It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation

Jessica A. Roth
Benjamin N. Cardozo School of Law, jroth1@yu.edu

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

Part of the Law Commons

Recommended Citation
Available at: https://larc.cardozo.yu.edu/faculty-articles/385
It Is Lawyers We Are Funding:  
A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation  

Jessica A. Roth*  

Introduction  

In the summer of 1996, Congress enacted a series of restrictions on the Legal Services Corporation ("LSC") to prevent recipients of LSC funds from engaging in political action. The restrictions prohibit LSC recipients from supporting litigation aimed at redistricting, at influencing or challenging any executive order or agency action at any level of government, or at encouraging individuals to participate in political activity. LSC recipients are also prohibited from participating in any litigation with respect to abortion; assisting any persons incarcerated in federal, state, or local prison; assisting any illegal aliens; and assisting any person charged with the illegal sale or use of drugs in a proceeding seeking to evict them from public housing. In addition, LSC recipients may not seek to reform any federal or state welfare system through litigation, lobbying, or rulemaking; participate in any class actions; sue the Legal Services Corporation; or request attorneys' fees, even where provided for by

---


2 The restrictions were incorporated into the appropriations bill, the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub. L. No. 104-134, 110 Stat. 1321.

3 See OCRAA § 504(a)(1).

4 See id. § 504(a)(2).

5 See id. § 504(a)(12).

6 See id. § 504(a)(14).

7 See id. § 504(a)(15).

8 See id. § 504(a)(11).

9 See id. § 504(a)(17).

10 See id. § 504(a)(16).

11 See id. § 504(a)(7).

12 See id. § 506.
federal or state law. These restrictions, as originally enacted, applied not only to the use of LSC funds, but also to funds received from any other source.

Although the LSC mandate has never been free of restrictions, the 1996 amendments represent Congress’s most comprehensive effort to date to remove disfavored subjects from the purview of LSC lawyers. Enacted after a heated debate between supporters and opponents of the LSC in Congress, the restrictions have been described as a compromise between those who would eliminate the Corporation entirely due to its “liberal” bent and those who would save it at all costs. Despite the new restrictions, many LSC lawyers and their supporters breathed a sigh of relief at their narrow escape from total “de-funding.” Just as LSC recipients have historically been reluctant to challenge the legality of the restrictions imposed on them, today’s LSC lawyers and supporters have largely

13 See id. § 504(a)(13).
14 See id. § 504(d)(1). In response to several court rulings finding the restriction on non-federal funds constitutionally suspect, the LSC revised its regulations concerning the use of non-federal funds. See 45 C.F.R. § 1610 (1996) (permitting LSC grantees to use non-federal funds for prohibited activities provided that the funds and facilities used to undertake these activities are segregated from federal funds).

15 The first LSC statute prohibited recipients from engaging in litigation relating to abortion, desegregation, selective service and military desertion cases, and criminal proceedings. Participation in class actions was only permitted if the individual lawyers received approval from their program superiors. See 42 U.S.C. § 2996(f)(b)(7)-(10) (1994). See generally Note, Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act, 61 CORNELL L. REV. 734, 736–39 (1976). The 1974 statute also placed severe restrictions on the ability of LSC lawyers to engage in political activities on their own time as well as in their representative capacities, and forbade LSC offices from becoming involved in any form of political organizing or lobbying efforts. See 42 U.S.C. § 2996(f)(a)(6)(A), (e)(b)(5) (1994).


17 See David E. Rovella, Legal Aid Lawyers Roll Dice with New Lawsuit, NAT’L L.J., Feb. 19, 1997, at A6 (describing Ken Boehm, former counsel to the LSC board, as characterizing the outcome as “a deal with moderate congressional Republicans last summer, allowing the new funding restrictions in exchange for a smaller LSC budget reduction... [t]here really was a quid pro quo...”).


19 In the over two decades since the LSC was created, the majority of the restrictions imposed on funding recipients, including the bans on abortion and desegregation cases, have never been challenged. See Note, The Constitutionality of Excluding Desegregation from the Legal Services Program, 84 COLUM. L. REV. 1630, 1630 (1984). One notable exception to this general reluctance to bring suit is the 1991 challenge to the redistricting restrictions brought in Texas Rural Legal Aid Inc., v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991) (“TRLA”). In TRLA, although the plaintiff LSC lawyers argued that the LSC had exceeded its authority by prohibiting redistricting litigation and that the regulations violated their First Amendment rights, the District Court and the Court of Appeals for the District of Columbia reached only the former issue. The court found the LSC to be within its statutory authority. See id. The other exception to the reluctance trend was brought in 1975 immediately after the LSC’s creation. The suit challenged one of the original restrictions that prohibited LSC employees from participating in, or encouraging
declined to challenge the most recent restrictions. Faced with the choice between limited funding and no funding at all, the cautious view rationally counsels against upsetting Congress and jeopardizing the future existence of the LSC.\(^{20}\)

A few renegade LSC lawyers have resisted this view. Convinced that the "LSC is caving into budgetary blackmail,"\(^{21}\) and that "it's better to hang than to compromise,"\(^{22}\) these lawyers challenge the assumption that the so-called "compromise" represented by the restrictions will ultimately save the Corporation.\(^{23}\) These lawyers have taken the LSC to court.\(^{24}\) In three lawsuits filed nationally, the lawyers have challenged the restrictions on First Amendment grounds of free speech and association, and Fifth Amendment grounds of equal protection and due process.\(^{25}\) Thus far, the lawsuits have had varying degrees of success. One state court held the class action restriction to be flatly unconstitutional under the First Amendment as applied to non-federal funds.\(^{26}\) A federal court found specific others to participate in, public demonstrations, boycotts, or strikes, on the grounds that the restriction violated the First and Fifth Amendment rights of the LSC grantees, the lawyers, and their clients. See Welfare Rights Org. v. Cramton, Civil No. 75-1938 (D.D.C., filed Nov. 20, 1975) (unpublished material) cited in Note, supra note 15, at 737 n.17.

\(^{20}\) Outgoing LSC President Alexander D. Forger observed of Burt Neuborne, the NYU law professor who is representing several LSC lawyers challenging the restrictions, "[he] has the luxury of playing Russian roulette," while LSC officials must face the reality of total defunding. Rovella, supra note 18, at A1. See also David E. Rovella, LSC Invites Law Firms to the Legal Services Game, NAT'L L.J., Jan. 27, 1997, at A8 ("The LSC has scolded grantees for thumbing their noses at Congress by continuing to pursue class actions."); Rovella, supra note 17, at A6 (quoting Ken Boehm, former LSC counsel, as saying, if those currently challenging the restrictions "are successful with this lawsuit, they will pull the rug out from under their supporters in Congress").

\(^{21}\) Rovella, supra note 17, at A6.

\(^{22}\) Rovella, supra note 18, at A1.

\(^{23}\) Valerie J. Bogart, one of the lawyers who has challenged the restrictions, argues that "placating LSC opponents is pointless, since 'no understanding exists' between the LSC and Republicans who seek the agency's elimination. ['The LSC keeps saying there is a contract with Congress . . . . There is no contract. The first thing out of this new Congress will be to zero us out.']" Id.


\(^{25}\) The Varshavsky case challenged the restrictions on the additional ground that they conflicted with the New York State Code of Professional Responsibility. The case was framed as a conditional motion to withdraw by Valerie Bogart, the LSC lawyer who had served as counsel for a certified plaintiff class in a class action against the New York Department of Social Services. Following a preliminary injunction against the Department of Social Services, Ms. Bogart had been involved in monitoring the Department's compliance. She asked the court to clarify whether the new LSC restrictions required her to withdraw from her involvement in that case. Ms. Bogart argued that she should not be required to withdraw, even if the regulations required it, on account of the fact that the regulations were void because they violated the U.S. Constitution and the Code of Professional Responsibility. See Varshavsky, No. 40767/91, slip op. at 2-3.

\(^{26}\) See id. at 20-21, holding sections 504(a)(7) (class actions) and 504(d)(1) (aplica-
restrictions, although not the class action restriction, to be unconstitu-
tional as applied to non-federal funds. The third case is still pending in
district court.

This Article provides support for the argument, not yet made in court,
that those restrictions that can be described as political, i.e., those prohib-
iting class actions and any type of political reform effort, are unconstitu-
tional even as applied to the use of federal funds. This argument is a
difficult one to make in light of the Supreme Court’s statement in Rust v.
Sullivan that the government may fund only those activities, including
speech, which it supports. It also may be a politically imprudent argument
to advance, since a legal victory on this basis of this argument could result
in the total elimination of the Legal Services Corporation. Nevertheless,
the argument is legally sound and is an important one to make from a
moral and political standpoint. While Congress may choose not to fund
legal services at all, in choosing which legal activities to fund, it may
not discriminate between legal activities based on their political import.
Drawing on one of the exceptions that the Court itself carved out in Rust,
namely, that the existence of a public subsidy does not justify restrictions
on speech in areas expressly dedicated to speech activity or the suppres-
sion of dangerous ideas, this Article argues that the LSC restrictions in
fact target dangerous ideas within a program expressly dedicated to First
Amendment activity.

Part I demonstrates that the types of litigation and political activities
prohibited by the LSC restrictions are protected by the First Amendment,
and that the restrictions constitute impermissible content discrimination.
Part II uses a public forum analysis to argue that in creating the LSC,
Congress dedicated funds to classic First Amendment activity. Accord-
ingly, any restrictions on the use of funds for particular activities cannot
be inconsistent with the program’s designated purposes. Part III demon-
strates that the restrictions also violate the equal protection component of
the Due Process Clause. Although the poor are not a suspect class for the
purposes of equal protection analysis, the regulations are nevertheless
unconstitutional because they are motivated by invidious bias. In addition,

27 See Legal Aid Soc’y of Haw., No. 97-00032, slip op. at 35–36, holding the following
provisions of the 1996 Legal Services Corporation Act unconstitutional: § 504(a)(1) (redis-
stricting); § 504(a)(2) (influence of executive orders or agency action); § 504(a)(3) (influence
of adjudicatory proceeding); § 504(a)(4) (comprehensive ban on lobbying); § 504(a)(12)
(polynomial organizing or educational activities); § 504(a)(14) (abortion); § 504(a)(15) (represen-
tation of prisoners); § 504(a)(17) (representation of drug defendants in public housing
evictions).
29 The Supreme Court has repeatedly held that there is no right to counsel in civil
they impair the LSC beneficiaries' fundamental right of access to the courts and consequently their ability to participate fully in and enjoy the protections of our democratic institutions.

I. The LSC Restrictions Violate the First Amendment

A. Litigation Is First Amendment Activity

1. NAACP v. Button

The Supreme Court consistently has held that litigation is protected activity under the First Amendment. In *NAACP v. Button,* Virginia sought to enforce a statute regulating solicitation in the legal business against the National Association for the Advancement of Colored People (NAACP). The Court found the statute unconstitutional as applied to the NAACP, despite the fact that Virginia had a legitimate interest in regulating abuses in the legal profession. Recognizing the special role that litigation played "[i]n the context of NAACP objectives," the Court held that litigation, and especially group litigation, could be "a form of political expression" for those groups, like the black community in the South, "which find themselves unable to achieve their goals through the ballot . . . ." For them, the Court reasoned, "litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country."

The Court refused to define precisely where in the penumbra of rights protected by the First Amendment the activities practiced by the NAACP fell. Rather, Justice Brennan, writing for the Court, found that the NAACP activities "whereby Negroes seek through lawful means to achieve legitimate political ends," could not be subsumed under any one "narrow, literal conception of freedom of speech, petition or assembly." However categorized, such litigation was entitled to the highest level of protection. Under the current system of government, as Justice Brennan saw it, not only was litigation potentially the only practical avenue available for a minority to petition for redress of grievances, but it was also the most effective way to communicate "the distinctive contribution of a

31 Id. at 429.
32 Id.
33 Id.
34 Id.
35 Button, 371 U.S. at 430.
36 Id.
37 See id. at 433.
38 See id.
minority group to the ideas and beliefs of our society." 39 Thus, from the standpoint of concerns about political participation and equality, as well as about the richness of the marketplace of ideas and the legitimacy of our political democracy—both integral to our understanding of the purposes of the First Amendment 40—the Virginia statute was destructive of constitutional values.

2. Beyond Button

In numerous cases since Button, the Supreme Court has reaffirmed and expanded its central holding that litigation is protected by the First Amendment. In Brotherhood of Railroad Trainmen v. Virginia, 41 United Mine Workers of America v. Illinois State Bar Association, 42 and United Transportation Union v. State Bar of Michigan, 43 the Court found, respectively, First Amendment protection for a railroad workers' union's attempt to provide its members with legal referrals for personal injury suits; a miners' union's effort to hire an attorney on a salaried basis to assist members with workmen's compensation claims; and a transportation union's attempt to secure competent counsel at reasonable fees for its members pursuing claims under the Federal Employers' Liability Act. Restating the principle that had emerged from the collective action cases following Button, Justice Black wrote for the Court in United Transportation Union: "[t]he common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." 44

Whereas Button, viewed narrowly, may have suggested that only litigation undertaken specifically for a political purpose was entitled to First Amendment protection, the union cases that followed made clear that litigation undertaken for any purpose was protected. As the Court stated in Trainmen, "[t]he Brotherhood's activities fall just as clearly within the protection of the First Amendment [as the activities at issue in Button] . . . . [T]he Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." 45 In fact, the

39 Id.
40 Kenneth L. Karst has described three purposes, "not always distinct in practice," which are commonly identified as central to the First Amendment as follows: "(1) to permit informed choices by citizens in a self-governing democracy, (2) to aid in the search for truth, and (3) to permit each person to develop and exercise his or her capacities, thus promoting the sense of individual self-worth." Kenneth L. Karst, Equality and the First Amendment, 43 U. CHI. L. REV. 20, 23 (1975).
44 Id. at 585.
45 Brotherhood of R.R. Trainmen, 377 U.S. 1, at 8.
majority in Trainmen specifically rejected the dissent’s view that the vital fact about Button was that litigation “was a ‘form of political expression’ to secure, through court action, constitutionally protected civil rights.”

Where no such civil rights were at issue, as in Trainmen, the dissent argued Button was “not apposite.” Again, in United Mine Workers, the Court clarified, “the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. ‘Great secular causes, with small ones, are guarded.’”

In re Primus reiterated the Button holding in a case more closely analogous to Button’s original facts. In Primus, the Court extended First Amendment protection to a South Carolina lawyer who had solicited a prospective litigant for representation by the ACLU. Finding that “the ACLU’s policy of requesting an award of counsel fees does not take this case outside of the protection of Button,” the Court held that the ACLU, like the NAACP, engaged in litigation as “a form of political expression” and “political association.” As in Button, the lawyer’s actions on behalf of the ACLU were found to be protected. While states may regulate lawyers’ activities, the Court held, they may do so only with “narrow specificity.” Moreover, the Court emphasized that the most exacting scrutiny should be applied to limitations on core First Amendment rights.

Because South Carolina’s action in punishing the ACLU lawyer failed such strict scrutiny, it was held unconstitutional under the First and Fourteenth Amendments.

3. Group versus Individual Litigation

Button and its progeny established that group litigation, whether undertaken for overtly political reasons or merely to secure more meaningful access to the courts, is protected by the First Amendment. Class actions, the most recent procedural device invented to bring group litigation, fall within the protections of Button. Insofar as litigation always involves

---

46 Id. at 10 (Clark, J., dissenting).
47 Id.
50 Id. at 429.
51 Id. at 428 (quoting NAACP v. Button, 371 U.S. 415, 429, 431 (1963)).
52 Primus, 436 U.S. at 433 (quoting Button, 371 U.S. at 433).
53 See Primus, 436 U.S. at 432 (quoting Buckley v. Valeo, 424 U.S. 1, 44–45 (1976)).
54 Primus, 436 U.S. at 439.
55 Class actions, as defined by Federal Rule of Civil Procedure 23, did not exist prior to the revision of the federal rules in 1966. Prior to the 1966 revision, claims in which many persons were interested could be brought under Federal Equity Rule 38, which dated to 1912. Federal Equity Rule 38 provided: “When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”
association and speech between the lawyer and his or her client, individual cases are also covered by the large shadow cast by Button. As demonstrated by the cases following Button, which involved actions taken one at a time on behalf of individual clients, one need not petition the court as a member of a group in order to enjoy the protections of the First Amendment. While First Amendment concerns may be at their zenith where an oppressed minority joins in asserting a political claim, these concerns are nevertheless present even when an individual litigant advances a small, non-political cause.

B. The Restrictions Constitute Impermissible Content Discrimination

1. Content-Based Discrimination against Speech Is Impermissible

a. The Classic Statement: Mosley and Core Political Speech

In the hierarchy of speech contemplated by the First Amendment, political speech "occupies the highest, most protected position." Unless there are narrow limits on political speech, content-based discrimination is prohibited. The outer limits of political speech are imprecise, and the term "political" can be interpreted broadly to include matters that are controversial and that are of public concern.


Commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression. Finally, "obscenity and fighting words," fill out the lowest tier, receiving "the least protection of all." Id.


Speech that does not overtly touch on government policy, but rather expresses a particular world view or perspective on people and events, is also frequently considered political speech. For example, art is often political in the sense that it implicitly critiques certain policies or offers alternative perspectives. Speech concerning race and religion is frequently political as well, in the sense that views on these subjects inform views about how society should be structured. The line defining where art, for example, turns into obscenity (or where it ceases to be mere entertainment and takes on a political hue), and where expressions on race cross over into fighting words, is inexact. The Court therefore has tended to overestimate the political value of speech, affording it more protection than it may warrant according to a more literal interpretation of "political" speech. See, e.g., Winters v. New York, 333 U.S. 507, 510 (1948) (“The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.”). See also Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (recognizing the political value of even indecent parodies of public figures); FCC v. Pacifica, 438 U.S. 726 (1978); cf. Miller v. California, 413 U.S. 15, 24 (1973) (finding certain pornographic brochures sufficiently lacking in “literary, artistic, political, or scientific value” to warrant regulation).

Police Department of Chicago v. Mosley\(^{59}\) posed the question of whether a city could single out one type of political speech, peaceful labor picketing, for exclusion from a general ban on picketing within 150 feet of any school. The Supreme Court held that it could not. The distinction made by the City of Chicago, in the Court’s view, represented the very essence of content discrimination: it impermissibly privileged one subject area of speech—labor disputes—over other subject areas of speech, such as racial discrimination. Justice Marshall, writing for the Court, invoked both the Equal Protection Clause of the Fourteenth Amendment and the First Amendment in his classic formulation of the general prohibition against content discrimination:

> Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard.\(^{60}\)

The Court has applied Mosley in other contexts to hold that a rule prohibiting any discussion of matters of public policy or politics may constitute impermissible content discrimination. In Consolidated Edison v. Public Service Commission of New York,\(^{61}\) the Supreme Court held that New York’s Public Service Commission could not suppress bill inserts discussing controversial issues of public policy. Reiterating its view that “the First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic,”\(^{62}\) the Court invalidated the Commission’s action. Although the utility’s bill inserts could be regulated pursuant to reasonable time, place, and manner restrictions that were neutral as to content, the Court found that the Commission’s stated rationale\(^{63}\) did not justify the restrictions. The Court found that the Commission had

---

\(^{59}\)408 U.S. 92 (1972).

\(^{60}\)Id. at 96 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 27 (1948)).


\(^{62}\)Id. at 537.

\(^{63}\)The Commission argued that it was concerned that allowing the inserts would: (1) force Consolidated Edison’s views on a captive audience; (2) prevent the allocation of limited resources in a way better designed to serve the public interest; and (3) force the ratepayers to subsidize the cost of the insert. See id. at 540–41.
singly out "certain bill inserts precisely because they address controversial issues of public policy" and that this restriction on the free speech of private parties was not narrowly tailored to a compelling state interest.

In *Boos v. Barry*, the Court similarly held that a local ordinance prohibiting the display of signs critical of foreign governments near their embassies constituted impermissible content discrimination. Observing that the ordinance "operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech," the Court determined that the ordinance was suspect because it kept an "entire category of speech" off the streets. Because this ordinance, like the one in *Consolidated Edison*, was not narrowly tailored to serve a compelling government interest, it was struck down. *Mosley*, *Consolidated Edison*, and *Boos* thus stand for the proposition that a regulation that singles out political speech for prohibition is highly suspect. For the regulation to be sustained in either the public forum context of the streets, such as in *Mosley* or *Boos*, or the private context, such as in *Consolidated Edison*, the state must present a compelling interest justifying the restriction. It must further demonstrate that the restriction is narrowly tailored to serve that interest.

**b. The Recent Statement: R.A.V. and Hate Speech**

Even when the content of speech is not protected by the First Amendment, the Supreme Court has long held that the state cannot discriminate

---

64 *Id.* at 537.

65 Although Consolidated Edison is a regulated utility, the Court found that it was a private party for the purposes of First Amendment analysis, and that the bills sent by the utility represented private, commercial speech. See *id.* at 534 n.1; see also *id.* at 539–40 ("Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy."). See Part II.B.3, *infra*, for an extensive discussion of the significance of the nature of the forum.


67 *Id.* at 318.

68 *Id.* at 319.

69 There have been occasional narrow exceptions to the general prohibition against subject-matter prohibitions. In *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), cited by the Court in *Consolidated Edison*, the Court upheld an ordinance prohibiting any political advertising on public buses. There, the Court found that the city's stated interests—"fears that partisan advertisements might jeopardize long-term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism," *Consolidated Edison*, 447 U.S. 530, 539—were sufficiently compelling and that the rule was sufficiently narrowly tailored.

70 The Supreme Court has historically held that a few select areas of speech are "not within the area of constitutionally protected speech" because they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly
between speakers based on the content of their speech.\textsuperscript{71} In \textit{R.A.V. v. City of St. Paul},\textsuperscript{72} one of the most recent statements of this rule, the Supreme Court invalidated a local ordinance making bias-motivated disorderly conduct a crime subject to more severe punishment than "ordinary" disorderly conduct. The Court accepted the Minnesota Supreme Court's finding that the ordinance reached only "'fighting words' within the meaning of \textit{Chaplinsky},"\textsuperscript{73} and that the speech was therefore proscribable. Nevertheless, the Court found the ordinance "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."\textsuperscript{74}

Although the types of expressive conduct forbidden by the ordinance (such as placing a swastika or a burning cross on public or private property)\textsuperscript{75} could have been prohibited under more general trespass or disorderly conduct laws, the Court was disturbed by the fact that only speech associated with specific subjects and certain viewpoints was singled out for the prohibition.\textsuperscript{76} Those wishing "to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality,"\textsuperscript{77} were not penalized, while those wishing to express themselves, albeit virulently, on the subject of "race, color, creed, religion, or gender"\textsuperscript{78} were. However noble the city's motives, the Court concluded that "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."\textsuperscript{79}
Within the subjects covered by the ordinance, Justice Scalia, writing for the plurality, found that one viewpoint, espousing white supremacy, was handicapped. While displays containing some words—odious racial epithets—for example, would be prohibited to proponents of all views, fighting words not invoking race, color, creed, religion, or gender—casting aspersions upon a person's mother, for example—seemingly would be usable ad libitum in the placards of those arguing in favor of racial tolerance and equality. Yet, such fighting words could not be used by those speakers' opponents. Justice Scalia concluded that this scheme impermissibly "license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." The St. Paul ordinance thus went beyond mere subject discrimination to the more insidious viewpoint discrimination, privileging the proponents of tolerance over those unimpressed with its virtues.

2. The LSC Restrictions Constitute Subject Matter as well as Viewpoint Discrimination

a. The Restrictions Discriminate against All Political Speech

Taken as a whole, the restrictions on LSC recipients enacted in 1996 are far broader than the restrictions on political speech presented in Mosley or Boos. The LSC restrictions prevent recipients from engaging in any First Amendment activity touching on political matters. LSC recipients, regardless of the subject matter, may no longer participate in class actions or petition local or federal agencies for a change in administrative rules. They may not counsel individual clients to participate on their own in political activity nor may they advocate a particular public policy. The restrictions, in short, seek to remove the LSC entirely from the political arena.

The members of Congress who passed these restrictions were quite purposeful about this result. As one proponent of LSC stated, seeking to appease his more conservative colleagues, "the following restrictions are in place: No class action suits by LSC, no lobbying, no legal assistance to illegal aliens, no political activities, no prisoner litigation, no redistricting litigation, no representation of people evicted from public housing due to drugs. That's all in the past." The LSC that emerged from the 1996

80 See id. at 392.
81 See id. at 391.
82 R.A.V., 505 U.S. at 391.
83 Id. at 392.
84 See OCRAA § 504(a)(7).
85 See id. § 504(a)(16).
86 See id. § 504(a)(12).
budget debate was self-consciously stripped of its ability to participate in any such political activities. It was reduced to doing “ham and eggs work for poor people,” not the “sexier lawsuit . . . the class action suits . . . that draw headlines.” 88

Regardless of the motive of Congress, 89 the restrictions on the LSC clearly fall within the paradigm of political subject matter discrimination prohibited by Mosley, Consolidated Edison, and Boos. The fact that the subject matter they restrict is so broad—i.e., all political speech—does not weaken the discriminatory nature of the prohibition. As in Consolidated Edison, where the prohibition applied to all controversial issues of public policy, the breadth of the prohibition only heightens the pressure on the government to advance a compelling interest served by such a rule.

b. The Restrictions Handicap a Particular Political Viewpoint

In addition to prohibiting all political activities, the LSC restrictions particularly handicap the political viewpoint generally associated with the population served by LSC recipients—the poor. If the poor and those who advocate their interests have a particular political viewpoint, it is arguably one that supports a more generous welfare state. This view has been typed “liberal” in the contemporary political debate, contrasted with the “conservative” view that advocates smaller government and less redistributive taxation. 90

The viewpoint of the poor is not necessarily limited to advocating for greater government largesse, however. The agenda pursued by legal advocates for the poor may rather be one seeking to hold the government accountable for infringements of substantive rights already afforded by law. This goal, like the goal of increasing poor people’s substantive rights, may be described as seeking political change from a non-responsive status quo 91 to a state wherein the government lives up to its obligations. This is not, however, equivalent to a change in the underlying law.

88 See id.
89 See discussion infra Part III.A.
90 See 142 CONG. REC. H8149-04,8182 (daily ed. July 23, 1996) (statement of Rep. Weldon) (“I have in front of me a whole list . . . of examples of where Legal Services Corporation attorneys are engaging in left-wing liberal advocacy and in many cases going exactly against the will of the people.”). Senator Helms expressed a similar view of the LSC in his comments during the 1995 budget debate, describing LSC lawyers as “a cadre of liberal lawyers [who] push their social policies down the throats of local governments and citizens.” 141 CONG. REC. S8948 (daily ed. June 22, 1995) (statement of Sen. Helms). Representative Doolittle stated “the reason a lot of members want to keep [the LSC] is because it is an advocacy group for liberal causes.” 142 CONG. REC. H8149-04,8181 (statement of Rep. Doolittle).
91 In his dissenting opinion in Cornelius v. NAACP, 473 U.S. 788 (1985), Justice Blackmun implicitly recognized that an “anti-status quo” viewpoint was a viewpoint for the purposes of a First Amendment content discrimination analysis. Because advocacy groups such as the NAACP were kept out of a Combined Federal Campaign Fund available to federal workers, Justice Blackmun concluded, “employees may hear only from those
One member of Congress understood "some apartment owners, some growers, [and] some government officials" to fear this viewpoint "because they do not want to afford the rights that the law gives." The belief that government and employers should be held accountable for their violations of law is a "viewpoint" that is fundamentally threatening to those in power. It is a viewpoint generally associated with the population served by the LSC, by virtue of the fact that they are poor and often receive government assistance that is less than satisfactory.

While this viewpoint may be widely shared by advocates for the poor, it is not limited to that population. Numerous groups over time have advocated the view that government should live up to its promises to its own citizens. As Harry Kalven wrote of the civil rights era, the efforts of the NAACP in the 1950s and 1960s were best characterized as "a strategy to trap democracy in its own decencies." Although the civil rights movement ultimately resulted in a change in the substantive law represented by the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the early stages of the movement focused on litigation that would "bring[] to light" the rights of blacks that "in an important sense were always there." The women's movement similarly used a strategy of targeted litigation to improve the enforcement of women's rights. By bringing well-timed cases under existing law, the advocates of women's equality created a "forced feeding of legal growth," and accelerated the evolution of "legal doctrine defining [their] rights."

charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint based . . . ." Id. at 833 (Blackmun, J., dissenting). The Supreme Court has also found white supremacy to constitute a viewpoint for the purposes of First Amendment analysis. See supra text accompanying notes 80-82; R.A.V. v. St. Paul, 505 U.S. 377 (1992). It has also held that a religious viewpoint is a viewpoint against which the state may not discriminate. See Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2517 (1995) ("Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."). If perspectives as broad and amorphous as "white supremacy" and "religion" may be described as viewpoints, "anti-status quo" is arguably a viewpoint as well.

93 Id.
95 Id. While many of the most significant advances were made through targeted litigation, the civil rights movement also utilized other legally protected means to advance its cause. The sit-ins and marches staged throughout the South strategically invoked numerous constitutional rights, albeit in a defensive posture, and often forced courts to assert their protected status as well. See, e.g., Garner v. Louisiana, 368 U.S. 157 (1961) (holding that participants in lunch counter sit-ins were protected by First and Fourteenth Amendments).
97 KALVEN, supra note 94, at 66-67. Kalven originated this concept in the context of
The LSC restrictions handicap a viewpoint that, like its predecessors in the civil rights and women's rights movements, petitions the government for change. Whether it leads LSC recipients to ask for a change in the substantive law, as prohibited by the restrictions on lobbying, or a change in the application or interpretation of existing law, as prohibited indirectly by the restrictions on class actions, this viewpoint challenges government officials to respect their clients and to honor the law. It is a viewpoint that public officials, ranging from Social Security Administration employers to members of Congress, would often rather not hear. It is the kind of classically unpopular, dissident viewpoint that government officials have historically attempted to suppress,\textsuperscript{98} and that the First Amendment was designed to protect.

As the Supreme Court recognized in \textit{New York Times v. Sullivan},\textsuperscript{99} the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . that government may be responsive to the will of the people and that changes may be obtained by lawful means.\textsuperscript{100} The constituency to whom the government must be responsive includes those holding minority viewpoints. If the government could silence speakers critical of its policies and the status quo, this nation would not have "uninhibited, robust, and wide-open"\textsuperscript{101} debate to which it has been nearly perfectly committed since its founding.

\textsuperscript{98} The Sedition Act of 1798 represents the most egregious attempt in our national history by Congress to insulate itself from criticism. The Act made it a criminal offense to:

\begin{quote}
write, print, utter or publish . . . any false scandalous and malicious writings against the government of the United States or either House of the Congress . . . or the President . . . with intent to defame the said government . . . or to bring them . . . into contempt, or disrepute; or to excite against them . . . the hatred of the good people of the United States . . .
\end{quote}

1 Stat. 596 (1798), cited in \textit{Kalven}, \textsuperscript{supra} note 94, at 17. The act expired by its own terms two years after its enactment. Although the constitutionality of the Sedition Act was never tested, "the attack upon its validity has carried the day in the court of history." \textit{New York Times v. Sullivan}, 376 U.S. 254, 275 (1964). As analyzed by Harry Kalven, the Sedition Act was remarkable because it represents the only time the United States has had a law creating a crime of seditious libel against the government. \textit{Kalven}, \textit{supra} note 94, at 17. The existence of such a law is significant, according to Professor Kalven, because a "free society is one in which you cannot defame the government." \textit{Id.} at 16. Thus, to the extent that the LSC restrictions represent an attempt by Congress to tread down this road once again, they are in poor historical company.

\textsuperscript{99} 376 U.S. 254 (1964).
\textsuperscript{100} \textit{Id.} at 269 (internal citations omitted).
\textsuperscript{101} \textit{Id.} at 270.
Viewed in light of *Button* and the subsequent litigation cases, *R.A.V.*, *Mosley*, *Consolidated Edison*, *Boos*, and *New York Times*, the LSC restrictions should be regarded with suspicion. As in *Consolidated Edison*, the restrictions remove all political subjects from the permissible range of speech activities by LSC grantees. As in *R.A.V.*, they handicap one particular, unpopular viewpoint. The LSC restrictions thus constitute both subject matter and viewpoint discrimination. Moreover, in light of *New York Times*, the restrictions should be viewed with particularly heightened suspicion because the viewpoint singled out for suppression is one that is critical of government.

The LSC's federal funding, however, places this case in a unique context. The speakers at issue are not classically private speakers as they were in *Button, Mosley, Consolidated Edison, Boos, and New York Times*. Rather, the government here is in the position of funding the speech it seeks to regulate. While LSC recipients in specific instances retain the characteristics of private entities, in the context of the use of federal funds, they are subject to regulation by Congress. Recognizing the Supreme Court's announcement in *Rust v. Sullivan*\(^ {102}\) that as a general rule "the Government may choose not to subsidize speech,"\(^ {103}\) the following Part will explain why, according to its own terms, *Rust* should not apply to the LSC case.

II. *Rust v. Sullivan* Distinguished

A. The General Rule and the Implied Exceptions

In *Rust v. Sullivan*, several recipients of family planning funds under Title X of the Public Health Services Act challenged regulations prohibiting Title X recipients from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The recipients argued that the regulations constituted impermissible viewpoint discrimination by privileging an anti-abortion viewpoint over a pro-abortion viewpoint in the context of family planning. The recipients argued that the regulations impaired a woman's constitutional right to seek an abortion under *Roe v. Wade*,\(^ {104}\) and that they impermissibly infringed on the doctor-patient relationship.

The Supreme Court rejected all of these arguments. Citing its previous decisions in *Regan v. Taxation with Representation*\(^ {105}\) ("TWR") and


\(^{103}\) Id. at 200.

\(^{104}\) 410 U.S. 113 (1973).

\(^{105}\) 461 U.S. 540 (1983). In *TWR*, the Court upheld a statute granting a tax exemption for lobbying activities undertaken by veterans' organizations, but not for lobbying activities undertaken by other nonprofit organizations.
Maher v. Roe, the Court found that the government does not engage in impermissible viewpoint discrimination when it “selectively fund[s] a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” By casting the provision of abortion services as an activity rather than a viewpoint, the Court found that there was no viewpoint discrimination. Once the issue was framed in such a manner, the distinction embodied in the regulations could be seen as representing not viewpoint discrimination, but instead the government’s choice “to fund one activity to the exclusion of the other.”

Viewed as a choice between activities, the government’s decision to fund all family planning services other than abortion was thus removed entirely from the paradigm of content discrimination and the protection of the First Amendment. The Title X recipients’ other claims were then easily dismissed as well, for, as the Court held in TWR, “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.” The woman’s right to choose an abortion was therefore not infringed by the government’s refusal to fund it.

The Court also declined to find that the Title X recipients’ right to speak about abortion was infringed by the regulations. Because the regulations allowed recipients to use non-federal funds to support the excluded services (provided that the facilities and personnel used to pursue them were kept separate) the government had not foreclosed the participants’ ability to exercise their constitutional rights. The fact that the recipients would have to go outside of the program to advocate personal or professional views inconsistent with the goals of the program did not trouble the Court. The Court reasoned that Congress, in creating the Title X program, had not “expressly dedicated [an area] to speech activity,” nor

---

106 432 U.S. 464 (1977). In Maher, the Court upheld a state welfare regulation authorizing payment for services related to childbirth but not for non-therapeutic abortions.

107 Rust, 500 U.S. at 193.

108 Id.

109 As the Court explained the crucial interpretive device in its analysis, “we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech . . . .” Id. at 194–95.

110 TWR, 461 U.S. at 549.

111 See also Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), cited approvingly by the Court in Rust, on this point (holding that the government need not remove any obstacles to the exercise of a fundamental right that are not of its own making).

112 See Rust, 500 U.S. at 196 (“The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.”).

113 Id. at 200 (quoting United States v. Kokinda, 497 U.S. 720, 726 (1990)).
preempted an area "traditionally open to the public for expressive activity."\textsuperscript{114} In short, because family planning could not be described as fundamentally a First Amendment activity, the restrictions, including any incidental burdens on speech, were permissible.

Finally, the Court held that the doctor-patient relationship was not unduly intruded upon by the regulations because the Title X program did not create the expectation of comprehensive medical services in the area of family planning. Reviewing the program's legislative history, the Court found that abortion services could reasonably be viewed as beyond the "scope of the project funded"\textsuperscript{115} and could be excluded on that basis. According to the Court, the regulations were justified because they were consistent with the statute authorizing the Title X program,\textsuperscript{116} and because patients should have been on notice that the care they received was subject to Congressional limitations.\textsuperscript{117}

B. The ExceptionsApplied to the LSC Case

Although Rust announced a rule of considerable import to all funding cases, its rule is not iron-clad. The Court acknowledged that even though the petitioners' constitutional arguments did "not carry the day" in Rust, they nevertheless were not "without some force."\textsuperscript{118} Had the facts of the case been different in any of several enumerated ways, the Court recognized that its decision might have come out differently.

As suggested by the foregoing analysis of the Court's reasoning, the outcome may have been different if the regulations had been found to target disfavored speech rather than activities; if they had not allowed the recipients of Title X funding to engage in the prohibited activities, including speech, through the use of non-federal funds; or if the restrictions were not reasonably related to the scope and nature of the federal program, as seen through the eyes of the program's authorizers and its beneficiaries. Most importantly, Rust might have been decided differently if the Court had found that the family planning program was expressly dedicated to First Amendment activity.

The following section explores the significance of these implied exceptions for the LSC case. Specifically, this section focuses on the distinction between regulations inherently targeting the expressive content of speech rather than its non-expressive element and the nature of the federal program.

\textsuperscript{114} Rust, 500 U.S. at 200.
\textsuperscript{115} Id. at 195.
\textsuperscript{116} See id. at 187.
\textsuperscript{117} See id. at 200.
\textsuperscript{118} Rust, 500 U.S. at 191.
1. First Amendment Activity Rather than Ordinary Conduct

In Rust, the Court emphasized that this was 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."119 If the distinction between those activities funded by the program and those excluded was fundamentally based on the content of speech, the Court would have taken more seriously TWR's admonition that it "would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'"120 If it had viewed the case through this lens, the Court would have been forced to consider whether the regulations' distinction between abortion and non-abortion related speech was at all "like distinctions based on race or national origin."121 In other words, the Court would have confronted the question recurring throughout its First Amendment jurisprudence: whether the distinction affected by the law was impermissibly based on the content of First Amendment activity.

If the regulations primarily target First Amendment activity, Rust, as well as the Court's expressive conduct cases,122 suggests that they should be subjected to strict scrutiny, especially if they target "dangerous ideas." If they represent a choice by Congress to fund only select activities, and thereby incidentally burden speech related to excluded activities, then they fall under Rust's permissive standard.123

In United States v. O'Brien,124 the Court designed a four-part test to determine whether regulations permissibly burden speech where speech

---

119 Rust, 500 U.S. at 194 (internal quotation marks omitted).
120 TWR, 461 U.S. at 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).
121 Id.
123 Laurence H. Tribe has described these different types of regulations as falling into two "tracks." Regulations that primarily target expressive activity follow "track 1," and should be subject to heightened scrutiny. Those that incidentally burden speech follow "track 2" and are subject to the more permissive standard established in O'Brien and reformulated in Rust. See Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, § 12-2, at 791–92 (2d ed. 1988).
and non-speech elements are combined. First, the regulation must be promulgated pursuant to a legitimate state power;\(^{125}\) second, the regulation must advance an "important or substantial governmental interest";\(^{126}\) third, that interest must be "unrelated to the suppression of free expression";\(^{127}\) and fourth, "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."\(^{128}\) If these conditions are met, the Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."\(^{129}\)

Thus, \textit{Button} notwithstanding, the government could assert that the LSC restrictions were constitutionally permissible because they serve an important, content-neutral governmental interest (in balancing the budget)\(^{130}\) that Congress may regulate pursuant to its spending power.\(^{131}\) Although the fourth part of the \textit{O'Brien} test suggests that the restriction must be narrowly tailored to serve that interest, \textit{Rust} suggests that the standard of tailoring is lower where the government funds the speech activity. Nevertheless, a significant lack of fit may imply that the government’s real interest is not what it represents,\(^{132}\) but is in fact the direct suppression of speech.

Part I.B of this Article suggested that the regulations are not in fact aimed primarily at the non-speech aspect of litigation and political activity. Rather, they purposefully target the expressive content of the proscribed activities. The legislative history of the regulations reveals Congress’s unmistakable intent to eradicate the influence of "liberal" lawyers. It does not manifest a concern for such \textit{ex post} rationales as reducing frivolous litigation or the wasting of funds. As Representative Burton complained during the Congressional debate over LSC funding,

The LSC is fighting the welfare reform plan in Wisconsin . . . even though this Congress and the President of the United States

\(^{125}\) See \textit{id.} at 377.

\(^{126}\) \textit{Id.}

\(^{127}\) \textit{Id.}

\(^{128}\) \textit{Id.}

\(^{129}\) \textit{Id.} at 376.

\(^{130}\) See \textit{infra} Part III discussing the government’s current defenses of the LSC restrictions.

\(^{131}\) See U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power to provide for the general welfare); U.S. CONST. art. I, § 8, cl. 18 (granting Congress power to make all laws necessary and proper to execute that power).

\(^{132}\) See, \textit{e.g.}, \textit{Cornelius v. NAACP}, 473 U.S. 788, 812 (1985) (holding that the underinclusiveness of the restriction in that case "cast[s] doubt on [the] genuineness" of the government’s asserted motive).

... support it. Why are taxpayers’ dollars being used to fight the very things we think are important? ... The right thing to do is protect the people of this country and get rid of the Legal Services Corporation.133

Moreover, the regulations are both grossly underinclusive and over­
inclusive to effectively address any purpose other than the suppression of disfavored speech. 134 Although, in O’Brien, the Court stated that it would not “strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive,”135 subsequent cases have made it clear that the Court has backed off from this approach. 136 Where the government’s asserted interest is clearly a sham to hide impermissible content discrimination or an otherwise illicit motive, the Court will not uphold the regulation merely because, in theory, a neutral reason for it could be imagined.137 Because it is impossible to read the legislative history of the LSC restrictions without coming to the conclusion that they were enacted

133 142 CONG. REC. H8149-04,8179 (daily ed. July 23, 1996) (statement of Rep. Burton). Representative Weldon expressed a similar sentiment that the LSC was engaging in unwelcome litigation. While the LSC recipients he had spoken with were doing “some good things ... representing people who are being unfairly evicted from their housing, helping out the poor ... .” Representative Weldon reported that he “did get them [the LSC lawyers] to acknowledge that there are LSC lawyers ... that engage in what I would call public advocacy to basically thwart the will of the people.” Id. at 8182 (statement of Rep. Weldon).

134 See infra Part III.A.3 (providing a more detailed discussion of the lack of tailoring of the restrictions and the inferences that may thereby be raised of an intent to discriminate based on content and speaker identity).


137 See, e.g., Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring) (“[A] legislature [might] enunciate a sham secular [purpose, but] our courts are capable of distinguishing a sham secular purpose from a sincere one.”); Cornelius v. NAACP, 473 U.S. 788, 833–34 (1985) (Stevens, J., dissenting) (“Everyone on the Court agrees that the exclusion of ‘advocacy’ groups from the CFC is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups.”); Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) (“[W]hether petitioners’ removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners’ actions.”); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969) (“In order for the state ... to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”).
to cut off disfavored viewpoints, the restrictions fail the O'Brien test, even as incorporated into and softened by Rust.

2. The Unconstitutional Conditions Doctrine

If the regulations at issue in Rust had not permitted the recipients of Title X funding to use other sources to fund their participation in the excluded activities, the Court might have struck them down. Under the unconstitutional conditions doctrine, the Court has consistently held that the government may not require parties to forego their constitutional rights altogether as a condition of receiving state funding or benefits. Applying this doctrine, the two courts that have rendered decisions on the LSC restrictions held the restrictions dealing with the use of non-federal funds unconstitutional. Although the LSC has revised its regulations on the use of non-federal funds pursuant to those decisions, the following discussion is included to complete the analysis in the event that Congress should again attempt to regulate the use of non-federal funds.

The clearest statements of the unconstitutional conditions doctrine in the First Amendment context have come through the trilogy of cases, Speiser v. Randall, Perry v. Sindermann, and FCC v. League of Women Voters. Speiser and Perry involved the explicit denial of a government benefit to individuals engaged in unpopular speech, while League of Women Voters dealt with the issue as applied to organizational speech.

In Speiser, California had conditioned eligibility for a property tax exemption on avowing that one did not advocate the forcible overthrow of the United States. The Court found that the denial of the exemption would have the “effect of coercing the claimants to refrain from the proscribed speech.” Because the condition was “frankly aimed at the suppression of dangerous ideas,” the fact that the exemption could be characterized as a privilege or bounty did not justify the restriction on speech.


141 408 U.S. 593 (1972).
143 357 U.S. at 519.
144 Id.
In *Perry*, the state Board of Regents fired a professor from his non-tenured academic job because he made unflattering remarks about its policies. The Court held in *Perry* that, even though a person does not have a right to valuable government benefits, government entities may not deny benefits "on a basis that infringes . . . constitutionally protected interests—especially . . . freedom of speech." As in *Speiser*, the fact that the individual had no right to the benefit at issue, and that the government was under no obligation to provide it, did not render the First Amendment inquiry irrelevant.

*League of Women Voters*, in contrast to *Speiser* and *Perry*, involved the assertion by an organization that it had been subjected to an unconstitutional condition. In *League of Women Voters*, Congress had prohibited any recipient of a grant from the Public Broadcasting Corporation ("PBC") from engaging in "editorializing." The prohibition extended not only to the use of federal funds, but to all funds raised by the broadcasting stations from any source. The Court found that the editorial speech targeted by the rule lay "at the heart of First Amendment protection," and that the government's stated purpose of preventing its entanglement with propaganda could not sustain the expansive prohibition. While the federal government could require that none of its funds be used for editorializing, the Court held that a PBC recipient must be free to segregate its funds, "to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities."

The LSC restrictions, as initially enacted, ran afoul of the unconstitutional conditions doctrine in precisely the same manner as did the FCC restrictions in *League of Women Voters*. The restrictions reached beyond the use of federal funds to prevent LSC recipients from using funds derived from any source to engage in the prohibited activities. Thus, in its zeal to cut off the disfavored First Amendment activities being pursued by LSC lawyers, Congress went too far.

145 *Perry*, 408 U.S. at 597.
146 *League of Women Voters*, 468 U.S. at 381.
147 *Id.* at 400. Cf. *Regan v. Taxation with Representation*, 432 U.S. 450 (1983) ("TWR") (discussed *supra* in text accompanying notes 105–110). The decision in *TWR* involved Congress's decision not to grant tax-exempt status to organizations if a substantial portion of their activities consisted of lobbying. Since the Court determined that the government was under no obligation to fund such activities, it held that there had been no imposition of an unconstitutional condition. After *TWR* and *League of Women Voters*, otherwise tax-exempt organizations have avoided the restriction at issue in *TWR* by creating separate lobbying organizations.
3. Public Forum Analysis

This section argues that the restrictions on LSC run afoul of the First Amendment not simply because they discriminate on the basis of the content of speech, but because they are inconsistent with the very purpose of the LSC program. In short, in contrast to the situation presented in *Rust v. Sullivan*, there is a legitimate and recognized public forum at issue in the case of the LSC.

The Court’s view of the Title X program adopted in *Rust* allowed it to conclude that abortion services could reasonably be excluded from the program’s scope. Since Congress had authorized a limited family planning program, it was not obligated to support services beyond the program’s limits. This narrow construction of the program’s scope was critical to the Court’s analysis. If the scope were more all-encompassing, both doctors and patients participating in the program might have had a reasonable expectation “of comprehensive medical advice.”

While this caveat suggests the possibility that clients might be justified in their expectation of comprehensive legal advice, the more interesting issue for the LSC case is the Court’s careful distinction between the nature of the Title X program and other institutions traditionally devoted to First Amendment activity. If the government subsidy at issue was not in the form of direct funding, but rather was “in the form of Government-

---


149 The LSC mandate is considerably broader than the Title X charter. Whereas Title X was established specifically to address family planning needs (rather than, for example, to provide comprehensive medical care to those in need), the LSC program was established to provide equal access to the justice system for all Americans. While Congress never intended to provide poor people with all the legal resources available to the wealthy, the LSC mandate would have to be narrowed to make it consistent with the latest round of restrictions, mocking its original purpose.

By directing funds to independently organized lawyers, the LSC also enmeshes itself in the professional norms of lawyers and their Code of Professional Ethics. These ethical rules require lawyers to provide the services they deem most appropriate to their clients’ needs: therefore LSC clients may have a reasonable expectation of comprehensive service, unless the LSC restrictions are considered to override the Code. One of the cases challenging the restrictions raised this apparent conflict between a lawyer’s professional obligations and the LSC restrictions, but no court has yet addressed the issue directly. *Varshavsky v. Perales*, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996) (avoiding the resolution of the alleged conflict because the court found that the LSC restrictions violated the First Amendment); *see also* discussion supra note 25.

While it is beyond the scope of this Article, a full development of the argument that the government may not be able to control its funds with exquisite specificity would be worth exploring. For an interesting answer to some of these questions, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 743–47 (1992) (arguing that the government should be limited in its ability to control speech within traditional fiduciary relationships). Part II.B.3 *infra* discusses the special status of the lawyer-client relationship in our tradition and suggests that Congress’s authority to attach limitations to funding in this area should be highly restricted.
owned property,” the Court recognized that the subsidy alone would 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.’” Because the Title X program could not be described as a forum traditionally or expressly dedicated to speech activity, the Court concluded that the restrictions on speech affected by the regulations were permissible.

The Court thus briefly invoked the “public forum” concept and found that it did not apply. Although the Court’s public forum jurisprudence is notoriously confused, at its core it is concerned with the relative importance of a particular space or institution to expressive activity. The finding of a public forum can either raise or lower the level of scrutiny applied to a restriction. But once the Court has begun to analyze a restriction in terms of its relationship to a public forum, it has already taken a significant analytical step towards accepting that those seeking access to the forum are engaged primarily in First Amendment activity rather than non-expressive conduct.

In Rust, as discussed above, the Court did not engage in this analysis because it did not consider the underlying activity to be sufficiently “expressive” to meet the threshold question asked in its public forum cases. Since the Court characterized abortion counseling as speech incidental to the provision of family planning services, it was willing to compromise abortion counseling in the name of the government’s authority to determine which services to provide. In the case of the LSC restrictions, however, which are more easily characterized as targeting speech, the Rust Court’s method of analysis may be inappropriate.

150 Rust, 500 U.S. at 200 (quoting United States v. Kokinda, 497 U.S. 720, 726 (1990)).


152 See Geoffrey Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 91 (1987) (“[A]lthough it is clear that the Court applies different standards of review for public forums and nonpublic forums, it is less clear precisely what standard it applies.”).

153 See Cornelius v. NAACP, 473 U.S. 788, 797 (1985) (holding that the threshold issue that must be decided in applying a public forum analysis is whether the activity allegedly excluded qualifies as “speech protected by the First Amendment, for, if it is not, we need go no further”).

154 Christina Wells has noted that the Court’s “treatment of abortion counseling [in Rust] as a form of activity rather than a form of speech” has much to do with its “emerging view that abortion is no longer a fundamental right.” Since the status of the activity associated with the speech has gone down in the Court’s conception of fundamental rights, the speech has been afforded less protection. See 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, 1725–26 (1995).
Public forum analysis may ultimately contribute little to the outcome of the LSC case.\textsuperscript{155} Nevertheless, it is another prism through which to view the restrictions, which takes seriously the First Amendment nature of the prohibited activities while balancing them against the government's interest in using its property—here, its money—in the manner it sees fit.\textsuperscript{156}

\textit{a. Establishing the Forum}

The Court generally has recognized two types of public forums: traditional public forums, such as streets and sidewalks,\textsuperscript{157} and designated public forums, such as school auditoriums, which the state has set aside for expressive activity.\textsuperscript{158} While restrictions on traditional public forums are subject to strict scrutiny,\textsuperscript{159} restrictions on the use of designated public

\textsuperscript{155} As Justice Kennedy noted in his separate opinion in \textit{Denver Area Educ. Telecomm. Consortium, Inc. v. FCC}, 116 S. Ct. 2374, 2413 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part), whether the Court finds a public forum does not change the fact that "strict scrutiny is the baseline rule for reviewing any content-based discrimination against speech. The purpose of forum analysis is to determine whether, because of the property or medium where speech takes place, there should be any dispensation from this rule.").

\textsuperscript{156} Forum analysis also takes into account the distinction that the Court has occasionally invoked between the government's speech and private speech funded by the government. In a nonpublic forum, the government controls the content of speech because the property has been dedicated to the government's purposes. In a public forum, however, private speakers are free to express their own views, even though they enjoy a government subsidy in the form of the forum. \textit{See} Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833–34 (1995). The Court stated:

[W]e 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 . . . . It does not follow, however . . . that viewpoint-based restrictions are proper when the University [or in this case, the government] 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.

\textit{Id.}

\textsuperscript{157} \textit{See} Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (holding that "streets and parks . . . [have] . . . time out of mind . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

\textsuperscript{158} \textit{See} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (defining designated public fora as "public property which the State has opened for use by the public as a place for expressive activity."). \textit{See also} Cornelius v. NAACP, 473 U.S. 788, 802 (1985) ("In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.").

\textsuperscript{159} \textit{See} Perry Educ. Ass'n, 460 U.S. at 45 ("In . . . quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").
forums are subject to less searching review, unless the state has designated an “unlimited” public forum. Restrictions on the use of limited designated public forums are permissible so long as they are consistent with the stated purposes of the forum and are viewpoint neutral. ¹⁶⁰ Access to nonpublic forums, such as government property that has not been designated for expressive activity, may be denied by the government at its discretion, so long as distinctions are not made on the basis of viewpoint. ¹⁶¹ In recent years, the Court has recognized that even non-tangible property, such as a pool of funding, may be considered a “metaphysical forum” and therefore is subject to the restrictions associated with that status. ¹⁶²

Traditional public forums are relatively easily identified. ¹⁶³ To determine whether the state has created a designated public forum, however, the Supreme Court held that it will look at the intent of the state actor creating the forum, and at the nature of the forum itself. In Cornelius v. NAACP, the Court stated, “[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the

¹⁶⁰ See Rosenberger, 515 U.S. at 829 (“Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum.’”) (internal citations omitted).

¹⁶¹ The Court in Perry Educ. Ass’n stated:

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry Educ. Ass’n, 460 U.S. at 49.

¹⁶² See Rosenberger, 515 U.S. at 830 (“The SAF [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”). The Rosenberger rationale has been picked up in at least three lower court decisions since it was handed down, two involving public funding rather than physical spaces. For example, in Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996), the Tenth Circuit applied Rosenberger to invalidate a city’s policy prohibiting sectarian instruction and religious worship in city-owned senior centers, holding that the policy constituted impermissible viewpoint rather than content-based discrimination within a designated public forum. In Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1548 (M.D. Ala. 1996), the Alabama district court similarly invalidated a statute prohibiting any college or university from spending public funds on or allowing the use of facilities by any organization promoting homosexual lifestyles. In Finley v. National Endowment for the Arts, 100 F.3d 671 (9th Cir. 1996), the Ninth Circuit applied Rosenberger in the context of funding for the arts, holding that discrimination based on viewpoint was impermissible because of the vital role that the arts, like universities, play in our democracy.

¹⁶³ These are the places that have “time out of mind” been dedicated to speech activity. See Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).
nature of the property is inconsistent with expressive activity."\textsuperscript{164} In \textit{Corneilius}, the Court examined the government's policy and practice in creating the Combined Federal Campaign ("CFC"), and determined that there had been no intent to create a public forum for solicitation. Rather, ironically, the Court found that the CFC had been created to "minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property."\textsuperscript{165} Since there had been no intent to create a public forum, the Court would not infer the creation of one.\textsuperscript{166}

In \textit{Perry Education Association v. Perry Local Educators' Association},\textsuperscript{167} the Court similarly refused to find the creation of a public forum in a school district mail system. "If by policy or by practice the Perry School District ha[d] opened its mail system for indiscriminate use by the general public,"\textsuperscript{168} then, in the Court's view, there might have been a plausible argument that a public forum had been created. Because the school had only selectively allowed outside groups access to the mail system, however, no public forum had been established, and no particular organization could claim a right of access to a system that had been lawfully dedicated to "facilitate internal communication of school-related matters to the teachers."\textsuperscript{169}

In \textit{Perry}, the Court specifically declined to find the creation of a limited public forum. Recognizing the possibility that such a forum could exist, the Court in dictum suggested that if a limited forum were to have been created, an organization's right to access the forum would turn on whether it was the type of organization for which the forum had been created. "[E]ven if we assume that by granting access to the Cub Scouts, YMCA's, [sic] and parochial schools, the School District ha[d] created a 'limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character."\textsuperscript{170} Although other "organizations that engage in activities of interest and educational relevance to students"\textsuperscript{171} might then have a right of access, the plaintiffs in \textit{Perry}, who were "concerned with the terms and conditions of teacher employment"\textsuperscript{172} would not.

\textsuperscript{164}473 U.S. 788, 803.
\textsuperscript{165}Id. at 805.
\textsuperscript{166}See id. ("That [First Amendment] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes.").
\textsuperscript{167}460 U.S. 37 (1983).
\textsuperscript{168}Id. at 47.
\textsuperscript{169}Id.
\textsuperscript{170}Id. at 48.
\textsuperscript{171}Id.
\textsuperscript{172}Id.
Considered together, *Perry* and *Cornelius* instruct that the Court will not find the creation of even a limited forum unless the government has created one by explicit statement, practice, or policy. Moreover, the right of access to a limited forum depends on its designated purpose. An individual asserting a right of access to a forum therefore first must point to evidence of the creation of a public forum. Second, if the forum is of limited character, the individual must demonstrate either that he or she is "like" those who have been granted access or that, to the extent that he or she is unlike those granted access, the distinction is an impermissible basis for exclusion.

The Court has taken up these themes in its subsequent cases discussing the creation of a limited public forum. In *Lamb's Chapel v. Center Moriches Union Free School District*, *Widmar v. Vincent*, and *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court addressed the creation of a limited public forum in, respectively, a school district's program making school facilities available to community organizations, a university's program making empty classrooms available to student groups, and a university's student activities fund. In these cases, relevant factors for the Court's determination of whether a public forum had been created included the schools' written policies and their ongoing practices. In each case, the Court found that there had been an impermissible exclusion from the forum.

In *Rosenberger*, the Court analyzed the University of Virginia's prohibition on the distribution of funds to religious organizations in terms of the general purposes of the student activities fund ("SAF") established by the University Guidelines, which contained the prohibition. The fact that the prohibition may have been in place since the inception of the program did not bar the Court's conclusion that the prohibition was inconsistent with the program's overall purpose of "support[ing] a broad range of extracurricular student activities that are related to the educational purpose of the University." Since the Court believed that the prohibition singled out a particular viewpoint for discrimination, it was inconsistent with the historical commitment of a university as an institution dedicated to the free exchange of ideas, and the University of Virginia's specific commitment in creating the SAF to fund all student organizations contributing to that exchange.

---

176 *Id.* at 824 (quoting Appendix to Petition for Cert. at 61a).
177 *See id.* at 835 (noting that viewpoint discrimination is especially dangerous in the context of a public university, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition").
In *Widmar v. Vincent*,\(^{178}\) which preceded *Rosenberger* by fourteen years, the Court similarly held that a university could not prohibit religious groups from using its facilities once it had “created a forum generally open for use by student groups.”\(^{179}\) Even if the university was not required to create the forum in the first place, once it adopted a policy making classrooms “generally open to the public,” the university “assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”\(^{180}\) The Court concluded that the university’s regulations did not withstand strict scrutiny because the regulations discriminated against “forms of speech and association protected by the First Amendment”\(^{181}\) on the basis of the religious content of that speech. To save its content-based exclusion, the university would have to show that the exclusion “serve[d] a compelling state interest and that it [was] narrowly drawn to achieve that end.”\(^{182}\)

*Lamb’s Chapel v. Center Moriches Union Free School District*,\(^{183}\) decided after *Widmar* and before *Rosenberger*, stands for the same principle, although the Court in *Lamb’s Chapel* never reached the question of whether the school district had established a public forum. In *Lamb’s Chapel*, a school district had denied a church access to school premises to show a religious film, although the district generally allowed the use of its facilities for civic, recreational, and social purposes. The Court held that the exclusion of religious groups constituted impermissible viewpoint discrimination regardless of the status of the forum created or the school district’s intent. Although the district undeniably had the right to “preserve the property under its control for the use to which it is dedicated”\(^{184}\) and was under no obligation to “permit[] after-hours use of its property for any . . . uses,”\(^{185}\) the Court held that it could not single out religious viewpoints for exclusion. Citing its other nonpublic forum cases, the Court stated, “control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”\(^{186}\) The distinction made by the school district was not viewpoint neutral and thus was impermissible.

Although it did not treat them separately in its opinions, the Court’s determination in each case seemed to rest on two related concerns. First,

---

\(^{179}\) *Id.* at 267.
\(^{180}\) *Id.* at 267–68.
\(^{181}\) *Id.* at 269.
\(^{182}\) *Id.* at 270.
\(^{183}\) 508 U.S. 384 (1993).
\(^{184}\) *Id.* at 390.
\(^{185}\) *Id.* at 391.
\(^{186}\) *Id.* at 392–93, (citing *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985) and *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).
the Court determined whether the excluded organizations were “like” those granted access. Second, the Court assessed the programs in light of the important role institutions of public education have traditionally played in American democracy.\(^\text{187}\) Since, as the Court recognized in *Rust v. Sullivan*, universities represent “a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the . . . First Amendment,”\(^\text{188}\) the universities’ exclusions were subject to heightened scrutiny. Unlike the Combined Federal Campaign in *Cornelius*, or the school mail system in *Perry*, or even the family planning clinics in *Rust*, institutions of public education are, in the Court’s view, fundamental to the well-being of our society. Whereas restrictions on speech within the confines of more limited forums do not greatly threaten societal-wide harms, restrictions on speech within spheres expressly dedicated to First Amendment activity, such as the university, have the potential to undermine the basic structure of our society. Connecting the two concerns described above, the Court’s limited public forum cases suggest that where the institution seeking to impose a restriction is one that is inherently devoted to First Amendment activity, the Court will assume that the institution’s ability to restrict or redefine\(^\text{189}\) the forum is highly circumscribed. For those few institutions that may be considered fundamental to the func-

\(^{187}\) Cf. Board of Educ., Island Trees Sch. Dist. v. Pico, 457 U.S. 853, 864 (1982) (acknowledging that “public schools are vitally important in the preparation of individuals for participation as citizens, and as vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system . . .”) (internal citations omitted).


\(^{189}\) If the government may continually redefine the scope of the program to exclude restricted activities, then there will never be any basis for the argument that a given restriction is inconsistent with the scope of the program. As scholars have noted in the area of unconstitutional conditions, “[t]o decide whether a condition on funding makes a recipient worse off, one must adopt some baseline from which to measure.” Cole, *supra* note 149, at 696 n.82 (citing Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4, 13 (1988) and Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293, 1352–59 (1984)).

The problem with the Court’s current approach to funding cases is that it “generally articulates no independent baseline, and simply accepts the government’s definition of the benefit program as the baseline . . . . However, taken to extremes this approach would allow government to avoid any unconstitutional condition by simply redefining its program.” Cole, *supra* note 149 at 696 n.82. As in the unconstitutional conditions area, restrictions attached to direct funding may never be deemed impermissible if there is no limit to the government’s ability to redefine the scope of a program each time it imposes a new restriction. Some independent baseline must exist by which restrictions may be evaluated. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2413–14 (1996) (Kennedy, J., concurring in part and dissenting in part) (“If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public forums; every exclusion could be recast as a limitation.”).
tioning of our society, even content-based exclusions such as those that were upheld in *Perry* may be impermissible.

Where a government program supports expressive activity, even within the confines of an institution not fundamental to the functioning of our society, the Court's public forum cases suggest that the relevant baseline is not simply the initial charter of a program. Rather, the relevant provisions of a charter are those that define the scope and purpose of the program in broad, constitutionally-permissible strokes. For example, allowing the facilities of a senior citizens center—an institution arguably not fundamental to the functioning of our society—to be used by community groups only during specified hours should be viewed as a permissible restriction aimed at preserving the center's buildings and resources. A declaration that all groups except those espousing a religious viewpoint may use the facilities should be viewed as impermissible viewpoint discrimination, even if the exclusion were written into the initial rules authorizing the program. Although the center could claim that the purpose of the program was to support non-religious activities during the specified hours, the Court undeniably would find this purpose impermissible.

Where the institution supporting the expressive activity is itself fundamental to the functioning of our society, however, the government's ability to limit access is properly viewed as even more restricted. The Court in *Rust* acknowledged this principle when it distinguished family planning clinics from public forums and universities. Public forums and universities have in common the near identity of their purposes with First Amendment activity and the important role that each has played historically in the development of thought in our society. The presence of government funding in these areas, while it is to be applauded to the extent that it supports their traditional functions, becomes suspect when it represents an attempt to displace traditional norms with a state-sponsored agenda.

---

190 The Court has yet to address the exact issue of what level of restrictions would be permissible in a limited public forum operating within an institution not fundamental to society. Each of the cases where the Court found the existence of a limited public forum arose in the context of a school or university, which the Court clearly considers fundamental. Conversely, the Court held that there was no forum in each case suggesting the presence of a limited public forum within a lesser institution. *See*, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (holding that an airport terminal was not a public forum, even though First Amendment activity occurred therein, because airports were neither historically nor expressly dedicated to First Amendment activity). The logic of the Court's decisions in this area, however, suggests that if a forum for expressive activity were recognized within an institution of lesser importance, such as a senior citizens center, the standard of review should be higher than if there were no forum, as in *Rust*, but less than where the institution is fundamental, as in *Rosenberger*.


192 As David Cole has argued, the "government cannot avoid [F]irst [A]mendment scrutiny [in these areas] by arguing that it has no obligation to subsidize the exercise of
The Court has never announced an exhaustive list of areas or institutions deemed fundamental to the functioning of our society; rather, the Court has chosen to identify such areas and institutions slowly over time.\(^{193}\) The following section argues for the inclusion of legal services in this emerging list. Because legal representation, by tradition and by ongoing practice, constitutes core First Amendment activity that is critical to the functioning of our society, the government's ability to impose its norms in this area, even as a condition of funding, should be highly restricted.

**b. Application to the LSC Case**

The LSC program should be viewed as a limited public forum because it has been dedicated since its inception to core First Amendment activity, namely the provision of legal advice and services. Congress created the LSC a decade after the Supreme Court held in *United States v. Button* that efforts to secure and act upon legal advice fall within constitutionally-protected freedoms.\(^{194}\) The LSC represents an attempt to make those freedoms meaningfully available to those who would otherwise be "unable to afford adequate legal counsel," or to seek "redress of grievances."\(^{195}\) Recognizing that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws,"\(^{196}\) Congress established the LSC with a broad mandate to serve "the ends of justice."\(^{197}\)

---

\(^{193}\) David Cole has suggested that public forums, public universities, and the press are most easily recognized as "spheres of neutrality" in light of the Court's decisions. Cole has also applied his analysis to government funding for the arts and government-funded counseling programs, arguing that these areas should similarly be deemed neutral. See Cole, *supra* note 149, at 682.

\(^{194}\) The House Report accompanying the Legal Service Corporation Act of 1974 explicitly invoked *Button* to explain that the restrictions contained within the bill should be read so as to be consistent with the First Amendment and lawyers' professional responsibilities to their clients. See H.R. REP. No. 93-247(1974), reprinted in 1978 U.S.C.C.A.N. 3872, 3881 ("Pursuant to Supreme Court decisions (such as NAACP v. *Button*) and in accordance with the general responsibilities of attorneys to their clients . . . the bill does not seek to prevent recipients and their employees from fully apprising the client community of its legal rights and properly informing poor people about the merits of prospective litigation.").


\(^{196}\) *Id.*

\(^{197}\) *Id.*
The legislative history of the LSC provides ample evidence to meet the standards announced in Cornelius for the creation of a designated public forum. The statute creating the program evidences an intent to dedicate funds to what had already been declared by the Supreme Court to constitute First Amendment activity. The nature of the property at issue—the funds dedicated to legal services—is by definition consistent with expressive activity, much as the student activities fund in Rosenberger was inherently consistent with expressive activity on the university campus. The LSC funds are unlike the school mail system in Perry that was created for one purpose and then allegedly diverted toward expression. Rather, the LSC funds were dedicated from the beginning to “encourag[ing] and promot[ing] the use of our institutions for the orderly redress of grievances and as a means of securing worthwhile reform,” in recognition of the fact that “justice is served far better and differences are settled more rationally within the system than on the streets.” Viewed in this light, the LSC was thus conceived as a way to move poor people’s grievances from the streets, a public forum from time immemorial, to the courts.

Since its inception, the primary criterion for eligibility for LSC assistance has been income. Individual LSC grantees have been free to determine their own financial eligibility requirements within the limits of the LSC Act and federal regulations. Although no individual in poverty has a right to LSC assistance, the forum created in the LSC fund has been in principle open to all who are “alike” in that they are poor and in need of legal representation. Like the student organizations in Rosenberger who had no right to the University of Virginia’s Student Activities Fund simply on account of being a student organization, individuals have no right to LSC assistance simply by virtue of being poor. Nevertheless, much like the student organizations in Rosenberger, individuals seeking the assistance of LSC grantees have the right not to be excluded on an impermissible basis, such as viewpoint. As the Supreme Court recognized in Rosenberger, “[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.”

---

198 See Cornelius v. NAACP, 473 U.S. 788, 802–03 (1985) (holding that a public forum can be created only “by intentionally opening a nontraditional forum for public discourse ... [on a property the nature of which is] consistent with expressive activity”).
200 Id.
201 See id. (stating that “[c]lients’ eligibility for legal assistance will essentially be determined by their impoverished circumstances”).
202 See LEGAL SERVICES CORPORATION, 1992 ANNUAL REPORT 5.
203 See Howard Gault Co. v. Tex. Rural Legal Aid, Inc., 615 F.Supp. 916, 936 (N.D.Tex. 1985), aff’d in part, rev’d in part on other grounds, 848 F.2d 544 (5th Cir. 1988) (holding that the LSC Act “does not create in an indigent any right to legal services which is enforceable under Section 1983”).
are not sufficient funds to distribute among eligible recipients, "it [is] incumbent on the state . . . to ration or allocate the scarce resources [according to] some acceptable neutral principle."205

The LSC statute has contained since its inception, however, exclusions that violate the principle for which Rosenberger has come to stand. In an effort to maintain the strength of the LSC, Congress declared that "the legal services program must be kept free from the influence of or use by it of political pressures."206 To effectuate the latter part of that concern, Congress prohibited LSC grantees from participating in cases involving desegregation, abortion, and military desertion. It also limited the ability of LSC grantees to participate in class actions and lobbying activities.207 But the fact that such restrictions were a part of the original LSC statute, and in turn have been supplemented several times, is not proof of their validity. As in Rosenberger, the general purposes of the LSC program may require the invalidation of exclusions that indicate that the government has misunderstood its responsibilities208 or its limitations. Where a program has been expressly dedicated to First Amendment activity, and has thereby been designated a public forum, any exclusions must be objectively "reasonable in light of the purpose served by the forum,"209 not simply necessary or desirable in the eyes of its creators.

In the case of the LSC, the public forum has been dedicated to those First Amendment activities, recognized in Button, that are associated with the provision of legal services. Restrictions placed on the LSC must therefore be reasonable in light of the guiding purpose of the program. To be sustainable under Rosenberger, content-based restrictions on LSC grantees must be consistent with the general purpose of the program and not represent hidden viewpoint discrimination.210 Restrictions on LSC grantees must therefore be analogous to limitations on a public university's funding for student organizations that state that no student periodicals whatsoever are eligible for funding. Some of the LSC restrictions arguably fall into this latter category of regulation. However, the restrictions on class actions by LSC grantees and all political reform efforts clearly do not. Viewed in light of their legislative history, these restrictions do not represent an attempt to allocate scarce funding according to a neutral principle, but rather mark an effort to silence liberal viewpoints.

205 Id.
207 See note 15, supra, describing the history of such restrictions.
208 In Rosenberger, for example, the University of Virginia defended its exclusion of religious groups from the SAF on the grounds that it thought it was obligated to do so by the Establishment Clause of the Constitution. See Rosenberger, 515 U.S. at 839–40.
209 Rosenberger, 515 U.S. at 829 (quoting Cornelius v. NAACP, 473 U.S. 788, 806 (1985)).
210 See id. (noting "viewpoint discrimination is presumed impermissible when directed against speech otherwise within the forum's limitations").
As in *Rosenberger*, the fact that the LSC restrictions have been incorporated into the charter of the LSC program does not bootstrap them into legitimacy.

The Court’s viewpoint-discrimination jurisprudence thus would seem to provide an adequate basis for invalidating the political LSC restrictions. However, the second strain of the Court’s school cases, which were discussed previously, suggests that restrictions on speech within fundamental institutions such as universities are particularly dangerous. This reasoning may provide additional support for the argument that even the “viewpoint-neutral” content restrictions attached to the LSC are constitutionally suspect. Just as the state, in creating a public university “acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition,” so too does Congress, in creating and funding the LSC, act against the backdrop of legal representation in the Anglo-American tradition. The lawyer-client relationship and the work product of the attorney have long enjoyed a unique level of protection in our system of justice. Lawyers are subject to a Code of Professional Responsibility, which requires them to exercise independent judgment on behalf of their clients, regardless of who pays their legal fees. These traditions and professional responsibilities suggest that the lawyer enjoys a special status in our system that should not be lightly disregarded even as Congress asserts its right to control the programs it funds.

When it created the LSC in 1974, Congress contemplated that the Corporation would provide legal services for indigent clients consistent with these traditions. The legislative record is replete with references to the lawyers’ Canon of Ethics and Code of Professional Responsibility, as guideposts for LSC lawyers. For example, the House Report accompa-

211 *Id.* at 835.
212 See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) (“[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy . . . .”).

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends . . . .

> *Id.*
214 See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.8(f) (August 1983, as Amended to February 1997); *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* DR-5-107(A), (B), EC 5-21, EC 5-22 (1983).
nying the 1974 Act explained that even the initial restrictions on political reform efforts did not preclude lawyers from participating in such matters in a representational capacity, where they felt that such efforts were consistent with their ethical and professional obligations.\textsuperscript{216} In short, Congress intended to create a program to provide poor people with lawyers possessed of independent and professional judgment. As the House Report stated, a choice of "how best to proceed in particular cases is always best left to the attorney and client, and the Corporation should not seek to substitute its judgment for that of the attorney in determining how best to serve the interests of particular clients."\textsuperscript{217}

If Congress, in one legislative act, created a program to fund lawyers, yet simultaneously limited their professional capabilities by barring certain subjects and legal activities, one wonders which half of the act Congress intended to take precedence. If Congress was truly committed to providing lawyers to poor people, then the restrictions on subject matter seem inconsistent with this purpose. Introducing restrictions on the lawyer's representational capacities, based solely on the source of the funding, is inconsistent with every tradition and professional ethic dictating undivided loyalty to the client.\textsuperscript{218} If the restrictions are of utmost importance to Congress, then it would appear that Congress was not really serious about providing lawyers to the LSC's intended beneficiaries. Rather, the LSC program would become merely a paralegal or legal referral service for poor people. Congress, however, is limited in its ability to redefine a traditional profession by choosing to fund only certain aspects of it.\textsuperscript{219} Restrictions that are inconsistent with lawyers' traditional responsibilities should cede to the larger purpose of the program since it appears expected that information about clients will be obtained solely through a simple form and that eligibility will be determined in a manner that produces utmost trust and confidence between attorney and client.

\textsuperscript{216} See id. (analyzing the Legal Services Corporation Act of 1974 § 6d(4)).

\textsuperscript{217} Id. (analyzing the Legal Services Corporation Act of 1974 § 7(7)).

\textsuperscript{218} In the criminal defense context, the Court has noted that a lawyer paid by the government to represent indigent clients "retains all of the essential attributes of a private attorney, including, most importantly, his 'professional independence,' which the State is constitutionally obliged to respect." West v. Atkins, 487 U.S. 42, 50 (1988). Distinguishing the legal profession from the medical profession, for example, the Court noted that "[i]n contrast to the public defender, [the doctor's] professional and ethical obligation to make independent medical judgments did not set him in conflict with the State . . . ." Id. at 51; cf. Polk County v. Dodson, 454 U.S. 312, 318–19 (1981) (explaining the role of a public defender). Although criminal defense is different from civil representation, Dodson and West stand for the principle that a lawyer's professional responsibilities are fundamentally different from those of members of the other professions, and may inherently require opposing the state's interests.

\textsuperscript{219} See Rust v. Sullivan, 500 U.S. 173, 200 (1991) (raising but not resolving the question that it "could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government").
from the legislative record that Congress believed it was creating a program to provide lawyers to poor people.

More important than any overriding congressional purpose is the fact that the limitations undermine the integrity of an institution that is fundamental to the functioning of our society. Like the public university, the untrammeled lawyer-client relationship is critical to the health of our legal system and our political democracy. Button highlighted the important First Amendment content of the lawyer-client relationship; this relationship, however, enjoyed protection long before Button because of the "broad[] public interests in the observance of law and administration of justice." 220

To the extent that the government becomes involved in regulating the types of cases lawyers may assist their clients with, or which procedural devices they may employ, the relationship between lawyer and client becomes tainted by government influence.

Although the concrete harm in each individual case where a client is referred to a non-LSC legal organization for assistance may be difficult to identify, the cumulative effect of allowing the government to effectively redefine the lawyer-client relationship suggests a problem of societal proportion. In the LSC context, as in the public university setting, the government may choose not to fund "fundamental" institutions. But once it does, it should not meddle with the institution's internal workings. Certain spheres are simply too important to allow the government to "buy up" in exchange for the control that generally comes with ownership. In the case of the LSC restrictions, a unique bundle of individual rights and societal interests are threatened. These include the First Amendment rights of the LSC lawyers and their clients, and the societal interest in preserving the integrity of the lawyer-client relationship.

III. The LSC Restrictions Violate the Equal Protection Component of the Due Process Clause

The LSC restrictions also raise a number of concerns under the equal protection component of the Constitution. The speech suppressed by the restrictions is undeniably connected to a disfavored group in our society—the poor. The restrictions reflect a desire on the part of Congress not only to not hear from the poor and their advocates, but also to keep them out of court. The restrictions reflect a bias on the part of Congress against the poor and they impinge on the fundamental right of access to the courts. This section will analyze the LSC restrictions in light of the equal protection component of the Due Process Clause, as an alternative basis on which the restrictions may be deemed unconstitutional.

A. The LSC Restrictions Represent Invidious Bias

Under traditional equal protection analysis, only those regulations that single out a group of people based on race, religion, national origin, or gender are subject to heightened scrutiny.\textsuperscript{221} Those that single out the poor as a group for disparate treatment are subject to mere rational basis review,\textsuperscript{222} such that the government must demonstrate only "that the statute is rationally related to a legitimate state interest."\textsuperscript{223} Particularly in matters of social and economic regulation, the Court will generally grant legislatures "wide latitude" to exercise their judgment, presuming that "even improvident decisions will eventually be rectified by the democratic processes."\textsuperscript{224}

1. The Poor

Although rational basis review is highly deferential, it is not entirely without bite. In several important cases affecting the poor, the Court found that the state failed to carry the admittedly light burden imposed by rational basis review. In the context of criminal law, for example, the Court has struck down statutes effectively imposing differential prison sentences based on wealth\textsuperscript{225} or differential liability for the expenses of providing counsel.\textsuperscript{226} The Court also has required states to provide trial

\begin{itemize}
\item \textsuperscript{221} Legislative classifications based on race, religion, or national origin are subject to the highest level of scrutiny, strict scrutiny, because "these factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). \textit{See}, e.g., Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (examining classifications based on race); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (analyzing classifications based on religion); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (discussing national origin). Legislative classifications based on gender are subject to an intermediate level of scrutiny, in recognition of the fact that gender "generally provides no sensible ground for differential treatment." \textit{Cleburne Living Ctr.}, 473 U.S. at 440. \textit{See}, e.g., United States v. Virginia, 116 S. Ct. 2264, 2275-76 (1996) (applying intermediate review standard to strike down the Virginia Military Institute's policy of excluding women); Reed v. Reed, 404 U.S. 71, 76 (1971) (announcing intermediate review standard).
\item \textsuperscript{222} \textit{See}, e.g., San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (applying low level standard of review to school financing scheme that discriminated against the poor); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (applying rational basis review to state's summary eviction procedures); Dandridge v. Williams, 397 U.S. 471, 487 (1970) (applying rational basis review to state's imposition of an upper limit on its cash assistance to families).
\item \textsuperscript{223} \textit{Cleburne Living Ctr.}, 473 U.S. at 440.
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{See} Williams v. Illinois, 399 U.S. 235, 242-45 (1970) (striking down state statute allowing for imprisonment beyond the statutory maximum period where the imprisoned individual was unable to pay an assessed fine or court costs).
\item \textsuperscript{226} \textit{See} James v. Strange, 407 U.S. 128, 141-42 (1972) (striking down a statute
transcripts for indigent defendants appealing their criminal convictions and counsel in a first appeal of right.

While the restrictions at issue in these cases generally implicated the fundamental liberty interests of the poor and were therefore subject to even more searching review under the Equal Protection Clause, the wealth-based distinctions also were analyzed in terms of rational basis review. In *James v. Strange*, for example, where the regulation at issue did not impair the liberty interests of indigent defendants, but rather subjected them to heightened liability for the cost of counsel, the Court found that the classification employed was irrational. Recognizing that "state recoupment statutes may betoken legitimate state interests," the Court nevertheless found that those interests could not justify the distinction made between "indigent criminal defendants" and "other classes of debtors." Because the state's recoupment statute put the indigent defendant uniquely at risk of losing "the means needed to keep himself and his family afloat," the Court held that it "embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."  

2. Other Non-Suspect Classes

The Court has also applied rational basis review to strike down classifications in other contexts where the poor were not affected. As in *Strange*, the Court has suspected in these cases the presence of punitiveness and discrimination that violate the spirit of equal protection. In *United States Department of Agriculture v. Moreno*, *City of Cleburne v. Cleburne Living Center*, and, most recently, *Romer v. Evans*, the Supreme Court held unconstitutional legislative enactments that could not be explained in terms of anything other than invidious bias. Because

---

imposing liability on indigent defendants for expenditures made by the state in the provision of counsel).  

229 See discussion infra Part III.B.  
230 *Strange*, 407 U.S. at 141.  
231 Id.  
232 Id. at 136.  
233 Id. at 142.  
237 Cass Sunstein has described these cases as the "*Moreno-Cleburne-Romer trilogy*", wherein the Court "ruled off-limits a constitutionally unacceptable 'animus' not involving federalism or discrimination on the basis of race or sex." Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 60 (1996).
such bias could not be considered a legitimate governmental purpose, the Court has held that the enactments failed under rational basis review.

In *Moreno*, the Court considered a subsection of the Food Stamp Act that excluded from participation "any household containing an individual who is unrelated to any other member of the household."\(^{238}\) Searching for a legitimate state purpose to sustain the exclusion, the Court found evidence in the legislative history only for the contention that the exclusion was "intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program."\(^{239}\)

The Court rejected the government’s assertion that the exclusion served the additional purpose of minimizing fraud in the administration of the food stamp program. It noted that the Act elsewhere contained specific provisions addressing fraud, and found that the denial of food to households containing unrelated individuals represented an irrationally overbroad response to the problem posed by these particular households, and an underinclusive response to fraud generally. Concluding that there was no plausible justification for the exclusion, the Court struck it down. Justice Brennan, writing for the Court, announced a principle that would be applied in later cases finding invidious bias: "if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."\(^{240}\)

In *Cleburne Living Center*, the Court considered the constitutionality of a city's requirement that operators of a group home for the mentally retarded obtain a special use permit. Finding that the requirement had been imposed solely out of fear of the mentally retarded, the Court held that the requirement could not survive rational basis review. As in *Moreno*, the Court searched the record for some "rational basis for believing that the [group] home would pose any special threat to the city’s legitimate interests."\(^{241}\) The Court considered the city’s various arguments regarding "fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents,"\(^{242}\) but found that such concerns could not justify the singling out of this particular home. While the city’s expressed concerns may have been legitimate, its imposition of the special permit requirement on the group home for the retarded, without imposing a similar requirement on other structures and dwellings threatening similar harms, was irrational. As the Court concluded, "[t]he short of it is that

\(^{238}\) *Moreno*, 413 U.S. at 529.

\(^{239}\) *Id.* at 534.

\(^{240}\) *Id.*


\(^{242}\) *Id.* at 450.
requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . ."\(^{243}\)

Romer applied this intuition to the highly unusual case of a state referendum, Colorado’s Amendment 2, prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination. Although homosexuals, like the poor and the mentally retarded, are not a suspect class for the purposes of equal protection analysis, the Court nevertheless found the referendum unconstitutional. Applying rational basis review, the Court again found that the action was motivated by invidious bias against an unpopular group.

Analyzing the referendum against the backdrop of the state’s asserted objectives of respecting “other citizens’ freedom of association—in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,”\(^{244}\) as well as the state’s interest “in conserving resources to fight discrimination against other groups”\(^{245}\)—the Court found a fatal disconnect. The referendum was “at once too narrow and too broad”\(^{246}\) to have been genuinely conceived as an effort to further these interests, since “[i]t identifies persons by a single trait and then denies them protection across the board.”\(^{247}\) The discontinuity of the referendum with the state’s asserted interests raised the inference that it was “inexplicable by anything but animus toward the class it affects,”\(^{248}\) and that the measure therefore lacked “a rational relationship to legitimate state interests.”\(^{249}\)

The rational basis standard that emerges from Moreno, Cleburne Living Center, and Romer is thus one that has considerably more bite than the standard applied in “the ordinary case, [where] a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”\(^{250}\) Where the Court suspects that the classification is “drawn for the purpose of disadvantaging the group burdened by the law,”\(^{251}\) it will not be sustained. Moreno thus established and Romer confirmed that sheer dislike for an unpopular group is not a legitimate basis for discriminatory state action.

\(^{243}\) Id.

\(^{244}\) Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

\(^{245}\) Id.

\(^{246}\) Id. at 1628.

\(^{247}\) Id.

\(^{248}\) Id. at 1627.

\(^{249}\) Id.

\(^{250}\) Romer, 116 S. Ct. at 1627 (distinguishing other “ordinary” cases where rational basis test was met).

\(^{251}\) Id.
3. Application to the LSC Case

The LSC restrictions were motivated by precisely the kind of invidious bias that *Moreno*, *Cleburne Living Center*, and *Romer* pronounce illegitimate. Viewed in light of their legislative history, there is no question that the restrictions represent an attempt to cut off unpopular viewpoints and to silence the trouble-making poor. Congressional debate on the restrictions revealed an intense dislike on the part of several Members for the types of cases brought by LSC lawyers, particularly those that could be described as "liberal."\(^{252}\) New York State Justice Beverly Cohen noted in her opinion striking down the restrictions that the legislative history "reveals that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients, and anyone who agrees with them. The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions."\(^{253}\) As in *Cleburne Living Center*, the LSC restrictions reflect desires on the part of Congress not to hear from the poor and not to be disturbed by their presence.

In its court papers defending the restrictions, the government has relied on *Rust v. Sullivan* to assert its right not to "subsidize certain activities," and to exercise "control over programs it creates and subsidizes."\(^{254}\) No other state interest has been represented. Under *Rust*, the government argues, Congress can choose which activities it wishes to fund, and which it wishes to exclude. According to the defenders of the restrictions, Congress's wish to "restore the LSC to its original focus on the bread and butter needs of the poor"\(^{255}\) is a legitimate rationale for removing class actions and other types of political action from the purview of LSC recipients.

As discussed in Part II *supra*, however, *Rust* may not be controlling in this case. Insofar as the provision of legal services is significantly different from the provision of family planning services, the former inherently implicating core First Amendment rights, the restrictions may not be constitutionally or statutorily permissible even if the state's asserted interests are taken at face value.

---


\(^{255}\) Defendants' Supplemental Memorandum of Law in Opposition to Motion for Preliminary Injunction at 6, Velasquez v. Legal Servs. Corp. (No. 97 CV 00182) (E.D.N.Y. Mar. 21, 1997).
However, once the state’s asserted interests are closely examined, these interests become even more suspect. As in Romer, the restrictions are at once too broad and too narrow to achieve their stated goals. In an alleged effort to stop what it considers frivolous or non-essential litigation and political activity, Congress has denied a wide panoply of legal tools across the board to LSC recipients. Rather than, for example, requiring recipients to certify that there is a good faith basis for all actions undertaken, Congress has substituted its own judgment that, in all cases, class actions and political activity will never be the most effective or efficient means available.

The restrictions are both too broad and too narrow. They deny effective relief where the excluded activities might in fact be the most effective means to address the “bread and butter needs” of poor people, and they are too narrow because they fail to address instances of abuse where none of the excluded tools are utilized. Such a discrepancy between the asserted goals and the actual effect of the restrictions suggests that Congress was not concerned about refocusing the LSC on the basic needs of the poor. Rather, the lack of fit suggests that Congress was attempting to suppress a distinctive political agenda, espoused by many LSC lawyers and their clients. As Moreno, Cleburne Living Center, and Romer instruct, such bare dislike for an unpopular group is an impermissible basis for a legislative classification, even if the government is under no general obligation to provide the benefit in question.

As two observers of the ongoing Congressional effort to limit the activities of LSC lawyers have noted: “If the Legal Services lawyers act improperly, the local program, the court, and the LSC all have sanction mechanisms.” Marie A. Failinger & Larry May, Litigating Against Poverty: Legal Services and Group Representation, 45 Ohio St. L.J. 1, 55 (1984). In light of such existing sanction mechanisms, the broad-based exclusions included in the 1996 restrictions are difficult to justify on the grounds that they will prevent abusive lawyering.

As Justice O’Connor, writing for a majority of the Court, recognized in Cornelius v. NAACP, 473 U.S. 788 (1985), a significant misfit between the state’s asserted goals and its actions can give rise to an inference that the state has misrepresented its actual purposes. In Cornelius, certain organizations including the NAACP had been excluded from participation in the Combined Federal Campaign (“CFC”), a federal program for charitable giving open to all federal workers. Although the government asserted that it had excluded all advocacy organizations in order to avoid controversy, and that it had included only those organizations that provided direct health and welfare services, the Court noted that other organizations that did not provide such direct services had been included. The Court found that this discrepancy “cast doubt” on the genuineness of the government’s asserted objectives, and invited the plaintiff organizations to develop on remand their argument that their exclusion “was impermissibly motivated by a desire to suppress a particular point of view.” Id. at 812–13. See also Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep’t of Chicago v. Mosley, 408 U.S. 92 (1972); and Martin v. Struthers, 319 U.S. 141 (1943) (all finding underinclusiveness indicative of an impermissible motive).
B. The Restrictions Impinge upon LSC's Clients' Fundamental Right of Access to the Courts

In addition to representing an invidious bias against the poor, the restrictions are invalid under the Equal Protection Clause because they impinge upon LSC clients' fundamental right of access to the courts.\textsuperscript{258} Access to the courts is not only fundamental as a First Amendment right, but also as a right preservative of all other rights.\textsuperscript{259} If the poor do not have access to the courts to enforce rights obtained in the legislative arena, those rights are effectively meaningless. More importantly, in light of the invidious bias cases, if legislative acts violate the constitutional rights of the poor, access to the court may provide the only means of redress.

As Justice Stone wrote in his famous footnote 4 to \textit{United States v. Carolene Products},\textsuperscript{260} "searching judicial inquiry" may be appropriate where a regulation "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."\textsuperscript{261}

\textsuperscript{258} Which rights are fundamental for the purposes of equal protection analysis are hardly fixed and precise. Statutory schemes impinging upon the right of poor people to travel, vote, or obtain a divorce, for example, have been invalidated as denials of equal protection on the grounds that these rights, among others, are fundamental. See \textit{Boddie v. Connecticut}, 401 U.S. 371 (1971) (invalidating law impinging on access to the courts to obtain a divorce); \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969) (addressing right to travel); \textit{Harper v. Virginia State Bd. of Elections}, 383 U.S. 663 (1966) (invalidating Virginia law imposing $1.50 poll tax). Although the Court has offered various formulations for determining whether a right is fundamental, no single definition has emerged as determinative. See, e.g., \textit{Boddie}, 401 U.S. at 374 (suggesting that the relevant inquiry is whether the state has monopolized enforcement of a particular right); \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937) (suggesting that the relevant question is whether it would be possible to imagine a "scheme of ordered liberty" without recognition of the right at issue as fundamental). See also \textit{Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights} (pt. 1), 1973 \textit{DUKE L.J.} 1153, 1178-80 (discussing the ambiguity in the Supreme Court's jurisprudence on which rights are fundamental); \textit{Ira C. Lupu, Untangling the Strands of the Fourteenth Amendment}, 77 \textit{MICH. L. REV.} 981, 1007-08 (1979) (same).

\textsuperscript{259} The notion of preservative rights was introduced in reference to voting in \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 370 (1886) and developed in \textit{Reynolds v. Sims}, 377 U.S. 533, 562 (1964). Moreover, as the \textit{Button} Court recognized, access to the courts will be critically important for those groups "unable to achieve their objectives through the ballot." \textit{NAACP v. Button}, 371 U.S. 415, 429 (1963). \textit{Frank I. Michelman} has written about the connection between access to courts and the ballot:

[L]itigation and legislation . . . [are] bound up with one another in an entire, political-legal order in which the court's part is no less critical than the legislature's . . . . Access to the courts and access to legislatures are [thus] claims that merge into one another, . . . [and one] cannot, without confusion, call a person a citizen and at the same time sanction . . . [his] exclusion . . . from that process.


\textsuperscript{260} \textit{304 U.S. 144} (1938).

\textsuperscript{261} \textit{Id.} at 153 n.4.
Although the poor are not the kind of "discrete and insular minority" contemplated by Justice Stone, legislative actions that threaten to undermine fatally the capacity of the poor or other non-suspect classes to participate in the political processes have nevertheless been consistently struck down.

The Court's poll tax and voting cases, for example, established that the right to vote may not be conditioned on the basis of wealth. Similarly, the Court's ballot access and filing fee cases have held that a state may not make it virtually impossible for new political parties to be placed on the ballot, or for poor people to run for office. The logic of these decisions reflects both a concern for the legitimacy of our political democracy and for the rights of minorities who are threatened with utter disempowerment. As Justice Warren noted in *Kramer v. Union Free School District*, "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." Moreover, "[s]tatutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives."

Although it was not explicit, Justice Kennedy's opinion in *Romer*, relied heavily on the Court's fundamental or preservative rights jurisprudence. In addition to finding that Colorado's Amendment 2 was motivated by invidious bias against homosexuals, the Court concluded that the referendum had the peculiar effect of making it "more difficult for one group of citizens than for all others to seek aid from the government.”

---

262 *Id.*


265 See *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating, as applied to indigents, California law requiring candidates for office to pay a filing fee equivalent to two percent of the annual salary of that office); Bullock v. Carter, 405 U.S. 134 (1972) (invalidating filing fee shifting costs of primary to candidates).


267 Id. at 626–27 (emphasis added).

This singling out of a disfavored group for differential treatment represented "a denial of equal protection of the laws in the most literal sense," because it imposed burdens on homosexuals shared by no other group of citizens. While other groups seeking protection from discrimination would need only petition the legislature for more favorable laws (if they did not already enjoy such statutory protection), homosexuals would face the additional burden of having first to succeed in passing a state referendum repealing Amendment 2.

The Court held that Colorado could not take such a dramatic step to make homosexuals, as a class, "stranger[s] to its laws," and thereby "unequal to everyone else." Citing Justice Harlan's dissent in *Plessy v. Ferguson*, the Court stated that "the Constitution neither knows nor tolerates classes among citizens." Because the Colorado referendum effectively created classes among citizens, not simply in the suspect class sense, but in the "caste" sense described in *Plessy*, it was impermissible. The referendum created a caste system by setting up rigid political barriers to one group's ability to enjoy the protections of law on an equal basis with other groups. These barriers would perpetuate the inequality of that group's status based on a single disfavored characteristic.

The LSC restrictions operate in a manner analogous to the restrictions in *Cleburne Living Center* and *Romer* because they go to the heart of the First Amendment rights of the poor and their ability to participate in the political-legal order. Similarly, in *United States v. Button*, the Court struck down restrictions that prevented blacks from exercising what

269 Id.
270 Id. at 1629.
271 163 U.S. 537 (1896).
272 *Romer*, 116 S. Ct. at 1623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).
273 Justice Harlan noted in his dissent to *Plessy*: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here." *Plessy*, 163 U.S. at 559.
274 Sunstein captured the two related ways in which Colorado's Amendment 2 tended to create a caste system based on sexual orientation. First, the Amendment reflected "a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive." Sunstein, supra note 237, at 62. In other words, Amendment 2 created a symbolic wall around homosexuals, giving legal imprimatur to the presumably straight majority of voters' wish to designate homosexuals as "other." This wish to seal off an undesirable group was similarly responsible, in the Court's opinion, for the City of Cleburne's effort to prevent the mentally retarded from entering their community. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

The second sense in which Amendment 2 attempted to establish a caste system was in its creation of a "second-class citizenship" for homosexuals whereby it would be more difficult for homosexuals than for any other group to obtain the protection of the laws. *See Sunstein, supra* note 237, at 63.

275 Cf. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 600 (1994) ("Winning the battle in the courts rather than in the legislatures does not violate democratic principles because the courts are intervening on behalf of groups that are under-represented in the legislatures.") (summarizing DAVID LUBAN, LAWYERS AND JUSTICE, AN ETHICAL STUDY (1988)).
was likely to be their most effective form of political expression. While the LSC restrictions leave the private bar free to take up class actions and political activity on behalf of the poor, the restrictions are likely to diminish the total volume of such cases and activities.\(^{276}\) Moreover, the inability of LSC recipients to initiate class actions threatens to undermine the effectiveness both of their representation of individual clients and of the class actions that are ultimately brought by separate counsel.\(^{277}\) By dispersing clients among private lawyers and non-LSC organizations, the restrictions take away the primary advantages the poor once had: LSC lawyers’ expertise in the needs of the poor and their ideal positioning to know when a problem had risen to a “class” dimension.\(^{278}\)

Thus, like Colorado’s Amendment 2, the LSC restrictions make it more difficult for the poor to obtain effective redress for their grievances.

\(^{276}\) To date, there is no data by which to judge the actual effect of the restrictions on the number of class actions and other actions taken on behalf of the poor. Existing studies of the pro bono activities of private lawyers suggest that “although most lawyers donate some free services, little of it involves the representation of indigents.” Cramton, supra note 275, at 578 n.121.

\(^{277}\) On the importance of class actions for effective individual as well as group representation, see Failinger & May, supra note 256, at 17. Failinger and May argue:

\[
\text{[T]he fact is that group representation devices such as class actions are often the most effective way of representing an individual poor person . . . . The individual lawsuit, which may restore some of the economic benefits lost by the poor person, cannot remedy past and future harassment or restore the political balance of power between the institution and the individual. By contrast, the class suit can secure relief for the client that is not only longer-lasting but also broader-based. Additionally, the publicity accompanying the class suit places more of a burden on the welfare official to explain his or her conduct to supervisors and members of the public . . . .}
\]

Id. See also Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972) (recognizing that class actions “may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture”).

\(^{278}\) Although no comprehensive list of major LSC victories exists, many of this century’s most important cases leading to an expansion of the rights of the poor were brought by LSC lawyers. Notable cases brought by LSC lawyers include Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that the right to divorce is fundamental); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that recipients of public assistance have a right to a hearing prior to the termination of benefits); and Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that the right to travel is fundamental). See Allen Redlich, A New Legal Services Agenda, 57 ALB. L. REV. 169, 169 n.4 (1993). The fact that such important cases were brought by LSC lawyers suggests that specialization in poverty law does add value to the service LSC lawyers are able to provide their indigent clients. See Cramton, supra note 275, at 590. Cramton writes:

\[
\text{[T]he staff-attorney system [of legal services for the poor, in contrast with a system which refers poor persons to members of the private bar] provides a cadre of lawyers who are intellectually and personally committed to serving the poor. The delivery of services may be organized so that clients are served by experienced specialists in various areas of poverty law, such as welfare, housing, or education. Further, the staff-attorney system permits more aggressive pursuit of}
\]
They are free to seek private representation in matters forbidden to LSC-grantees, just as homosexuals in Colorado would have been free to seek vindication of their rights by campaigning for the repeal of Amendment 2. But at some point, the Supreme Court has said, the albatross placed around the neck of a disfavored group, even if it is not a suspect class, grows too large and offends our sense of fairness. While individuals with sufficient resources may hire only one lawyer, impoverished clients must seek the assistance of several lawyers to obtain effective relief. Yet, the lawyers most likely to assist them in an effective manner have been placed off limits.

The chilling of class actions and political activity that the restrictions cause is particularly alarming because the doctrine of offensive collateral estoppel does not apply to the federal government. In United States v. Mendoza, the Supreme Court held that “the United States may not be collaterally estopped on an issue such as this, adjudicated against it in an earlier lawsuit brought by a different party.” In Mendoza, a Filipino national had applied for naturalization, building his case in part around a constitutional challenge to the government’s administration of the Nationality Act. This issue had been previously decided against the government in a case brought by another Filipino national.

The Court found that the government could not be estopped from relitigating the issue. “[B]ecause of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates,” the Court held that estoppel was inappropriate. The Court suggested a variety of policy reasons, including concerns about “thwart[ing] the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” The Court declared that the government is simply “[u]nlike a private litigant.”

Mendoza thus prevents an individual challenging a federal statute, policy, or regulation from relying on a previous decision. Any person not party to the previous decision must relitigate the issue, no matter how many times a court has already decided a similar issue in their favor. Under Mendoza, therefore, class actions may not only be the most efficient

institutional reform that benefits groups of poor people rather than merely an individual client.


281 Mendoza, 464 U.S. at 159.

282 Id. at 160.

283 Id. at 161.
and effective way to obtain relief for individuals with grievances against the federal government, they may be essential. In a world of limited resources, relitigating the same issue against the government is simply impracticable. *Mendoza* thus creates enormous incentives for similarly situated individuals to join as a class; if they are not party to the initial litigation they may never obtain relief. Viewed in this light, the prohibition on class actions seems particularly insidious, and the restrictions on lobbying and political activity deliver the final blow for real change.284 As Judge Cohen noted in *Varshavsky*: “The ostensible goal of saving money will not be accomplished by relegating the poor to less efficient individual actions for the same relief.”285 The goal of silencing disfavored views of “unpopular individuals,”286 however, will be accomplished quite effectively.

**Conclusion**

The history of the Legal Services Corporation reflects recurrent good and bad impulses in our society. Created in a gesture of optimism about the potential for legal representation to improve the lot of the poor, since its inception the LSC has been weighed down by restrictions, reflective of the cultural wars of the day, which have undermined the ability of LSC grantees to provide uncompromised legal services to their clients. These restrictions generally have been enacted to placate opponents of the LSC who, if they cannot defeat the Corporation entirely, are mollified by the knowledge that it will undertake only “ham and eggs” work for poor people. In addition, these restrictions have generally reflected a desire to defund “liberal” causes, loosely defined as any unpopular effort on behalf of the least favored in our society. While the 1996 restrictions specifically

---

284 As Allen Redlich has noted:

[T]he need to provide a full range of quality legal services cannot be overstated. Just as aspirin tablets and band-aids are not solutions to serious diseases and serious injuries, steering the poor through the system and helping the client get only what the system will allow is not a solution to poverty . . . . Whether the legal services programs of America can increase the number of legal aspirin tablets and band-aids they dispense is in the long run meaningless, unless the programs have the ability and determination to do more. To ensure the poor “access” to the legal system while limiting the ability of their lawyers to use the law in a meaningful manner may make lawyers feel good about themselves and the legal system, but, like a medical facility that dispenses only aspirin, this type of program is of little societal value.

Redlich, *supra* note 278, at 174–75.


target illegal aliens, drug users, and prisoners, prior restrictions have prohibited the representation of military deserters and those seeking an abortion, desegregation, or redistricting. A 1977 attempt to cut off LSC funding for representation of homosexuals is notable not for its blatantly discriminatory purpose, but rather for the fact that it failed.287

A consistent theme behind the restrictions imposed on the LSC over its life is that of Congress trying to control the classes of people that will receive assistance for reasons unrelated to financial need or ability to benefit from legal representation. The 1996 restrictions are merely the latest wave in this effort; nevertheless, they are notable insofar as they are the first to categorically place all political activity beyond the scope of LSC lawyers. If ever there was a time to make the case that the restrictions amount to impermissible discrimination on the basis of the content of First Amendment activity, it is now. As this Article has argued, Rust v. Sullivan need not be an impediment to such a challenge. Other constitutional principles, such as the prohibition on content discrimination and the Court’s public forum jurisprudence, provide avenues by which to distinguish Rust.

For the poor person in our society, the need for an effective and independent lawyer is particularly strong. Without such representation, the poor will not be able to exercise their fundamental right of access to the courts, a right all the more important where other means of participation in the political-legal order are effectively unavailable. The right to uncompromised legal services is properly viewed as preservative of all other rights for the LSC population, and should not be taken away lightly. Although the current political climate favors the conditioning of public assistance on a recipient’s willingness to work or ability to meet other requirements, this Article attempts to demonstrate how the provision of legal services is qualitatively different from other types of public assistance. Without expressing a view on the moral or constitutional legitimacy of recent revisions to the welfare system, this Article has suggested that restrictions on legal services are uniquely corrosive of cherished constitutional freedoms and of the health and legitimacy of our democracy. Thus, while current law does not require any public support for civil legal services for the indigent, fairness and current law dictate that if such services are provided, restrictions imposed on them may not discriminate on the basis of viewpoint or fatally undermine the efforts of lawyers seeking relief for their clients.

At the time of this Article's completion, the 1997 budget battle is in its intermediate stages. The LSC again faces major cuts, as Congressional foes resurrect their enthusiasm for defunding it.288 Those LSC lawyers who said there was no deal in 1996 to save the Corporation appear to have been correct.289 The restrictions have not insulated the LSC from continued assault. Regardless of the eventual budget for the LSC in the coming year, the 1996 restrictions promise to remain in effect until they are successfully challenged in court. This Article provides the groundwork for such a challenge, a challenge that, of course, must be brought by lawyers who are outside the Legal Services Corporation and therefore are not subject to its restrictions.


289 See supra note 23.