	Susan Creighton	Stanford
	Joan Greco	Harvard
		(1984-85)
Justice Antonin Scalia	Gary Lawson	Yale
	Lee Liberman	Chicago
	Roy McLeese III	New York Univ.
	Patrick Schiltz	Harvard
Retired Chief Justice Warren Burger	Gene Schaerr	Yale
CHAMBERS	PREVIOUS CLERKSHIP	
Chief Justice William Rehnquist	J. Harvie Wilkinson III,	4th Cir.
	Carl McGowan,	D.C. Cir.
	James Hunter III,	3rd Cir.
Justice William Brennan Jr.	Louis Pollak,	E.D. Pa.
	David Bazelon,	D.C. Cir. (1984-85)
	Ruth Bader Binsburg,	D.C. Cir.
	Harry Edwards,	D.C. Cir.
Justice Byron White	Ruggero Aldisert,	3rd Cir.
	Justice Byron White	(two year term)
	Jim Carrigan,	D. Colo.
	Robert McWilliams,	10th Cir.
Justice Thurgood Marshall	James Oakes,	2nd Cir.
	Wilfred Feinberg,	2nd Cir.
	Edward Weinfeld,	S.D.N.Y.
	James Oakes,	2nd Cir.
Justice Harry Blackmun	Phyllis Kravitch,	11th Cir.
	Harry Edwards,	D.C. Cir.
	Louis Pollak,	E.D. Pa.
	Frank Coffin,	1st Cir.
Justice Lewis Powell Jr.	Louis Oberdorfer,	D.D.C.
	Abner Mikva,	D.C. Cir.
	John Minor Wisdom,	5th Cir.
	Joseph Sneed,	9th Cir.
Justice John Paul Stevens	Abner Mikva,	D.C. Cir.
	Patricia Wald,	D.C. Cir.
Justice Sandra Day O'Connor	Harry Edwards,	D.C. Cir.
	Stephen Breyer,	1st Cir.
	Pamela Rymer,	C.D. Calif.
	Ruth Bader Binsburg,	D.C. Cir.
Justice Antonin Scalia	Antonin Scalia,	D.C. Cir. (1984-85)
	Antonin Scalia,	D.C. Cir. (1983-84)
	Antonin Scalia,	D.C. Cir.
	Antonin Scalia,	D.C. Cir.
Retired Chief Justice Warren Burger	Kenneth Starr,	D.C. Cir.

## CHAMBERS

Chief Justice William Rehnquist	Hogan & Hartson (D.C.)
	Gibson, Dunn & Crutcher (Los Angeles)
	Dechert Price & Rhoads (Philadelphia)
Justice William Brennan Jr.	Undecided (private firm, D.C.)
	Ropes & Gray (Boston) *
	Davis Polk & Wardwell (D.C.)
	Bredhoff & Kaiser (D.C.)
Justice Byron White	Gibson, Dunn & Crutcher (Los Angeles)

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Justice Thurgood Marshall	Davis Polk & Wardwell (D.C.) Arnold & Porter (Denver) Davis, Graham & Stubbs (D.C.) Undecided (private firm, D.C. or Atlanta) American Civil Liberties Union New York, fellowship) Columbia University School of Law (New York) Undecided (New York)
Justice Harry Blackmun	Undecided (private firm) Iran/U.S. Claims Tribunal undecided (D.C.) AIDS Action Council (D.C.)
Justice Lewis Powell Jr.	Altshuler & Berzon (San Francisco) Morgan, Lewis & Bockius (Philadelphia) Covington & Burling (D.C.) Undecided (private firm)
Justice John Paul Stevens	Arnold & Porter (D.C.) Northwestern Univ. School of Law
Justice Sandra Day O'Connor	Nofziger Special Investigation [+] Undecided Undecided Undecided
Justice Antonin Scalia	Yale Law School (fellowship) George Mason Univ. School of Law Asst. U.S. Attorney (D.C.) Undecided
Retired Chief Justice Warren Burger	Sidley & Austin (D.C.)

\* Dean Hashimoto, who is also a medical doctor, is working part-time at Ropes & Gray and serving part-time at the Harvard Public Health Service.

[+] Charles Blanchard will join Phoenix's Brown & Bain next year, after serving in the office of Independent Counsel James McKay.

CORRECTION-DATE: September 28, 1987

CORRECTION:

Also in the Sept. 7 issue, the chart accompanying "Boutiques Lose Appeal for 1986 Clerks" (Page 4) misidentified the law school attended by Ann Kappler, incoming clerk to Justice Harry Blackmun. Kappler is a graduate of New York University School of Law.

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