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ARTICLES

THE BROOKLYN MUSEUM CONTROVERSY AND THE ISSUE OF GOVERNMENT-FUNDED EXPRESSION*

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INTRODUCTION

In the fall of 1999, the Brooklyn Institute of Arts and Sciences, commonly known as the Brooklyn Museum, planned to present an exhibit of young British artists entitled "Sensation." The exhibit—drawn from the private collection of art collector Charles Saatchi—had been previously presented in London. The exhibit included a painting by Chris Ofili, entitled "The Holy Virgin Mary," which depicted a black Madonna painted on a sparkling gold background with breasts sculpted out of elephant dung.[1]

Although several of the pieces in the "Sensation" exhibit had been the source of considerable controversy when presented in London, the Ofili painting was not regarded by London observers and art critics as especially controversial. Nevertheless, when New York City Mayor Rudolph Giuliani learned of the painting,[2] he expressed particular unhappiness with the

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[1] Brooklyn Inst. of Arts and Scis. v. City of New York, 64 F. Supp. 2d 184, 190 (E.D.N.Y. 1999).

[2] In September, 1999, Mayor Giuliani publicly announced his displeasure with the Ofili painting and more generally with the exhibit. *Id.* at 191. In fact, Mayor

manner in which Ofili depicted the Madonna. He regarded Ofili's painting as degrading and disrespectful.[3]

Because of his displeasure with the anticipated exhibit, in general, and with the Ofili painting, in particular, Mayor Giuliani tried to persuade Brooklyn Museum officials to withdraw the exhibit.[4] When those efforts failed, he announced that he would withhold from the Museum more than $7 million dollars that the New York City Council had appropriated to the Museum for fiscal year 2000.[5] Not content with that sanction, the Mayor further initiated an action in state court in an effort to terminate the Museum's 106-year-old leasehold arrangement with the City and to evict the Museum from its City-owned building.[6] Moreover, the Mayor announced that he would try to block $20 million in construction funds that the Museum was seeking for major repairs and construction projects, including restoration of the building steps.[7] He even threatened to take over the Brooklyn Museum's Board of Trustees because a majority of the Board refused to agree to close the exhibit.[8]

Giuliani either was aware or should have been aware of the exhibit and its content well before September 1999 because he serves as an *ex officio* member of the Brooklyn Museum's Board of Trustees. *Id.* at 190. On June 18, 1998, at a meeting of the Board of Trustees, Museum Director Arnold Lehman discussed the exhibit with the Board. The minutes of the June board meeting were reviewed at the next board meeting on October 15, 1998, and at that meeting, a complete catalog of the exhibit was distributed to the Board. Then, at the June 18, 1999 board meeting, Mr. Lehman and the board further discussed the exhibition. Affidavit of Arnold L. Lehman at 14-16, Brooklyn Inst. of Arts and Scis. v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99-6071-NG). Moreover, the fiscal year 2000 budget request submitted by the Brooklyn Museum to the City's Department of Cultural Affairs also contained, among other information, a description of the exhibit. And, in April 1999, Director Lehman wrote to Schuyler Chapin, Commissioner of the Department of Cultural Affairs, "highlighting the controversial nature of the SENSATION Exhibition." Supplemental Affidavit of Arnold L. Lehman at 13, Brooklyn Inst. of Arts and Scis. v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99-6071-NG).

[3] *Brooklyn Inst. of Arts and Scis.*, 64 F. Supp. 2d at 186.

[4] *Id.* at 191.

[5] *See id.* at 189-91.

[6] *See id.* at 187.

[7] Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 9, Brooklyn Instit. of Arts and Scis. v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. CV99-6071-NG).

[8] *Brooklyn Inst. of Arts and Scis.*, 64 F. Supp. 2d at 191.

On September 28, 1999, the Museum sued Mayor Giuliani and the City of New York in the United States District Court for the Eastern District of New York.[9] In essence, the Museum claimed that the Mayor had violated the First Amendment by seeking to punish the Museum for the content of the artistic expression presented in the exhibit.[10] The Museum requested injunctive relief to prohibit the Mayor from continuing to retaliate against the Museum for its refusal to withdraw the exhibit.[11] The suit also requested the restoration of the funding that had been appropriated by the City Council and that had been withheld by the Mayor.[12] The City responded by moving to dismiss the suit. The Museum, in turn, requested preliminary injunctive relief.[13]

On November 1, 1999, District Court Judge Nina Gershon denied the City's motion to dismiss and issued a preliminary injunction.[14] In doing so, Judge Gershon concluded that the "First Amendment bars government from censoring works said to be offensive,"[15] that the "City ha[d] . . . admitted the obvious; it acknowledged that its purpose"[16] in withholding funding and seeking to evict the Museum was "directly related, not just to the content of the Exhibit, but to the particular viewpoints expressed,"[17] and that "[t]here can be no greater showing of a First Amendment violation."[18]

Accordingly, the preliminary injunction issued by the District Court prohibited the City from "withholding or otherwise failing to provide the Brooklyn Museum . . . any sums of money appropriated, allocated, promised or otherwise payable to the . . . Museum"; from "denying, delaying or otherwise discriminatorily treating pending or future funding requests of any type as the result of the Exhibit"; from "evicting or seeking to evict the . . . Museum . . . from its premises [on] Eastern Parkway, Brooklyn"; and from "interfering in any manner . . .

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[9] *Id.* at 191-92.
[10] *Id.*
[11] *Id.* at 192.
[12] *Id.*
[13] *Brooklyn Inst. of Arts and Scis.*, 64 F. Supp. 2d at 192.
[14] *Id.* at 205.
[15] *Id.* at 198.
[16] *Id.*
[17] *Id.* at 200.
[18] *Brooklyn Inst. of Arts and Scis.*, 64 F. Supp. 2d at 200.

with the composition of the Board of Trustees of the Brooklyn Museum."[19] The City filed a notice of appeal from the issuance of the preliminary injunction. Yet, prior to its resolution, the City withdrew the appeal and settled the controversy under terms that were entirely favorable to the Museum.

The excessiveness of Mayor Giuliani's response to the Brooklyn Museum's refusal to withdraw the exhibit made for an easy case. In expressing his opposition to the Ofili piece, the Mayor described the piece as a form of "Catholic bashing," and he announced that "[p]ublic taxpayer dollars should not go for aggressive desecration of national or religious symbols of great significance and sensitivity to people."[20] But the Mayor's response to the exhibition was not limited to a withdrawal of those funds used by the Museum to present the artwork that he found offensive. Instead, the range of punitive action undertaken by the Mayor demonstrated a transparent attempt to retaliate against a private institution for the views conveyed by that institution. Accordingly, the Mayor's behavior offered a classic example of viewpoint-based discrimination in violation of well-settled First Amendment principles. The district court decision was well supported by longstanding First Amendment doctrine. And the City was wise to settle the controversy prior to the completion of the appellate process.

However, suppose the Mayor had been more restrained in his response to the exhibit. Suppose that the Mayor did not try to withdraw all City funding from the Museum, did not try to evict the Museum from its City-owned building, and did not seek the removal of the Board of Trustees. Suppose, instead, that the Mayor had simply said that City funds should not be used to present artwork that offends many New York City residents and that, therefore, the Museum should return to the City those funds that the City had paid to the Museum that were attributable to the presentation of the exhibit or, more particularly, the offending pieces of art.

If Mayor Giuliani had adopted this more modest stance, his position would have provoked a more interesting set of constitutional questions than those raised by the actual law-

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[19] *Id.* at 205.

[20] Dan Barry, *On Display at City Hall, 2 Catholics, 2 Views*, N.Y. TIMES, Sept. 25, 1999, at B1.

suit. A more restrained approach by the Mayor would have brought into sharp relief the questions as to whether, when the government chooses to fund or sponsor expressive enterprises, it can impose any restrictions on funded-expression that it wishes and whether the First Amendment can effectively serve to distinguish between appropriate and inappropriate restrictions on the use of taxpayer monies for expressive purposes.

These questions were critical to a dispute that arose some years ago when a Long Island school board removed approximately nine books—including Bernard Malamud's THE FIXER and Kurt Vonnegut's SLAUGHTERHOUSE FIVE—from its high school library.[21] The school board claimed that it should not have been required to pay for or make available books that conveyed political and social messages that a majority of board members found disagreeable.[22]

These issues re-surfaced in the early 1990s when the federal government attempted to limit the speech of health-care professionals receiving federal funds for family-planning counseling.[23] Federal regulations prohibited such professionals from even discussing the availability of abortion with their patients.[24] In defending these regulations, the federal government asserted that it should not be required to subsidize a message with which many people disagreed, even though such restrictions prevented physicians from discussing a full range of medical options with patients.[25]

The issue arose again, a few years later, when various members of Congress began questioning the extent to which government funds should be used by the National Endowment for the Arts (the "NEA") to finance artistic expression that might offend a considerable segment of the community.[26] Congress ultimately adopted legislation that required the Chairperson of the NEA to consider, as part of the grant-making process, not only the artistic merit of grant recipients, but also

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[21] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) [hereinafter *Pico III*].

[22] Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 638 F.2d 404, 410-12 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982) [hereinafter *Pico II*].

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

[24] 42 U.S.C. §§ 59.2, 59.8, 59.9, 59.10 (1991).

[25] New York v. Sullivan, 889 F.2d 401, 412 (2d Cir. 1989).

[26] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

"general standards of decency and respect for diverse beliefs and values."[27]

In each of these situations, government institutions used the power of the purse to dictate the content of expressive enterprises. Condemning such practices, critics argued that the school board engaged in censorship when it removed books from the library,[28] that the federal government inappropriately used funding to tell physicians what they could or could not say to patients,[29] and that Congress wrongfully injected criteria having little or nothing to do with aesthetics into the process of funding artistic expression.[30]

In fact, First Amendment challenges were directed at each of these governmental restrictions, and each of these controversies reached the Supreme Court. But in none of these three cases did the Court offer a clear and coherent doctrinal analysis that would allow for the consistent resolution of these and other similar controversies. Such a failure is not entirely surprising. Traditional First Amendment doctrine prohibits the government from engaging in viewpoint discrimination and, in many instances, content-based discrimination in its restriction of private individuals and associations using private resources to convey ideas.[31] But a First Amendment prohibition against the government engaging in viewpoint or content-based discrimination cannot be universally and inexorably applied in every circumstance where the government chooses to subsidize expression.

The problem of applying the traditional First Amendment prohibition against viewpoint discrimination to circumstances involving government-funded speech is complicated by situations where the government has specific policy positions to impart or views to express, and therefore, it uses public funds to convey its views. Yet there are other situations where the government pays for communicative relationships or creates institutions devoted to discourse and expression where it is

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[27] 20 U.S.C. § 954(d)(1) (2000).

[28] *Pico III*, 457 U.S. 853, 859 (1982).

[29] Rust v. Sullivan, 500 U.S. 173, 181 (1991).

[30] *Finley*, 524 U.S. at 580.

[31] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 806 (1985); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

well-recognized that those engaged in expression are not conveying the government's own message. For example, when a municipality promotes an anti-smoking campaign and uses public funds to buy billboard space for such a campaign, we understand the municipal government to be conveying the government's anti-smoking views. By contrast, when a municipality creates a speakers'-corner in a public park and provides police protection for individuals who use that venue for political or religious advocacy, we recognize that the views conveyed by such individuals are not those of the municipality, even though government funds create the expressive opportunities for these individuals.

The fact that in some instances the government is paying to convey its own views, while in other instances public-funding is designed simply to facilitate the expressive opportunities of private persons or associations, suggests that a preliminary question might be asked whenever one is considering the constitutionality of restrictions imposed by the government upon the use of public monies to engage in expression. That question is whether, in subsidizing expression, the government is seeking to impart its own message or whether it is reasonably understood that the ideas conveyed are those of the recipient of the funding. If the government's decision to fund an expressive enterprise does not rest upon its desire to convey its own discrete message, but instead rests upon more general interests in providing expressive opportunities for individuals or private entities, constitutional analysis can proceed to the invocation of traditional First Amendment doctrine. In such circumstances—where the government cannot plausibly claim to be using its funding authority to convey its own message and where the speech is understood to be that of the private individual or group—traditional First Amendment doctrine prohibits the state from engaging in viewpoint discrimination, and, in some circumstances, content-based discrimination.

Applying this analytic approach leads to the conclusion that even if, hypothetically, Mayor Giuliani were to have adopted the more modest position described above, his position could not be sustained under the First Amendment as properly understood. The basis for this conclusion, and the case-law and historical examples supporting this conclusion, are discussed in more detail in Part III.

Before reaching that discussion, and by way of background, it may be useful to consider two matters: how the Court has responded to the issue of "government-funded speech"[32] in three cases where this issue has been raised most prominently and how leading scholars have treated this issue. These matters are addressed in Parts I and II. Part IV discusses a controversy, currently pending before the Supreme Court, that once again implicates the problem of government-funded expression and the First Amendment principles that constrain the government when it uses its fiscal authority to limit expression by recipients of government subsidies. The case, *Legal Services Corporation v. Velasquez*,[33] involves a restriction that, *inter alia*, prohibits attorneys that receive federal funds to represent indigent clients from using those funds to challenge the constitutionality of any welfare law. The issue in *Velasquez* is whether this restriction violates the First Amendment. Part IV also applies the analytic approach developed in Part III and concludes again that the restriction at issue in *Velasquez* should be found unconstitutional.

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[32] The term "government-funded speech" is intended to describe the circumstance where government provides funding or financial support for an expressive enterprise and attempts to dictate to the recipient of such financial support what ideas shall be conveyed or what expression shall or shall not take place with government monies. In this respect, the term describes a narrow sub-species of the broader circumstance that occurs when government provides financial support for an individual and attempts more generally to condition behavior on the receipt of such monies. In the narrow case of "government-funded speech," the government is simply saying to recipients, "Here is our money and this is what you can and cannot say with our money." In the broader situation, the government is saying, "If you take government money, not only must you refrain from conveying certain ideas with the government money, but, as a condition of receiving such money, you cannot convey certain ideas even with your own money." The constitutionality of the more broad and far-reaching set of restrictions by the government is generally addressed by the "impermissible conditions" doctrine. This Article is limited to the more narrow condition described here as the circumstance of "government-funded speech."

[33] Velasquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999). The United States, the Legal Services Corporation, and Velasquez all filed petitions for certiorari review from the Second Circuit decision. The Court granted the petitions of both the United States and the Legal Services Corporation, but it denied the petition submitted by Velasquez. Legal Servs. Corp. v. Velasquez, 164 F.3d 757 (2d Cir. 1999), *cert. granted*, 120 S. Ct. 1553 (2000).

I.

Board of Education, Island Trees Union Free School District v. Pico[34] involved a decision by a local school board to remove approximately nine books from a high school library. The books included Kurt Vonnegut's SLAUGHTERHOUSE FIVE, Demond Morris' THE NAKED APE, Piri Thomas' DOWN THESE MEAN STREETS, Bernard Malamud's THE FIXER, and Eldridge Cleaver's SOUL ON ICE. In removing the books, the school board issued a press release announcing that the books had been removed because they were "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[35]

In the lawsuit that challenged the book removal decision as a violation of the First Amendment, the school board offered a more persuasive defense of its authority to remove the books. It asserted that public education in elementary and secondary schools has historically performed an inculcative function; that in the performance of that function, school officials must necessarily decide what views to emphasize, or even to convey, and what views not to emphasize or convey; and that, within our democratic system, school boards bear the ultimate responsibility for making those choices.[36] Moreover, the school board reinforced this claim by asserting that, in addition to its responsibilities with respect to curricular matters, the board was also ultimately responsible for fiscal matters; that in the exercise of its fiscal responsibility, it retained the obligation to decide whether taxpayer monies should be used to convey particular views; and that as a democratically-elected body, it was the appropriate institution to decide whether taxpayer monies should be used to buy or maintain books that, in the view of the school board, contained ideas that offended a great many residents.[37]

In response to these arguments, the United States District Court for the Eastern District of New York granted summary judgment for the school board, dismissing the First Amendment challenge to the book removal decision. In reaching this

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[34] 457 U.S. 853 (1982).

[35] *Pico III*, 457 U.S. at 857.

[36] Appellants' Brief at 13-21, Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) (No. 80-2043).

[37] *Id.* at 35-36.

result, the district court reasoned, in part, that intrusion by the federal judiciary into the school board's decision-making "would infringe upon an elected school board's discretion in determining what community values were to be transmitted."[38] The court further observed that the issue of whether "it is a wise or even desirable educational decision to sanitize the library . . . should be decided and remedied either by the school district's voters, or by the State Commissioner of Education on an appropriate administrative appeal."[39]

On appeal, a divided panel of the Second Circuit reversed and remanded the case to the district court for trial. However, the two judges voting to reverse did so on different grounds. District Court Judge Charles Sifton, sitting by designation, based his decision upon the "unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters."[40] By contrast, Circuit Court Judge Jon Newman rested his decision upon the concern that the book removal decision may have constituted an effort to suppress ideas and that "a trial [was] required to determine precisely what happened, why it happened, and whether, in the circumstances of [the] case, the School Board's actions . . . created a sufficient risk of suppressing ideas to constitute a violation of the First Amendment."[41]

On review by the Supreme Court, the plaintiffs essentially advanced two First Amendment arguments. First, they asserted that a school board was not permitted to employ its authority over the content of the school library or over the curriculum for the purpose of imposing a narrow set of ideological views and a "pall of orthodoxy" over the schoolhouse and that the behavior of the school board in *Pico* evinced such an impermissible motive.[42] The plaintiffs' second argument, based on Judge Sifton's decision, was that the First Amendment requires procedural regularity to insure against ad hoc censorial

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[38] Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 474 F. Supp. 387, 396 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982) [hereinafter *Pico I*].

[39] *Id.*

[40] *Pico II*, 638 F.2d at 414.

[41] *Id.*

[42] Respondents' Brief at 10-22, Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 638 F.2d 404 (2d Cir. 1980) (No. 79-7690; No. 619).

decisions and that the school board's behavior was highly irregular and arbitrary.[43]

By a narrow 5-4 margin, the Supreme Court voted to affirm the Second Circuit's decision and to remand the case for trial.[44] But the majority vote to affirm yielded three different opinions. A plurality opinion issued by Justice Brennan was joined by Justices Marshall and Stevens and, in part, by Justice Blackmun. Justice Brennan offered an analysis of the First Amendment claims that turned upon the school board's motives:

> If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioner disagreed, and if the intent was the decisive factor in petitioner's decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*.[45]

Justice Blackmun largely concurred with Justice Brennan and agreed with Justice Brennan's major emphasis upon the school board's motivation and the impermissibility, under the First Amendment, of the school board's exercise of its inculcative function to impose a "pall of orthodoxy" over the classroom.[46] But Justice Blackmun declined to join only that part of Justice Brennan's opinion that characterized the students' right at issue as the right to receive information.[47]

Justice White cast the deciding vote in favor of remanding the case for trial. In so doing, however, Justice White offered no analytic approach to the "difficult First Amendment issues in a largely uncharted field" that were presented by the case.[48] Instead, he suggested that if the case returns to the Court after trial, "there will be time enough to address the First Amendment issues that may then be presented."[49]

Thus, the *Pico* decision failed to provide any clear guidance regarding the appropriate standards for evaluating First

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[43] *Id.* at 31-36.
[44] *Pico III*, 457 U.S. at 855, 883.
[45] *Id.* at 871.
[46] *Id.* at 876-82 (Blackmun, J. concurring in part and concurring in judgment).
[47] *Id.* at 878 (Blackmun, J. concurring in part and concurring in judgment).
[48] *Id.* at 884 (White, J. concurring).
[49] *Pico III*, 457 U.S. at 883 (White, J. concurring).

Amendment challenges in circumstances where the government is subsidizing expression. The plurality accepted the claim that public schools may permissibly perform an inculcative function, and therefore, they recognized that some kinds of content-based decisions are necessary when public school officials decide upon the content of the collection in a school library or the books that are to be used in a curriculum. But the plurality further concluded that the First Amendment would be violated when such officials exercised their authority "for the *purpose* of restricting access to . . . political ideas or social perspectives."[50] In reaching this conclusion, however, the plurality failed to suggest precisely when, under this standard, a school board would be found to have exceeded its authority or where the line would be drawn between permissible inculcation of values and impermissible indoctrination. In these respects, Justice Brennan's opinion concluded, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violate[s] the constitutional rights of the students."[51] And Justice Rehnquist, writing in dissent and joined by Chief Justice Burger and Justice Powell, "cheerfully concede[d]" this point.[52] But neither the plurality opinion nor the dissenting opinion fully grappled with the question as to why this intuitive conclusion—one held by at least seven members of the Court—should have been true.

Matters became no clearer nine years later when the Court considered *Rust v. Sullivan*.[53] *Rust* involved a 1970 congressional enactment, Title X of the Public Health Services Act,[54] which authorized the Secretary of Health and Human Services ("HHS") to grant public agencies and nonprofit private entities financial assistance for family planning services. The statute contained a reservation, however, which provided that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning."[55] In

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[50] *Id.* at 879 (Blackmun, J., concurring).

[51] *Id.* at 870-71.

[52] *Id.* at 907 (Rehnquist, C.J. dissenting).

[53] 500 U.S. 173 (1991).

[54] P.L. No. 91-572, § 6(c), 84 Stat. 1506 (1970) (codified as amended at 42 U.S.C. §§ 300-300a-6 (1998)).

[55] 42 U.S.C. § 300a-6 (1998); *Rust*, 500 U.S. at 178.

1988, the Secretary of HHS[56] vastly expanded the proscriptive reach of this statutory limitation by promulgating regulations that imposed several restrictions on recipients of Title X funding. Recipients were prohibited from providing "counseling concerning the use of abortion as a method of family planning or [from providing a] referral for abortion as a method of family planning."[57] Recipients were also prohibited from "engaging in activities that encourage, promote or advocate abortion as a method of family planning."[58] The regulations also required that "Title X projects be organized so that they are 'physically and financially separate' from prohibited abortion activities."[59]

Several recipients of Title X funding challenged these regulations. They contended that the regulations exceeded the scope of the authorizing statute upon which the regulations rested and were inconsistent with the statute. They also contended that, in restricting what health care professionals could say to patients, the regulations intruded impermissibly into the doctor-patient relationship and that they impermissibly burdened the First Amendment rights of health care professionals to express their professional views and the First Amendment rights of patients to hear those views.[60]

More particularly, plaintiffs' First Amendment claims rested upon three distinct, though somewhat overlapping, arguments. The plaintiffs first asserted that the regulations prohibited conversations between physician and patient about abortion, while they did not prohibit conversations about carrying a fetus to term. Therefore, the regulations were not even-handed on the subject of abortion and, consequently, amounted to impermissible "viewpoint discrimination" in violation of the First Amendment.[61] Second, plaintiffs asserted that since the regulations conditioned funding on the wavier of a physician's right to discuss with a patient the possibility of abortion, the regulations constituted an "unconstitutional condition" in dero-

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[56] During the litigation, Louis Sullivan replaced Otis Bowen as Secretary of HHS.

[57] 42 C.F.R. § 59.8(a)(1) (1989); *Rust*, 500 U.S. at 179.

[58] 42 C.F.R. § 59.10(a) (1989); *Rust*, 500 U.S. at 180.

[59] *Rust*, 500 U.S. at 180 (quoting 42 C.F.R. § 59.9 (1989)).

[60] *Id.* at 183, 192, 196, 200.

[61] *Id.* at 192-93.

gation of First Amendment rights.[62] Third, plaintiffs contended simply that the regulations unconstitutionally burdened the right of physicians to advise their patients.[63]

The Supreme Court ultimately rejected each of these First Amendment arguments. In addressing the second claim, the Court read the "unconstitutional conditions" precedent quite narrowly. The Court asserted 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."[64] In this regard, the Court concluded that the restrictions in *Rust* left recipients of federal funds with the opportunity to discuss abortion with patients by speaking with privately-raised money through an "affiliate organization."[65] In response to the argument that the regulations impermissibly burdened First Amendment-protected communication between physician and patient, the Court announced that it need not address that question because the "regulations [did] not significantly impinge upon the doctor-patient relationship."[66] This was so, the Court reasoned, because the regulations did not "require[] a doctor to represent as his own any opinion that he does not in fact hold" and because "the doctor-patient relationship established by the Title X program" was not "sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[67]

In its disposition of the case, the *Rust* Court largely avoided the claim that the regulations amounted to impermissible viewpoint discrimination. The Court responded, in part, to this claim by raising the example of the National Endowment for Democracy and observing that when Congress established that program "to encourage other countries to adopt democratic principles . . . it was not required to fund a program to encourage competing lines of political philosophy such as communism

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[62] *Id.* at 196.
[63] *Id.* at 200.
[64] *Rust*, 500 U.S. at 197.
[65] *Id.* at 198.
[66] *Id.* at 200.
[67] *Id.*

and fascism."[68] Yet the *Rust* Court acknowledged that, in some circumstances, government cannot justify control over content simply upon the claim that it is providing fiscal support that enables the expression to take place.[69] And in this regard, the Court cited two examples: (1) government-funded public fora and (2) public universities.[70] But the Court's opinion in *Rust* never explained why it was appropriate for Congress to engage in viewpoint discrimination when it funded the National Endowment for Democracy or why it was constitutionally improper to use the government's fiscal authority as a justification for restricting the views expressed by speakers in public parks or by scholars at public universities.

At bottom, the *Rust* Court responded to the issue of government-funded expression by offering incomplete and insufficient explanations for its decision. *Rust* might be interpreted as holding that government restrictions on the use of public subsidies raise no First Amendment problems except in the limited circumstances where such restrictions run afoul of a narrowly defined "impermissible conditions" doctrine. But such an interpretation would be inconsistent with the recognition in the *Rust* opinion that public fora and public universities provide examples of situations in which government restrictions might violate the First Amendment, even if the restrictions do not violate the "impermissible conditions" doctrine.[71] The *Rust* opinion never attempted to reconcile these examples or to explain the principle or policy choices that account for the First Amendment protection of public fora and public universities and the refusal to extend similar protection to the doctor-patient relationship.

However, approximately four years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[72] the Court did attempt to rationalize the *Rust* decision. *Rosenberger* involved a constitutional challenge to the criteria employed by the University of Virginia in subsidizing student organizations through monies contributed by students to a Student Activities

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[68] *Id.* at 194.
[69] *Rust*, 500 U.S. at 199.
[70] *Id.* at 199-200.
[71] *Id.*
[72] 515 U.S. 819 (1995).

Fund ("SAF").[73] Under university guidelines, SAF monies could not be given to an organization or activity that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."[74] A religious organization challenged the guidelines claiming that, under the First Amendment, the University of Virginia as a public university had an obligation to remain neutral with respect to the expression undertaken by student organizations and that the University could not provide subsidies to a broad range of ideological organizations and, at the same time, disfavor groups espousing religious viewpoints.[75] The University defended its criteria, claiming that if it were to subsidize religious organizations, it would violate the Establishment Clause of the First Amendment.[76]

The Court rejected the University's position.[77] In doing so, the Court concluded that the University's program of funding student organizations was analogous to the government subsidizing a forum.[78] The Court conceded that "[t]he SAF is a forum more in a metaphysical than in a spatial or geographic sense,"[79] but it concluded, nevertheless, that "the same principles are applicable."[80] Those principles mandate government neutrality and erect a strong presumption against viewpoint discrimination in providing access to a forum.[81]

In response to the argument that conferring financial support to religious organizations would violate the Establishment Clause, the Court concluded, in part, that there was no plausible fear that the religious expression undertaken by a funded religious group would be mistaken as the expression of the University.[82] Consequently, the *Rosenberger* Court recognized a distinction between government-funded speech designed to convey the government's own message and government funds that are transmitted to individuals to convey their

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[73] *Id.* at 824-28.
[74] *Id.* at 823.
[75] *Id.* at 887.
[76] *Id.* at 828.
[77] *Rosenberger*, 515 U.S. at 846.
[78] *Id.* at 830.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Rosenberger*, 515 U.S. at 840-43.

own personal views.

In this regard, the Court re-characterized the *Rust* decision. According to the *Rosenberger* Court, *Rust* rejected the constitutional challenge to the restrictions at issue because, in that situation, "the government [had not created] a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."[83]

The distinction fashioned by the *Rosenberger* Court between the government as "speaker" and government-funded speech where the government is not understood as the "speaker" offered a valuable insight for resolving controversies involving subsidized expression. But the lesson of *Rosenberger* seemed to have been forgotten when, three years later, the Court decided *National Endowment for the Arts v. Finley*.[84]

The *Finley* case involved a facial challenge to the standards employed by the National Endowment for the Arts ("NEA") in awarding fiscal grants to artists. In authorizing such grants, Congress, by statute, initially conferred broad grant-making discretion upon the NEA, subject to such general priorities as "artistic and cultural significance," "creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts."[85] In 1990, however, Congress amended the statute authorizing NEA grant-making. The amendment provided that the NEA's Chairperson was required to establish procedures to judge the artistic merit of grant applications and to "take[] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[86]

In a challenge to the facial validity of the "decency and respect" criteria, a federal district court concluded that the criteria were unconstitutionally vague and enjoined their enforcement.[87] On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed.[88] The court of

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[83] *Id.* at 833.

[84] 524 U.S. 569 (1998).

[85] 20 U.S.C. § 951(c)(1)-(10) (1965), *amended by* 20 U.S.C. § 954(d)(1) (1990).

[86] 20 U.S.C. § 954(d)(1) (1990).

[87] Finley v. Nat'l Endowment for the Arts, 795 F. Supp. 1457, 1471-72 (C.D. Cal. 1992).

[88] Finley v. Nat'l Endowment for the Arts, 100 F.3d 671, 683-84 (9th Cir.

appeals concluded that the criteria were not only unconstitutionally vague, but that they also violated the First Amendment prohibition against viewpoint discrimination.[89] On certiorari review, the Supreme Court reversed the Ninth Circuit.[90]

In reversing the Ninth Circuit, the Court reasoned that the statutory provisions had been read by the NEA as "merely hortatory" and that, at least as interpreted by the NEA, the provisions simply added " 'considerations' to the grant-making process," but did "not preclude awards to projects that might be deemed 'indecent' or 'disrespectful'; nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application."[91] And, based upon this interpretation of the statutory provisions, the Court concluded that the provisions "admonishe[d] the NEA merely to take 'decency and respect' into consideration, and . . . [were] aimed at reforming procedures rather than precluding speech."[92] Consequently, it was not apparent that the provisions would "inevitably . . . be utilized as a tool for invidious viewpoint discrimination."[93]

Moreover, the Court distinguished the *Rosenberger* analysis and suggested that the principles applicable to government-funded speech articulated in the *Rosenberger* opinion were limited to circumstances involving public fora. In this regard, the *Finley* Court observed:

> In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately "encourage a diversity of views from private speakers." The NEA's mandate is to make aesthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations.[94]

In response to the claim that the statutory provision was excessively vague, the Court observed that "[i]n the context of selective subsidies, it is not always feasible for Congress to

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1996).

[89] *Id.*

[90] *Finley*, 524 U.S. at 590.

[91] *Id.* at 580.

[92] *Id.* at 582.

[93] *Id.*

[94] *Id.* at 586 (quoting *Rosenberger*, 515 U.S. at 834, 824).

legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.' "[95]

Thus, it is apparent that when it comes to the issue of government-funded expression, the Court has failed to offer clear guidance or a coherent analytic approach. The Court's opinion in *Rosenberger* suggested an analysis that would shed considerable light on the issue. Nevertheless, the overall trajectory of precedent—from *Pico* to *Rust* to *Rosenberger* and, ultimately, to *Finley*—leaves First Amendment doctrine very much unsettled.

II.

The Supreme Court's failure to offer a coherent and consistent analytic approach toward the problem of government-funded speech has prompted scholars and commentators to address the problem. In a 1980 article, Professor Steven Shiffrin discussed the issue of government-funded speech.[96] He examined, among other issues, the propriety of public officials using taxpayer monies to express support for some favored political candidates; to provide subsidies for some, but not all, artists; and to control the content of curricula in public schools.[97] Professor Shiffrin considered the traditional First Amendment prohibition against government favoring some ideas over others and the admonition of the Supreme Court, in *Police Department v. Mosley*,[98] that, in regulating access to public fora, the government must afford all points of view an equal opportunity to be heard.[99] He concluded that these doctrinal propositions were unhelpful when applied to the various controversies discussed in his article. Therefore, he urged what he described as "an eclectic approach" upon the claim that "the government speaks in too many ways with too many different effects for too many reasons to expect that general theory can be an unfailing guide to easy solutions. An approach which

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[95] *Finley*, 524 U.S. at 589.
[96] Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980).
[97] *Id.* at 623-53.
[98] 408 U.S. 92 (1972).
[99] *Id.* at 101.

fails to pay attention to context will ignore much of importance."[100]

Notwithstanding Professor Shiffrin's insistence upon a fact-based and contextual approach toward the issue of government-funded expression, his article ultimately tilted toward a structural analysis that urged adherence to rules of procedural regularity. Thus, he argued:

> [G]overnment [funding of] artistic speech and subsidies to the arts can be reconciled with constitutional principles if sufficient safeguards are introduced to protect against monolithic decision-making and politicization. Again an eclectic approach suggests the propriety of general prophylactic rules designed to accommodate government interests with first amendment values. Ad hoc decision-making in particular cases would be ineffective. Attention to the structure of the government role in the communicative process yields the most promising solutions.[101]

Professor Shiffrin urged a similar approach toward the problem of public education and the authority of school officials to perform an inculcative function in the transmittal of elementary and secondary education.[102] He acknowledged that "[t]he problem, viewed from the eclectic approach, is to fashion a structure that allocates the decision-making authority so as to accommodate the relevant interests."[103] In this regard, Professor Shiffrin's structural approach seemed to anticipate the First Amendment principles of procedural regularity urged by Judge Sifton in the *Pico* case.

Professor David Cole has also offered a structural approach toward the problem of government-funded speech. In an insightful and important essay, Professor Cole argued that earlier scholarly efforts to address the issue of government-funded speech as a sub-species of the "unconstitutional conditions" doctrine were somewhat misdirected.[104] In this regard, he noted, as a general matter, that:

> [U]nconstitutional conditions doctrine seeks to identify those conditions on funding that have a coercive effect on the recipient's free-

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[100] Shiffrin, *supra* note 96, at 610.

[101] *Id.* at 646-47.

[102] *Id.* at 649-50.

[103] *Id.* at 650.

[104] *See generally* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992).

> dom to exercise constitutional rights on her own time and with her own resources. The doctrinal focus is on the pressure that the dangling of a financial benefit places on the would-be recipient's freedoms outside the funded program. The doctrine's corollary is that if the conditions do not restrict the recipient on her own time, no constitutional issue is raised.[105]

But, according to Professor Cole, the funding of expression raises additional concerns. He noted that "[w]hen the government funds speech[,] . . . first amendment concerns are not limited to potential coercion of the subsidized speaker, but extend also, perhaps more importantly to the listener."[106] Moreover, Professor Cole recognized that the problem of government-funded speech implicates the question as to when it is proper for government officials to use the public fisc to express the government's viewpoint and when it is necessary to insist that the government must remain neutral. He acknowledged that "first amendment doctrine can neither insist on across-the-board government neutrality nor permit untrammeled content control over funded speech."[107] He, therefore, proposed:

> [A]n institutional accommodation which would recognize the legitimacy of non-neutral government support of speech, but at the same time insist upon protecting certain institutional spheres of independence and neutrality as checks against the dangers of government propaganda and indoctrination. In these protected spheres, government should be required to afford a degree of independence to institutions and speakers notwithstanding the presence of government funding, toward the end of ensuring a vigorous public debate and avoiding the perils of indoctrination. In other funded settings, government should remain free to support specific viewpoints and dictate the content of speech.[108]

The "spheres of neutrality" identified by Professor Cole included "public fora," "public education," "the press," "the arts," and "professional fiduciary counseling."[109]

Professors Martin Redish and Daryl Kessler offered a different approach to the problem of publicly subsidized expression. In a 1996 article, they presented an elaborate categorical matrix for analyzing the constitutionality of content-based and

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[105] *Id.* at 680.
[106] *Id.*
[107] *Id.* at 681.
[108] *Id.*
[109] Cole, *supra* note 104, at 681.

viewpoint-based government funding decisions.[110] The Redish-Kessler taxonomy divided affirmative subsidies of expression into two groups: "policy subsidies" and "auxiliary subsidies."[111] According to Redish and Kessler, "policy subsidies include situations in which the government either funds the speech of 'core' policy-making government employees or makes a political appointment based at least in part on that appointee's prior expression."[112] Redish and Kessler regarded such conduct as constitutional.[113]

Redish and Kessler then subdivided "auxiliary subsidies" into three sub-categories: "categorical" subsidies, "viewpoint-based" subsidies, and subsidies of "judgmental necessity."[114] The authors defined a categorical subsidy as a content-based, but viewpoint-neutral, decision to fund a category of expression such as the funding of art, and they regarded such a funding choice as constitutional.[115] They defined viewpoint-based subsidies as funding based on "the viewpoint espoused by [the] speaker, such as when the government chooses to fund the work of a particular artist because she produces art glorifying the Republican Party," and they generally regarded such subsidies as unconstitutional.[116]

The final category defined by Redish and Kessler involved subsidies of "judgmental necessity."[117] By way of example, they suggested that this category included circumstances "when the government chooses between two artists applying for government funding or between two researchers in similar areas seeking governmental support for their research."[118] Redish and Kessler regarded such financial support as "conditionally constitutional."[119] They further explained that "[t]he choice of one speaker over another is constitutional if the government bases its decision on criteria 'substantially related' to

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[110] *See generally* Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996).

[111] *Id.* at 546.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Redish & Kessler, *supra* note 110, at 547.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

the pre-described viewpoint."[120]

Each of these scholarly attempts to grapple with the issue of government-funded expression offers valuable insights. Professor Shiffrin's approach is most useful in a case like *Pico* where—if one accepts the claim that public education can legitimately perform an inculcative function—various governmental officials and employees may enjoy a shared responsibility for deciding upon the views that are to be conveyed as part of the public school curriculum or, alternatively, decision-making responsibility might be assigned to some public officials and not to others. Thus, for example, a school district might establish its rules of governance so that, in the ordinary course, decisions over the content of a school library are made by the school librarian in consultation with the school principal and not by the school board. In such circumstances, a school board's intrusion into the decision-making process might be found to violate First Amendment principles of procedural regularity.

Professor Cole's approach to the problem of government-funded speech would be particularly helpful in cases like *Rust*. In such a case—at least under the revisionism offered by the *Rosenberger* opinion—the government had a message to impart and tried to use its funding authority to communicate that message. But, under Professor Cole's approach, such a rationale by the government would not save the restriction at issue in *Rust* from constitutional invalidation. Professor Cole would regard the restriction as an intrusion into an institutional relationship—the physician-patient relationship—that is deserving of special constitutional protection. Such an intrusion, according to Professor Cole, would violate the government's constitutional obligation of neutrality.[121]

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[120] Redish & Kessler, *supra* note 110, at 547.

[121] Professor Cole's approach might also prove helpful in resolving a controversy that developed a few years ago at the Smithsonian Institution. The controversy arose when curators at the Smithsonian prepared an exhibit relating to the decision by the United States to use nuclear weapons against Japan during World War II. MARTIN HARVIT, AN EXHIBIT DENIED 50-66 (1996). Some veterans organizations and politicians criticized the historical perspective advanced by the exhibit's curator, claiming that the exhibit was not sufficiently praising of the role played by the United States in World War II, in general, and the decision to use nuclear weapons, in particular. *Id.* at 238-60. The politicians further claimed that an exhibit sponsored with taxpayer monies should not present an historical per-

But there are many cases that can be resolved by conducting a less complicated inquiry because there are many cases where the government has decided to fund an institutional relationship or expressive enterprise, not to convey a discrete message or to advance a policy position, but for other public policy reasons.[122] Therefore, asking and answering the simple question, "Who's the speaker?," can often penetrate some of the confusion that surrounds the issue of government-funded speech. Professor Cole's thoughtful analysis will undoubtedly enrich such an inquiry. But, in those circumstances where the government is not the "speaker," but is simply using the public fisc to facilitate the speech of private individuals or organizations, traditional First Amendment doctrine can and should be applied as a limitation upon government using its funding authority to dictate the views expressed. This matter is developed more fully in Part III.

III.

There are circumstances where government officials have a message to convey and where they provide funding to convey that message. In such circumstances, the government may properly be regarded as the "speaker," and, as the speaker, the government is free to express its preferred position without giving equal weight to conflicting views. Thus, for example, the President can use public monies to conduct a press conference at which he may express his own views about public policy matters without presenting an opposite viewpoint. The Supreme Court recognized this proposition in *Rust* when it ob-

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spective that invited any criticism or second thoughts about the decision to use nuclear weapons. *Id.* The political controversy ultimately resulted in the effective cancellation of the exhibit without litigation. *See id.* at 372-98. But the controversy provoked the question as to whether it is appropriate for the United States to establish and support a museum that serves simply as an institution designed to present only the government's version of historical events and to present only historical perspectives that are praising of United States policies or whether such control over the content of a museum's exhibit is inappropriate as a matter either of public policy or First Amendment principle. Professor Cole's structural approach may well speak to that issue.

[122] The most obvious example involves the government creating an area in a public park for individuals to engage in speaking and demonstrating. Other examples are discussed in Part III.

served that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism or Fascism."[123] And the Court reinforced this observation in *Rosenberger*:

> [G]overnment [is permitted] 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 . . . [for] when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[124]

On the other hand, there are situations where the government funds communicative relationships or where it creates or supports institutions devoted to discourse and expression where it is well recognized that those engaged in expression are not conveying the government's message but are, instead, conveying their own views. This proposition was also recognized by the *Rosenberger* Court. Thus, after explaining that the government as "speaker" must remain free to support its own policy positions, the *Rosenberger* Court was careful to note that "[i]t does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize the transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[125]

The most common example of the government providing financial support for communication by private speakers occurs when a state or municipality creates or subsidizes a public forum or a limited forum for individual expression. In this regard, there is a long line of cases holding that the government cannot engage even in content-based discrimination in regulating access to a public forum and that, when administering a limited forum, the government can establish categorical restrictions that define the nature of the forum, but it cannot engage in viewpoint discrimination within the categories of appropriate expression.[126]

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[123] *Rust*, 500 U.S. at 194 (citations omitted).
[124] *Rosenberger*, 515 U.S. at 833.
[125] *Id.* at 834.
[126] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S.

These principles were also reaffirmed in *Rosenberger*. The Court in *Rosenberger* cited *Mosley* in support of the proposition that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[127] In addition, the *Rosenberger* Court highlighted the special First Amendment concerns that arise when the government discriminates against speech based not only on content, but also on viewpoint. Citing *R.A.V. v. City of St. Paul*,[128] the *Rosenberger* Court emphasized that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[129] And, even in a publicly funded program that was a forum only in a "metaphysical" sense, the *Rosenberger* Court made clear that "[t]he government must abstain from regulating speech when the . . . opinion or perspective of the speaker is the rationale for the restriction."[130] Indeed, the fundamental premise of the Supreme Court's public forum cases is that while the speakers in a public forum may be using public facilities or public subsidies to communicate ideas, the ideas that they are communicating are their own and not those of the government.

In this regard, the Court's decisions in *Lamb's Chapel v. Center Moriches Union Free School District*,[131] *Capital Square Review Board v. Pinette*,[132] and *Rosenberger* are particularly instructive. Each of these cases involved the constitutionality of restrictions directed against religious expression. In each of these cases, the government defended its restrictions upon the claim that it would violate the Establishment Clause if it were to provide financial support for religious expression, and, in each of these cases, the Court rejected the government's defense. The Court did so because the communication that took place within the public forum was reasonably understood as

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384, 390-91 (1993); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 799-800 (1985); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-46 (1983); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[127] *Rosenberger*, 515 U.S. at 828 (citing *Mosley*, 408 U.S. at 96).

[128] 505 U.S. 377 (1992).

[129] *Rosenberger*, 515 U.S. at 829 (citing *R.A.V.*, 505 U.S. at 391).

[130] *Id.* at 830.

[131] 508 U.S. 384 (1993).

[132] 515 U.S. 753 (1995).

the expression of private individuals or organizations, and the government was not understood to be endorsing the religious expression at issue, even if it created the forum or otherwise provided financial support that allowed the communication to take place. Accordingly, in each of these cases, the Supreme Court concluded that the government restrictions amounted to impermissible viewpoint discrimination in violation of the First Amendment.[133]

But the prohibition against viewpoint discrimination is not limited to circumstances where government subsidizes a forum for communication; it also applies to other sorts of communicative relationships and institutions funded or subsidized by the government. One such example is provided by our public universities. Indeed, when state-funded universities first developed in the United States, scholars feared that politicians would use the power of the purse to dictate the content of the curricula. Thus, Professor Arthur Lovejoy, one of the founders of the American Association of University Professors (the "AAUP") and one of the principal architects of the AAUP's position on "academic freedom," wrote that "the distinctive social function of the scholar's trade cannot be fulfilled if those who pay the piper are permitted to call the tune."[134] Largely in response to this concern, principles of "academic freedom" were developed to insulate the lectures and writings of faculty members from influence by funding sources, whether such sources were private or governmental.[135]

These principles acquired constitutional recognition in *Sweezy v. New Hampshire*.[136] *Sweezy* arose out of an Attorney

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[133] *See Pinette*, 515 U.S. at 760 ("[Pinette's] religious display in Capitol Square was private expression."); *Rosenberger*, 515 U.S. at 834-35 ("The distinction between the University's own favored message and the private speech of students is evident in the case before us. . . . The University declares that the student groups eligible for . . . support are not the University's agents, are not subject to its control, and are not its responsibility."); *Lamb's Chapel*, 508 U.S. at 395 ("[U]nder these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the [School] District was endorsing religion or any particular creed . . . ").

[134] David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1413 (1988) (citing Arthur Lovejoy, *Professional Association or Trade Union?*, 24 AAUP BULL. 409, 414 (1938)).

[135] *See* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1277 (1988).

[136] 354 U.S. 234, 255 (1957).

General investigation in New Hampshire into the subject matter of a scholarly lecture delivered at a state university. In holding that the investigation was unconstitutional, both Chief Justice Warren's plurality opinion and Justice Frankfurter's concurring opinion discussed the importance of "academic freedom."[137] Justice Frankfurter, in particular, warned against the "grave harm resulting from governmental intrusion into the life of a university . . . [and in] compelling a [scholar] to discuss the contents of his lecture."[138]

Subsequent cases have reinforced the notion that academics have a First Amendment right to remain free from governmental intrusion into scholarly discourse, even if the government is funding the academic enterprise. For example, in *Keyishian v. Board of Regents*,[139] the Court held that the First Amendment protected state university faculty members from dismissal based on their allegedly " 'seditious' utterances,"[140] or because they refused to sign a certification stating that they did not belong to the Communist Party.[141] In ruling in favor of the faculty, the Supreme Court announced that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[142]

This concern for government-imposed orthodoxy within the classroom was subsequently explored in *University of Pennsylvania v. EEOC*.[143] That case involved an inquiry by the Equal Employment Opportunity Commission (the "EEOC") into a university's peer review process for tenure decisions. The University attempted to resist disclosure of its employment procedure arguing, in part, that such disclosure would compromise academic freedom.[144] The Supreme Court rejected the University's argument but, nonetheless, recognized the applica-

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[137] *Id.* at 250, 262-65.
[138] *Id.* at 261.
[139] 385 U.S. 589 (1967).
[140] *Id.* at 599.
[141] *Id.* at 609.
[142] *Id.* at 603.
[143] 493 U.S. 182 (1990).
[144] *Id.* at 195-97.

tion of academic freedom principles where "government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it."[145] After reviewing its decisions in *Sweezy* and *Keyishian*, the Court observed, "When, in those cases, the Court spoke of 'academic freedom' and the right to determine on 'academic grounds who may teach' the Court was speaking in reaction to content-based regulation."[146] The *EEOC* Court also made clear that its reference to content regulation reflected a more specific concern that government would endeavor to "direct . . . university discourse toward or away from particular subjects or points of view."[147]

Accordingly, under principles of academic freedom, the political branches of government may decide whether to fund a university. They may sponsor a law school and not a medical school. However, within the context of a government-sponsored academic program, the scholars and academics must remain free to pursue their individual academic expression without intrusion by the politicians because it is well understood that, when scholars engage in academic discourse, even in a public university, they are conveying their own ideas and not those of the state—even though the state may be paying their salaries.

A similar understanding should generally pertain to the expression undertaken by the curators of art museums. Just as academic judgments should be left to the academics, curatorial judgments should be left to the curators. And just as a state should not use its funding authority to micro-manage the content of a professor's lectures, the First Amendment should bar Mayor Giuliani from using City funding to dictate the content of a curated art exhibit.

Asking the question, "Who's the speaker?," provides significant guidance in resolving First Amendment controversies of the sort described here. With respect to the Brooklyn Museum controversy, the decisions regarding the content of the exhibit clearly reflected the curatorial judgments of Museum officials. The "Sensation" exhibit did not purport to convey the views of the City and could not plausibly be understood to be doing so.

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[145] *Id.* at 197.

[146] *Id.* (citing *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603).

[147] *Id.* at 198.

When the City initially decided to appropriate monies to the Brooklyn Museum and to other art institutions in the City, it did so not to convey any particular message but to provide general support for the arts and to enhance the cultural environment within the City. So understood, the City was not acting as a "speaker" in providing funds to the Brooklyn Museum. Therefore, traditional First Amendment principles prohibit City officials from using the power of the purse to dictate the content of the exhibit.

IV.

The question, "Who's the speaker?," can also guide the resolution of the issues presented in *Legal Services Corp. v. Velasquez*. At issue in *Velasquez* is a restriction imposed upon lawyers who receive funding from the Legal Services Corporation ("LSC").[148] LSC was created by Congress in 1974 to "provid[e] financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[149] As Congress noted in the original enabling legislation, "[T]here [was] a need to provide equal access to the system of justice in our Nation for individuals who [sought] redress of grievances"[150] and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel."[151] That need continues. Accordingly, for the past twenty-five years, LSC has continued to provide financial support to legal organizations around the country that represent indigent clients.

In 1996, however, Congress significantly reduced LSC's budget and, at the same time, imposed a set of restrictions upon lawyers and legal organizations receiving LSC monies.[152] The restrictions prohibited recipients of LSC funding from representing prisoners, from representing some aliens, from attempting to influence the issuance of any executive

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[148] *See* Legal Servs. Corp. v. Velasquez, 164 F.3d 751 (2d Cir. 1999), *cert. granted*, 120 S. Ct. 1553 (2000) (setting forth certiorari question).

[149] 42 U.S.C. § 2996b(a) (2000).

[150] 42 U.S.C. § 2996(1).

[151] 42 U.S.C. § 2996(2).

[152] Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-34, § 504, 110 Stat. 1321. These restrictions are summarized in *Velasquez*. *See* 164 F.3d at 760 n.1.

order or the promulgation of any administrative regulation, from participating in a class action, from advocating political or labor activity, from participating in litigation involving abortion or reapportionment, and from seeking statutory attorneys' fees in connection with any litigation.[153]

Lawyers employed by grantees funded with LSC monies along with their indigent clients and contributors challenged the constitutionality of many, but not all, of these restrictions. In 1997, the United States District Court for the Eastern District of New York, relying on *Rust*, upheld the facial validity of the restrictions and denied the plaintiffs' request for preliminary injunctive relief.[154] On appeal, the Second Circuit affirmed the district court's holding in all respects, except one.[155] Writing for the court, Judge Leval held that the provision permitting "representation of a client seeking a welfare benefit . . . only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits"[156] constitutes a viewpoint-based restriction and is, therefore, unconstitutional.[157] In explaining this conclusion, Judge Leval asserted that the restriction "accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint."[158]

The plaintiffs and the defendants, LSC and the United States, requested review by the Supreme Court. Review was granted only with respect to the petitions filed by the United States and LSC. Therefore, the only issue before the Court is the constitutionality of the restriction that forbids recipients of LSC funding from challenging the constitutionality of any welfare regulation or statute.

In defending the restriction, the United States has insisted that this controversy should be governed by the same principles that led the Court to uphold the restriction at issue in

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[153] *Velasquez*, 164 F.3d at 760 nn. 1-2.
[154] Velasquez v. Legal Servs. Corp., 985 F. Supp. 323 (E.D.N.Y. 1997).
[155] *Velasquez*, 164 F.3d at 769.
[156] *Id.* at 769.
[157] *Id.*
[158] *Id.* at 769-70.

Rust.[159] And LSC has argued that, in the government-funding context, the First Amendment prohibition against viewpoint discrimination is limited to public forum cases and cannot be extended to the circumstances presented in *Velasquez*.[160]

Both of these arguments are seriously flawed. The suggestion that *Rust* dictates the outcome of the *Velasquez* case should be rejected for two reasons. First, *Rust* was wrongly decided and rested upon the Court's avoidance of the central First Amendment issue in the case. The restrictions at issue in *Rust* were plainly viewpoint-based and such viewpoint discrimination could not and should not have been upheld upon the misplaced suggestion that physicians working in a Title X program serve simply as mouthpieces for the government. In fact, such physicians did not regard themselves merely as spokespersons for the government nor can it be plausibly claimed that their patients regarded them simply as government messengers.

Second, even if *Rust* had been properly decided, it is distinguishable from *Velasquez*. As noted above, in *Rosenberger*, the Court characterized the health care professionals in *Rust* as speaking on behalf of the government and not on behalf of themselves when they functioned within the Title X program.[161] If this characterization can be regarded as plausible, *Rust* presents a situation that is far different from that presented by *Velasquez* because a lawyer representing an indigent client in a suit against the government cannot be similarly characterized as a government spokesperson.

Indeed, in *Polk County v. Dodson*,[162] the Court essentially rejected the claim that criminal defense lawyers are agents of the state even when they are paid by the state to argue on behalf of indigent defendants.[163] In *Dodson*, an individual convicted after a state criminal trial subsequently brought suit under 42 U.S.C. § 1983 alleging that a public defender, who was a full-time county employee, had failed to

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[159] *See* Brief for the United States at 23-24, Legal Servs. Corp. v. Velasquez, 164 F.3d 757 (2d Cir. 1999) (No. 98-6006).

[160] *See* Brief for the Legal Services Corporation at 26-28, Legal Servs. Corp. v. Velasquez, 164 F.3d 757 (2d Cir. 1999) (No. 98-6006).

[161] *Rosenberger*, 515 U.S. at 833.

[162] 454 U.S. 312 (1981).

[163] *Id.* at 319-21.

provide adequate representation.[164] In dismissing the suit, the Court reasoned that lawyers representing indigent defendants in criminal cases owe a duty of "undivided loyalty" to their clients and that this duty precludes such lawyers from being treated as county agents, even though they were paid with county funds.[165] The Legal Services lawyers before the Court in *Velasquez* owe their clients no less of a duty of "undivided loyalty." That duty is incompatible with the assertion that such lawyers are spokespersons for the government.

LSC is also unpersuasive when it argues, in *Velasquez*, that the prohibition against viewpoint discrimination applies, in the funding context, only when the government subsidizes public fora.[166] This argument ignores the public university cases discussed above. As Justice Frankfurter noted in *Sweezy*, "A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest."[167] Again, just as academic judgments must be left to the academics, decisions about what legal arguments should be advanced on behalf of clients should be left to the lawyers in the pursuit of their "undivided loyalty" to their clients and in the exercise of their professional judgments.

CONCLUSION

In sum, controversies involving government-funded speech can often be addressed by asking a simple and straightforward question: "Who's the speaker?" Our collective experience with government subsidies supporting public fora and public universities suggests that the government cannot simply say to the beneficiaries of such subsidies, "If you take public monies, the government, as patron, can tell you what to say with that money." Instead, where the government is not truly the speaker and where the government may have chosen to subsidize an expressive institution or enterprise for a variety of reasons unrelated to the discrete message conveyed within that institution or by that enterprise, traditional First Amendment princi-

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[164] *Id.* at 314.

[165] *Id.* at 322-23.

[166] *See* Brief for the United States at 23-24, Legal Servs. Corp. v. Velasquez, 164 F.3d 757 (2d Cir. 1999) (No. 98-6006).

[167] *Sweezy*, 354 U.S. at 262.

ples apply. In such circumstances, the First Amendment prohibition against viewpoint discrimination and the First Amendment insistence upon procedural regularity come forcefully into play.