

## **RUST IN THE FIRST AMENDMENT SCAFFOLDING**

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### INTRODUCTION

Members of the United States Supreme Court frequently cite *Rust v. Sullivan*<sup>1</sup> when analyzing issues implicating government speech or funding. Yet, there is sharp disagreement about how to characterize that case, and the competing versions have very different implications. While the Court could offer an authoritative construction of *Rust* that would reduce if not eliminate the number of inconsistent *Rust* analyses, the justification for rejecting some of the competing versions might well provide the basis for undermining several cases that have used *Rust* as a foundation. The Court's practice of citing *Rust* for very different constitutional approaches not only makes *Rust* difficult to understand, but also destabilizes the jurisprudential lines based on *Rust*. A brief examination of the contradictory accounts of

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<sup>1</sup> See generally *Rust v. Sullivan*, 500 U.S. 173 (1991).

*Rust* illustrates how the willingness of members of the Court to recharacterize cases to reach a preferred result can undermine constitutional guarantees and the rule of law.

Part I of this Article discusses *Rust*, explaining both what the Court held and why it is subject to differing interpretations. Part II discusses the oscillating characterizations of *Rust*, and how the Court has undermined various parts of First Amendment jurisprudence by its frequent *Rust* recharacterizations that conveniently provide the basis for a desired result. The Article concludes that unless the Court offers more consistent and plausible analyses of the various jurisprudential lines that *Rust* is used to support, both those lines and the Court's remaining credibility may be undermined beyond repair.

### I. *RUST V. SULLIVAN*

*Rust v. Sullivan* was controversial for a number of reasons, not least of which was that it prohibited physicians who had received certain funds from discussing abortion with their patients.<sup>2</sup> The Court provided several rationales for upholding the prohibition without making clear which of the rationales provided the basis for the opinion. That failure made the opinion even more difficult to understand and more open to criticism than it might otherwise have been.

*Rust* involved the constitutionality of a federal program designed to fund family planning services.<sup>3</sup> Because family planning can involve a whole range of services, the program's intended scope needed clarification. Congress had specified that funds could not be used to support abortion as a method of family planning,<sup>4</sup> but that still left open how the particular limitation was to be interpreted. The Court explained that Congress "intended to ensure that Title X funds would 'be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities.'"<sup>5</sup> By limiting the use of the funds in this way, Congress made clear that the focus of Title X funding was for services prior to conception.

In 1988, the Secretary of Health and Human Services explained that "Title X services are limited to 'preconceptional counseling, education, and general reproductive health care,' and expressly exclude 'pregnancy care

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2 *Id.* at 180 (citing 42 C.F.R. § 59.8(b)(5) (1989)). The Court, however, claimed that the regulation did not constitute a complete prohibition. *See id.* 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.").

3 *Id.* at 178 ("Title X of the Public Health Service Act (Act), 84 Stat. 1506, as amended, 42 U.S.C. §§ 300 to 300a-6, . . . provides federal funding for family-planning services.").

4 *Id.* (noting that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning") (quoting 42 U.S.C. § 300a-6 (1988)).

5 *Id.* at 178-79 (quoting H.R. REP. NO. 91-1667, at 8 (1970) (Conf. Rep.)).

(including obstetric or prenatal care).”<sup>6</sup> Women seeking aid in determining the best ways to time their *future* pregnancies could be helped. However, currently “pregnant women must be referred to appropriate prenatal care services.”<sup>7</sup> Thus, the program’s provision of assistance in family planning was limited in that only pre-pregnancy services could be provided.

A pregnant woman seeking advice from a physician employed at a Title-X-funded facility could not receive counseling, because “the program does not furnish services related to childbirth.”<sup>8</sup> Rather, such a patient would receive “transitional information,”<sup>9</sup> i.e., a referral “for *appropriate* prenatal and/or social services” by way of “a list of available providers that promote the welfare of mother and unborn child.”<sup>10</sup> However, “appropriate” was defined in a particular way in that those making a referral were prohibited from directly or indirectly promoting abortion. Not only was an employee of a “Title X project . . . expressly prohibited from referring a pregnant woman to an abortion provider,”<sup>11</sup> but any referral list could not indirectly encourage abortion.<sup>12</sup>

Suppose that a patient expressly asked to be referred to an abortion provider. Although prohibited from making such a referral,<sup>13</sup> the physician was not required to remain silent. “One permissible response to such an inquiry is that ‘the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.’”<sup>14</sup> The physician had other alternatives as well, such as providing a list of health care providers including one or more who provided abortion among other services.<sup>15</sup> However, the referring physician was precluded from “weighing the list of referrals in favor of health care providers which perform abortions”<sup>16</sup> and was also precluded from “excluding available providers who do not provide abortions.”<sup>17</sup> Finally, the referring physician

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6 *Id.* at 179 (citing 42 C.F.R. § 59.2 (1989)).

7 *Id.* (quoting 53 Fed. Reg. 2925 (Feb. 2, 1988)).

8 *Id.*

9 *Id.*

10 *Id.* (quoting 42 C.F.R. § 59.8(a)(2) (1989)).

11 *Id.* at 180.

12 *See id.* (citing § 59.8(a)(3)) (explaining that a Title X project was expressly prohibited from indirectly encouraging abortion through referrals).

13 *Id.* (“The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.”).

14 *Id.* (quoting § 59.8(b)(5)).

15 Ann Brewster Weeks, *The Pregnant Silence: Rust v. Sullivan, Abortion Rights, and Publicly Funded Speech*, 70 N.C. L. REV. 1623, 1632–33 n.45 (1992) (“Referral lists were required to be weighted towards providers of prenatal care, but could include facilities providing abortion-related services . . .” (citing *New York v. Sullivan*, 889 F.2d 401, 410–14 (2d Cir. 1989), *aff’d sub nom. Rust*, 500 U.S. 173)).

16 *Rust*, 500 U.S. at 180 (quoting § 59.8(a)(3)); *see also* Thomas Wm. Mayo, *Abortion and Speech: A Comment*, 46 SMU L. REV. 309, 309 (1992) (“[A] pregnant patient could not be given a referral list that is weighted in favor of health care providers who offer abortions.”).

17 *Rust*, 500 U.S. at 180 (quoting § 59.8(a)(3)).

was prohibited from “steering’ clients to providers who offer abortion as a method of family planning.”<sup>18</sup> The patient would have to figure out for herself which, if any, of those on the referral list would provide the abortion services she sought.<sup>19</sup>

The *Rust* policy has been described as a gag rule, because physicians were prohibited from discussing abortion.<sup>20</sup> While the *Rust* policy did not preclude patients from eventually securing an abortion, it decreased the likelihood that a patient would secure one. Because the refusal list could not be weighted in favor of abortion providers and could not exclude providers merely because of their refusal to provide abortions, the policy in effect placed additional obstacles in the path of a woman seeking an abortion, even if those obstacles were not always insurmountable, given sufficient knowledge, tenacity, and means.<sup>21</sup>

The Court quickly dispensed with the challenge that the regulation unconstitutionally burdened a woman’s right to choose an abortion. “Congress’ refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all.”<sup>22</sup> While the Court was correct that many women would be no worse off as a result of the *Rust* policy than they would have been if Congress had refrained from funding family planning services as a general matter, it was unclear whether the Court was thereby announcing the relevant standard for the constitutionality of congressional funding. If so, the Court was announcing a very deferential standard.<sup>23</sup> But as Justice Blackmun noted in his dissent, government does not have carte blanche to fund whatever it wants as long as those not benefiting from the largesse would be no worse off than they would have been if Congress had simply withheld the funds as a general matter. “[T]here are some bases upon which

<sup>18</sup> *Id.* (quoting § 59.8(a)(3)).

<sup>19</sup> See *infra* notes 22–23 and accompanying text (noting that the Court in *Rust* was correct in finding that women would be no worse off as a result of this policy than they would have been had there been no funding at all).

<sup>20</sup> See Weeks, *supra* note 15, at 1624 (“In *Rust* the Court declared constitutional a set of controversial federal regulations known colloquially as the Gag Rules, which forbid health care providers at publicly funded family planning clinics from speaking with their patients about abortion.” (footnote omitted)).

<sup>21</sup> See Linda Maher, *Government Funding in Title X Projects: Circumscribing the Constitutional Rights of the Indigent*; Rust v. Sullivan, 29 CAL. W. L. REV. 143, 171 (1992) (“It may also leave her without adequate time in which to safely seek an abortion, if she is confused by the restrictions or the limited medical advice.”).

<sup>22</sup> *Rust*, 500 U.S. at 202; see also Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 764 (“[T]he Court engaged in an unspoken ‘greater includes the lesser’ analysis and described that this choice in funding is not the same as a penalty and leaves women in same position as if the federal funding did not exist at all.”).

<sup>23</sup> Cf. Mark P. McKenna, *Intellectual Property, Privatization and Democracy: A Response to Professor Rose*, 50 ST. LOUIS U. L.J. 829, 837 (2006) (“As Justice Scalia noted in a recent speech about government funding of the arts, it has long been the case that ‘he who pays the piper calls the tune.’”).

government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its decision to support an activity upon considerations of race.”<sup>24</sup>

The petitioners had argued that the funding restriction placed undue limits on the doctor-patient relationship.<sup>25</sup> But the *Rust* restriction was distinguishable from others requiring “all doctors within their respective jurisdictions to provide all pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient’s decision.”<sup>26</sup> The Court noted that doctors not receiving Title X funding were free to discuss abortion.<sup>27</sup> While women might well have been better off if they were able to receive abortion counseling at a Title X funded facility, the “Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.”<sup>28</sup> Thus, the Court reasoned, while states cannot require all physicians to provide certain information to any woman contemplating an abortion, Congress can limit the services it funds by refusing to support abortion directly or indirectly.

The Court’s analysis was dissatisfying for a number of reasons. While a statute requiring all physicians to give their patients irrelevant or contra-indicated information is of course objectionable, such a statute would not be transformed into acceptable legislation merely because it required many fewer physicians to give their patients irrelevant or contra-indicated information. An individual who has a consultation with her physician reasonably expects to receive medical advice that is given in light of her needs, desires, and condition in particular,<sup>29</sup> and this federally imposed limitation might preclude a patient from hearing about the medically indicated procedure. Perhaps a statute requiring that only a limited number of patients receive useless or misleading information is less objectionable than a statute that requires all patients to receive such information,<sup>30</sup> but those receiving

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<sup>24</sup> *Rust*, 500 U.S. at 210–11 (Blackmun, J., dissenting).

<sup>25</sup> *Id.* at 202 (majority opinion) (“Petitioners also argue that by impermissibly infringing on the doctor-patient relationship and depriving a Title X client of information concerning abortion as a method of family planning, the regulations violate a woman’s Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm.”).

<sup>26</sup> *Id.* at 203.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Cf. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1309 (2010) (“Whatever the government needed to do to ensure that it effectively communicated its family-planning policies to the public, that effort did not need to include suppressing the speech of healthcare workers who were advising individual patients about their specific conditions and treatments.”).

<sup>30</sup> Or perhaps not, if the limited dissemination of misleading information has discriminatory effects. See Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 3, 13 (2008) (noting that minority women of color were disproportionately affected by these restrictions).

this unhelpful information would likely find that their ability to make an informed decision would have been undermined rather than improved.<sup>31</sup>

While the Court may have been correct that “a doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered,”<sup>32</sup> this would be small consolation to those women who were not even alerted that their condition warranted serious consideration of an abortion.<sup>33</sup> Nor would it be much consolation to those who had wrongly inferred that they should not seek an abortion based on the advice that they had received from a Title X funded physician,<sup>34</sup> perhaps having relied on that physician to fulfill her professional responsibility to advance the patient’s medical well-being.<sup>35</sup>

In his dissent, Justice Blackmun noted that “Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion.”<sup>36</sup> This limitation was not merely a content-based restriction—“[t]he regulations are also clearly viewpoint based.”<sup>37</sup> For example, “the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman’s expressed desire to continue or terminate her pregnancy.”<sup>38</sup> Further, “[i]f a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning.”<sup>39</sup> But the patient might infer from such a statement that the physician herself did not believe abortion appropriate, which might well have been inaccurate.

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31 Cf. Danielle Lang, *Truthful but Misleading? The Precarious Balance of Autonomy and State Interests in Casey and Second-Generation Doctor-Patient Regulation*, 16 U. PA. J. CONST. L. 1353, 1388 (2014) (“[A]t some critical point, the amount of information that the Nebraska and South Dakota dissuasion laws would have required would have likely disrupted the patient’s ability to make an autonomous and informed assessment of her options.”).

32 *Rust*, 500 U.S. at 203.

33 *See id.* (“Petitioners contend, however, that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services.”).

34 *Id.* at 217 (Blackmun, J., dissenting) (“[T]he Title X client will reasonably construe [her physician’s Government-controlled words] as professional advice to forgo her right to obtain an abortion.”).

35 *See id.* at 213–14 (“[T]he physicians and counselors who staff Title X projects seek to provide [their clients] with the full range of information and options regarding their health and reproductive freedom. Indeed, the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand no less.”); *see also* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 557 (2000) (“[T]hese predominantly lower-income women would hear this state-dictated information from those whom they were most likely to trust—their doctors and health service providers.”).

36 *Rust*, 500 U.S. at 209 (Blackmun, J., dissenting).

37 *Id.*

38 *Id.* (citing 42 C.F.R. § 59.8(a)(2) (1990)).

39 *Id.* (citing C.F.R. 59.8(b)(4) (1990)).

An individual physician who felt ethically compromised by the limitation<sup>40</sup> on what she could say to her patient could simply refuse to be employed at a facility receiving Title X funds.<sup>41</sup> But the patient might well be unaware that the physician who did advise her was prohibited from discussing all of the relevant options.<sup>42</sup> When the Court suggested in *City of Akron* that “because abortion is a medical procedure, . . . the full vindication of the woman’s fundamental right necessarily requires that her physician be given ‘the room he needs to make his best medical judgment,’”<sup>43</sup> the Court was suggesting that physicians as a general matter must be permitted to discuss abortion in appropriate cases and not merely that constitutional requirements are satisfied as long as some physicians are permitted to discuss it with some of their patients.<sup>44</sup>

While *Rust* was clear that the reviewed provision did not violate constitutional guarantees, the Court was less than clear about why that was so. It could have been because the Court did not believe the restriction particularly burdensome<sup>45</sup> or because the restriction was limited to a program that the government itself was funding.<sup>46</sup> But these positions would have differing implications for other kinds of programs whose constitutionality might be challenged. As to which understanding of *Rust* would ultimately be adopted, this would have to be decided at a later date.

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40 *Cf. id.* at 213 (“[T]he physicians and counselors who staff Title X projects seek to provide them with the full range of information and options regarding their health and reproductive freedom.”).

41 *Id.* at 212 (“The Court concludes that the challenged regulations do not violate the First Amendment rights of Title X staff members because any limitation of the employees’ freedom of expression is simply a consequence of their decision to accept employment at a federally funded project.”).

42 *Cf. Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1608–09 n.456 (1994) (discussing “the poor woman who unsuspectingly walks into the only clinic she can afford and receives slanted government-funded misinformation”).

43 *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983) (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, the Court overruled *Akron* insofar as it found “a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.” *Casey*, 505 U.S. at 882 (opinion of O’Connor, Kennedy, and Souter, JJ).

44 The *Rust* Court did not seem to think so. 500 U.S. at 203 (suggesting that the constitutional guarantees were not violated as long as physicians not receiving Title X funding remained unconstrained).

45 *See supra* notes 27–28, 32 and accompanying text.

46 *See supra* notes 22, 27–28 and accompanying text.

## II. THE SUBSEQUENT TREATMENT OF *RUST*

The *Rust* Court provided one rationale when upholding that restriction,<sup>47</sup> but in subsequent decisions the Court recharacterized the *Rust* holding and rationale so that it stood for a very different proposition.<sup>48</sup> The difficulty thereby raised was not merely that the understanding of the decision had been reformulated,<sup>49</sup> but that the Court has gone back and forth between differing characterizations to reach particular results and, in at least some of the cases, a non-preferred interpretation would have led to a contrary result. The Court's oscillating characterizations of *Rust* when providing the basis for particular holdings underscore that the Court's approaches to government speech and funding are unprincipled, which makes them especially unstable.

### A. *The Court's Recharacterization of Rust*

The Court offered some clarifying remarks about *Rust's* foundation in *Rosenberger v. Rector & Visitors of University of Virginia*.<sup>50</sup> *Rosenberger* involved a challenge to the refusal of the University of Virginia to fund the printing costs of a student publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."<sup>51</sup> Citing *Rust*, the University had argued that "content-based funding decisions are both inevitable and lawful."<sup>52</sup> However, the *Rosenberger* Court distinguished *Rust*.<sup>53</sup> While admitting that the *Rust* Court had "upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling," the *Rosenberger* Court characterized the *Rust* program in the following way: "[T]he government did not create a program to encourage private speech but instead used private speakers to

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47 *Rust*, 500 U.S. at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

48 See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[In *Rust*], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program . . . [W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

49 Cf. Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009-2010 CATO SUP. CT. REV. 67, 104 (2010) ("[T]he Supreme Court took the opportunity to reformulate the key passage in *Chaplinsky* and to recharacterize *Ferber* in ways that should strictly limit both decisions' precedential force for further content-based restrictions.").

50 See generally *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

51 *Id.* at 823 (alteration in original).

52 *Id.* at 833.

53 *Id.*



transmit specific information pertaining to its own program.”<sup>54</sup> The *Rosenberger* Court then explained that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes” and, further, that “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”<sup>55</sup> Thus, while the *Rust* Court had implied that the government was permitted to restrict its funding to messages of which it approved,<sup>56</sup> the *Rosenberger* Court implied that the *Rust* restriction was permissible because the government, itself, was speaking.

Once *Rust* was cabined, the *Rosenberger* Court explained that a different analysis is appropriate when the state “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.”<sup>57</sup> When the state provides a forum for private speakers, it “may not silence the expression of selected viewpoints.”<sup>58</sup> The Court’s characterizations of *Rust* as a government speech case and *Rosenberger* as a private speech case had important implications for the resolution of *Rosenberger*.

Suppose that the *Rust* holding was that the government as funder was permitted to discriminate on the basis of viewpoint because, in effect, the government had decided that it was only willing to pay for speech that favored childbirth and was simply unwilling to fund pro-abortion speech. Were that the correct reading of *Rust*, then the University of Virginia would have been correct that *Rust* establishes the permissibility of a state deciding to discriminate among viewpoints by funding certain views and not others.<sup>59</sup>

The University of Virginia had argued that it was engaging in *content* rather than *viewpoint* discrimination, because it was unwilling to fund any approach expressing a view about the existence of a deity or ultimate reality—theists, agnostics, and atheists would all be denied funding.<sup>60</sup> Thus, all

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54 *Id.*

55 *Id.*

56 *See Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

57 *Rosenberger*, 515 U.S. at 834.

58 *Id.* at 835.

59 *See supra* note 46 and accompanying text.

60 *See Rosenberger*, 515 U.S. at 895 (Souter, J., dissenting) (“And since [the regulation] limits funding to activities promoting or manifesting a particular belief not only ‘in’ but ‘about’ a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists . . . .”); *see also* Jennifer Lynn Davis, Note, *The Serpentine Wall of Separation Between Church and State: Rosenberger v. Rector & Visitors of the University of Virginia*, 74 N.C. L. REV. 1225, 1253 (1996) (“One significant aspect of the *Rosenberger* opinion, then, is that the Court concluded that a prohibition on all forms of religious speech is viewpoint discrimination and not content discrimination.”).

viewpoints on a particular topic would not be funded.<sup>61</sup> The *Rosenberger* Court rejected that the University was engaging in content rather than viewpoint discrimination,<sup>62</sup> although the basis for that rejection was not entirely clear. While the dissent had argued that “no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints,” the Court explained that the dissent’s view “reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech.”<sup>63</sup> But the dissent had not offered a bipolar view, instead having suggested that any of a range of views about the existence of a deity or ultimate reality would not receive funding.<sup>64</sup>

The Court seemed to understand that the dissent was suggesting that more than two views were excluded, but then argued that the “dissent’s declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.”<sup>65</sup> While the Court’s point would be well-taken were there several views on a particular subject and half of them were barred,<sup>66</sup> the criticism is not persuasive when *all* of the voices on a particular topic are muted.<sup>67</sup>

The *Rosenberger* Court was likely worried that viewpoint discrimination might be masked as content discrimination,<sup>68</sup> an eventuality that the Court may itself have made more likely by suggesting that the difference between content and viewpoint discrimination is a matter of degree.<sup>69</sup> Claiming that this was a matter of degree was especially unfortunate in the context under discussion because content discrimination is sometimes permissible in the context of a limited purpose public forum.<sup>70</sup> “The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”<sup>71</sup> Thus, if the state-created limitations on a forum are reasona-

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61 See Mark Strasser, *Leaving the Dale to Be More Fair: On CLS v. Martinez and First Amendment Jurisprudence*, 11 FIRST AMEND. L. REV. 235, 246 (2012) (“[T]he policy applied to all discussions of a particular kind of content, regardless of viewpoint.”).

62 *Rosenberger*, 515 U.S. at 831 (“We conclude . . . that here . . . viewpoint discrimination is the proper way to interpret the University’s objections to *Wide Awake*.”).

63 *Id.*

64 See *id.* at 895 (Souter, J., dissenting) (describing limiting funding to other groups of deists, atheists, and agnostics).

65 *Id.* at 831–32 (majority opinion).

66 Strasser, *supra* note 61, at 247 (“The Court’s construing the silencing of multiple voices as viewpoint discrimination would be understandable if, for example, four views on a particular topic had been excluded while two or three other views on that same topic had been permitted.”).

67 *Id.* (“But the University had precluded providing financial support for *any* view on particular topics, and thus had simply limited the forum by excluding certain contents.” (footnote omitted)).

68 Cf. *Rosenberger*, 515 U.S. at 831 (“[I]t must be acknowledged, the distinction is not a precise one.”).

69 See *id.* at 829 (“Viewpoint discrimination is thus an egregious form of content discrimination.”).

70 See *id.* at 830 (“[C]ontent discrimination . . . may be permissible if it preserves the purposes of that limited forum . . .”).

71 *Id.*

ble in light of the state's legitimate purpose, those limitations will be upheld.<sup>72</sup> That said, however, "viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations."<sup>73</sup>

The *Rosenberger* Court had to overcome at least two obstacles if it was going to strike down the University's refusal to fund the publication costs at issue. First, assuming that the University had set up a limited purpose public forum,<sup>74</sup> the Court would either have to treat the restriction as viewpoint-based or as content-based. If the former, then the restriction likely could not pass muster.<sup>75</sup> If the latter, then the restriction would be unconstitutional only if not reasonable in light of the University's purpose, a much easier standard for the University to meet.<sup>76</sup>

After finding that the University's restriction was viewpoint-based,<sup>77</sup> the Court had no difficulty in plausibly suggesting that the University could not meet its burden when defending the constitutionality of its practice.<sup>78</sup> But the Court's approach to finding viewpoint rather than content discrimination creates potential difficulties in other cases involving limited public fora. If the removal of all rather than some viewpoints on a particular topic nonetheless counts as viewpoint discrimination,<sup>79</sup> then limited public fora (when defined in terms of permissible contents<sup>80</sup>) would seem readily susceptible to attack by construing them as discriminating on the basis of viewpoint rather than content.<sup>81</sup> The Court did nothing to reduce that vulnerability, e.g., by offering a helpful guide for determining when claimed content discrimination was in fact viewpoint discrimination. Instead, the Court simply "acknowledged [that] the distinction is not a precise one," and "conclude[d] . . . that . . . viewpoint discrimination is the proper way to

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<sup>72</sup> *See id.*

<sup>73</sup> *Id.* at 830 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

<sup>74</sup> *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (citing *Rosenberger*, 515 U.S. at 837) ("We held [in *Rosenberger*] that by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints.").

<sup>75</sup> *See supra* note 73 and accompanying text.

<sup>76</sup> *See supra* notes 70–72 and accompanying text.

<sup>77</sup> *Rosenberger*, 515 U.S. at 831.

<sup>78</sup> *See id.* at 832 ("The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid.").

<sup>79</sup> Strasser, *supra* note 61, at 247 ("The difficulty with the *Rosenberger* analysis was that it suggested that removing all viewpoints on a particular topic was nonetheless viewpoint rather than content discrimination.").

<sup>80</sup> *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–107 (2001)) ("In such a [limited purpose] forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral.").

<sup>81</sup> Strasser, *supra* note 61, at 247 ("Such an analysis suggests that a limitation on content will simply be interpreted as a limitation of multiple viewpoints and will then be subject to the kind of scrutiny reserved for viewpoint discrimination.").

interpret the University's objections to *Wide Awake*."<sup>82</sup> The Court did not even point to the facts or practices establishing that the University was engaging in viewpoint discrimination, and instead seemed to be adopting a "we know it when we see it" approach to viewpoint discrimination.<sup>83</sup>

Suppose that the Court could offer a persuasive account of why *Rosenberger* involved viewpoint rather than content discrimination.<sup>84</sup> Even so, the *Rosenberger* Court had to overcome a second obstacle, namely, that *Rust* seemed to establish that the government could fund some viewpoints without funding others.<sup>85</sup>

The *Rosenberger* analysis of why *Rust* was distinguishable because involving government speech<sup>86</sup> was not particularly plausible—the doctors did not view themselves as spokespersons for the government;<sup>87</sup> the patients did not view their doctors that way either;<sup>88</sup> and the *Rust* Court itself did not seem to view the case as one involving government speech.<sup>89</sup> Further, the *Rust* recharacterization has important implications for state beliefs regarding the appropriate practice of medicine. In effect, the *Rosenberger* account of *Rust* implies that the state recommends certain medical approaches (and not others) without considering the particular needs of the patient.<sup>90</sup> To

<sup>82</sup> *Rosenberger*, 515 U.S. at 831.

<sup>83</sup> *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .").

<sup>84</sup> *Cf. Cásarez*, *supra* note 35, at 529 (arguing that the University of Virginia's "regulation appears to carry a significant risk of viewpoint discrimination").

<sup>85</sup> *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."); *id.* at 194 ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." (citing 22 U.S.C. § 4411(b) (1988)); Alan Trammell, *The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle That Never Was*, 92 VA. L. REV. 1957, 1999 (2006) ("If *Rust* stood for the proposition that the government had wide discretion in its funding decisions, the University had arguably acted within the zone of its discretion.").

<sup>86</sup> *See supra* notes 54–58 and accompanying text.

<sup>87</sup> Arthur N. Eisenberg, *The Brooklyn Museum Controversy and the Issue of Government-Funded Expression*, 66 BROOK. L. REV. 275, 306 (2000) ("In fact, such physicians did not regard themselves merely as spokespersons for the government nor can it be plausibly claimed that their patients regarded them simply as government messengers.").

<sup>88</sup> *Id.*

<sup>89</sup> Trammell, *supra* note 85, at 1999 ("Judging by the language of *Rust*, there is no reason to think that it has anything to do with the government speech or public forum cases.").

<sup>90</sup> As I've explained elsewhere, such a recommendation is not credible. *See* Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 92 (2011) ("Yet, it is not credible for the government to tell a particular patient (without knowing anything at all about that patient) that it would be best for her not to have an abortion."); *cf. Gey*, *supra* note 29, at 1309 ("Whatever the government needed to do to ensure that it effectively communicated its family-planning policies to the public, that effort did not need to in-

make matters worse, the government was making a recommendation that might have been antithetical to the patient's needs without informing her that the government never believes abortion a viable option—only if she asked about abortion might she be told that the project did not consider abortion appropriate.<sup>91</sup> If she did not ask, then she might well make unwarranted assumptions about whether an abortion would have been appropriate in her case.<sup>92</sup>

The *Rosenberger* Court reached its desired result by clarifying certain matters and obscuring others. Forum doctrine became more confused, e.g., because it became less clear how to tell whether a limited purpose public forum involved content rather than viewpoint discrimination.<sup>93</sup> In contrast, the Court offered a clarification of *Rust* by explaining that the case involved government speech,<sup>94</sup> although that characterization was not particularly plausible.<sup>95</sup>

After *Rosenberger*, the Court's policy seemed clear. When the government is speaking (even through private individuals), the government is permitted to discriminate on the basis of viewpoint. However, when the government is not itself speaking but instead has set up a forum for private speech, discrimination on the basis of viewpoint is not permissible.<sup>96</sup> Yet, this approach was brought into question<sup>97</sup> in *National Endowment for the Arts v. Finley*.<sup>98</sup>

clude suppressing the speech of healthcare workers who were advising individual patients about their specific conditions and treatments.”).

91 *Rust v. Sullivan*, 500 U.S. 173, 209 (1991) (Blackmun, J., dissenting) (citing 42 C.F.R. § 59.8(b)(4) (1990)).

92 Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 670 (2008) (“[C]onfusion about whether the doctor’s communication represents government policy (as claimed in *Rust*) or expert advice may lead the patient to believe that her doctor ruled out abortion as a medically viable option for her in particular.”).

93 *See supra* notes 79–83 and accompanying text. Or, the Court might have been making a different claim *sub silentio*. *See* Strasser, *supra* note 61, at 249 (“The Court might implicitly have been challenging the reasonableness of limiting a university forum in such a way that discussions promoting or opposing religious points of view are excluded.”).

94 *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” (citing *Rust*, 500 U.S. at 196–200)).

95 *See supra* notes 87–92 and accompanying text.

96 *See Rosenberger*, 515 U.S. at 834 (suggesting that viewpoint discrimination is permissible when the government is the speaker but not when the government is encouraging private speakers to express a variety of viewpoints).

97 *See* Lackland H. Bloom, Jr., *NEA v. Finley: A Decision in Search of a Rationale*, 77 WASH. U. L.Q. 1, 2 (1999) (“Much of the confusion in the [*Finley*] opinion seems quite deliberate, as if to suggest that the Court decided to reach a result it found difficult to justify under existing precedent, thus producing an opinion that through obscurity might cause as little damage as possible to the existing doctrinal framework.”).

98 *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 572–73 (1998) (ruling that National Endowment for the Arts grant criteria are facially valid as not interfering with First Amendment rights).

### B. *The Court Changes Course*

At issue in *Finley* was a congressional mandate requiring the Chairperson of the National Endowment for the Arts (“NEA”) to “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public”<sup>99</sup> before granting artists public funding. Members of Congress believed the additional requirement necessary after they became aware that NEA funds had been used to mount an exhibition of Robert Mapplethorpe’s homoerotic work<sup>100</sup> and had been used to support the work of Andres Serrano, who had created “Piss Christ,” which some believed sacrilegious.<sup>101</sup>

The Court considered whether the decency and respect “provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency.”<sup>102</sup> But the Court took issue with the claim that such works must be rejected, instead noting that the National Endowment for the Arts “reads the provision as merely hortatory, and contends that it stops well short of an absolute restriction.”<sup>103</sup> The contested section did “not preclude awards to projects that might be deemed ‘indecent’ or ‘disrespectful,’ nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application.”<sup>104</sup> Because Congress had merely required that such works be disfavored rather than that they not receive funding under any circumstances,<sup>105</sup> the Court suggested that this was not the kind of restriction that violated constitutional guarantees.<sup>106</sup>

Allegedly, “the ‘decency and respect’ criteria do not silence speakers by expressly ‘threaten[ing] censorship of ideas.”<sup>107</sup> The Court reasoned that “the varied interpretations of the criteria and the vague exhortation to ‘take

<sup>99</sup> *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1) (1994)).

<sup>100</sup> *Id.* at 574 (citing 135 Cong. Rec. 22372 (1989)) (“The Institute of Contemporary Art at the University of Pennsylvania had used \$30,000 of a visual arts grant it received from the NEA to fund a 1989 retrospective of photographer Robert Mapplethorpe’s work . . . [which] included homoerotic photographs that several Members of Congress condemned as pornographic.”).

<sup>101</sup> *Id.* (citing 135 Cong. Rec. 9789 (1989)) (“Members also denounced artist Andres Serrano’s work Piss Christ, a photograph of a crucifix immersed in urine. Serrano had been awarded a \$15,000 grant from the Southeast Center for Contemporary Art, an organization that received NEA support.”).

<sup>102</sup> *Id.* at 580.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 580–81.

<sup>105</sup> *Id.* at 600 (Scalia, J., concurring in the judgment) (“Instead of banning the funding of such productions absolutely, which I think would have been entirely constitutional, Congress took the lesser step of requiring them to be disfavored in the evaluation of grant applications.”).

<sup>106</sup> *Id.* at 590 (majority opinion) (“Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process. It does not, on its face, impermissibly infringe on First or Fifth Amendment rights.”).

<sup>107</sup> *Id.* at 583 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992)).

them into consideration”<sup>108</sup> made it “unlikely that this provision will introduce any greater element of selectivity than the determination of ‘artistic excellence’ itself.”<sup>109</sup> Thus, the Court seemed to say, because mainstream values and decency might be interpreted in many different ways, these additional considerations would be unlikely to have the chilling effect that was feared. Yet, it was not as if artists seeking funding would have no idea which viewpoints were disfavored. As Justice Scalia noted in his concurrence in the judgment, the limitation at issue was adopted in response to the funding of the work of Mapplethorpe and Serrano,<sup>110</sup> which meant that artists would be on notice with respect to some kinds of work that would be disfavored.<sup>111</sup> Justice Scalia readily admitted that this was viewpoint discrimination,<sup>112</sup> although he believed such discrimination constitutionally permissible.<sup>113</sup> As a further reason not to strike down the provision, the Court explained that “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.”<sup>114</sup> Precisely because the NEA has limited funds, that agency must of necessity “deny the majority of the grant applications that it receives, including many that propose ‘artistically excellent’ projects.”<sup>115</sup> Thus, it was not as if an individual artist would have a reasonable expectation that he or she would receive funding, given that the number of individuals seeking funding greatly exceeded the available funds.<sup>116</sup>

While the Court was correct that the demand for funding exceeded the supply of grant dollars, that was beside the point. The whole issue was whether aesthetically excellent entries could be denied funding based on the artist’s

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108 *Id.* at 583–84.

109 *Id.* at 584; see also Harold B. Walther, Note, National Endowment for the Arts v. Finley: *Sinking Deeper into the Abyss of the Supreme Court’s Unintelligible Modern Unconstitutional Conditions Doctrine*, 59 MD. L. REV. 225, 239 (2000) (“The Court . . . further justifi[ed] their finding that a clear penalty did not exist in § 954(d)(1) by stating that because people would generally not agree as to what constitutes ‘decency’ and ‘respect,’ ‘the provision does not introduce considerations that . . . would effectively preclude or punish the expression of particular views.’” (quoting *Finley*, 524 U.S. at 583)).

110 *Finley*, 524 U.S. at 594 (Scalia, J., concurring in the judgment).

111 *Cf. id.* at 589 (majority opinion) (“We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding.”).

112 *Id.* at 593 (Scalia, J., concurring in the judgment) (“This unquestionably constitutes viewpoint discrimination.”).

113 *See id.* at 598 (“[T]he congressional determination to favor decency and respect for beliefs and values over the opposite [is constitutional] because such favoritism does not ‘abridge’ anyone’s freedom of speech.”).

114 *Id.* at 585 (majority opinion).

115 *Id.*

116 *See* Ingber, *supra* note 42, at 1613–14 (“The amount of money allotted by the government to be dispensed by the NEA will always be limited and exceeded by the number of applicants. Scarcity requires a competition among applicants for grants, as a grant given to one artist is necessarily denied to another.” (footnote omitted)).

expressed viewpoint.<sup>117</sup> Merely because some criteria were used to exclude would hardly mean that viewpoint was also an appropriate consideration.

Consider college admissions. Elite schools may have many more deserving applicants than they can admit.<sup>118</sup> Yet, merely because college admissions are very competitive would not somehow establish that an individual could be denied admission because of an irrelevant consideration such as her minority racial status. Such a policy would be unconstitutional, precisely because the use of one of the factors, even if not dispositive, was nonetheless irrational and a violation of constitutional guarantees.<sup>119</sup>

Ironically, after suggesting that the competitive nature of the grant funding made it permissible for viewpoint to be considered in the process, the *Finley* Court explained that “[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.”<sup>120</sup> However, the Court did not specify what kinds of problems would be posed if the NEA were penalizing disfavored viewpoints. The Court might merely have been suggesting that such an interpretation would have misconstrued congressional intent,<sup>121</sup> or the Court might have been suggesting that penalizing disfavored viewpoints would have violated First Amendment guarantees.<sup>122</sup>

The Court reaffirmed that “Congress has wide latitude to set spending priorities,”<sup>123</sup> and cited *Rust* for the proposition that “Congress may ‘selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program

117 See Kristine M. Cunnane, Note, *Maintaining Viewpoint Neutrality for the NEA: National Endowment for the Arts v. Finley*, 31 CONN. L. REV. 1445, 1472 (1999) (“Although the NEA is a selective funding program, selectivity does not justify viewpoint discrimination in supporting private speech.”).

118 See Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993, 994 (1999) (“Elite undergraduate institutions, highly regarded graduate programs, and competitive professional schools are more alike than they are different: selecting among many qualified applicants requires similar procedures that cut across types of schools.”).

119 See *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (“[A] plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is ‘the inability to compete on an equal footing.’” (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

120 *Finley*, 524 U.S. at 587.

121 See *id.* at 600 (Scalia, J., concurring in the judgment) (“Congress took the lesser step of requiring them to be disfavored in the evaluation of grant applications.”).

122 See *id.* at 587 (majority opinion) (“[T]he First Amendment certainly has application in the subsidy context . . . .”); *id.* (“[E]ven in the provision of subsidies, the Government may not ‘ai[m] at the suppression of dangerous ideas.’” (alteration in original) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)). But see *id.* at 600 (Scalia, J., concurring in the judgment) (“[B]anning the funding of such productions absolutely . . . would have been entirely constitutional . . . .”).

123 *Id.* at 588 (majority opinion) (citing *Regan*, 461 U.S. at 549).



which seeks to deal with the problem in another way.”<sup>124</sup> But *Rosenberger* had suggested that *Rust* only authorized selective funding where government was itself the speaker,<sup>125</sup> and there was no suggestion that the NEA was only funding the government’s message. Indeed, Justice Souter noted in his dissent that “this patronage falls embarrassingly on the wrong side of the line between government-as-buyer or -speaker and government-as-regulator-of-private-speech.”<sup>126</sup>

The government-as-speaker explanation of *Rust* permitting the government to articulate its own views without articulating competing views<sup>127</sup> does not permit the government to penalize the expression of disapproved viewpoints when the government is not speaking.<sup>128</sup> On that understanding of *Rust*, *Finley* should have been decided differently, as Justice Souter observed.<sup>129</sup> While the government-as-spender explanation of *Rust* supported the *Finley* holding,<sup>130</sup> it undermined the result in *Rosenberger*.<sup>131</sup> Basically, *Rust* is being used in incompatible ways.

### C. Another About-Face

*Rust* was controversial at least in part because it construed a federally funded program providing medical services as the government’s expressing its own views through private individuals. The *Rust* approach was the focus of an analysis in *Legal Services Corp. v. Velazquez*.<sup>132</sup>

<sup>124</sup> *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)); see also Bloom, *supra* note 97, at 15 (“[T]he majority explained that the Government has wide discretion to choose spending priorities or to engage in selective funding without discriminating on the basis of viewpoint.”).

<sup>125</sup> See *supra* notes 54–56 and accompanying text (asserting that the *Rosenberger* Court read *Rust* as permitting government restriction on the funding of messages only when the government itself was the speaker).

<sup>126</sup> *Finley*, 524 U.S. at 612 (Souter, J., dissenting).

<sup>127</sup> See *Rust*, 500 U.S. at 194 (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” (citing 22 U.S.C. § 4411(b) (1988)); see also Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (“[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” (citing *Rust*, 500 U.S. at 193)).

<sup>128</sup> See *supra* notes 57–58 and accompanying text (explaining that the government’s ability to restrict funding on messages does not apply to private speakers).

<sup>129</sup> See *supra* note 126 and accompanying text (noting Justice Souter’s *Finley* dissent, which drew a line between government-as-speaker or -buyer and government-as-regulator-of-private-speech).

<sup>130</sup> Cf. *Finley*, 524 U.S. at 596 (Scalia, J., concurring) (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983)) (“It is preposterous to equate the denial of taxpayer subsidy with measures “aimed at the suppression of dangerous ideas.”).

<sup>131</sup> See *supra* note 59 and accompanying text (suggesting that if the *Rust* Court had held that the government as a funder was able to discriminate based on viewpoint, *Rosenberger* would have been decided differently).

<sup>132</sup> 531 U.S. 533 (2001).

At issue in *Velasquez* was the constitutionality of restrictions imposed on the Legal Services Corporation (“LSC”).<sup>133</sup> The Legal Services Corporation provided funds to local organizations to provide legal representation to indigents on non-criminal matters.<sup>134</sup> However, Congress had specified that funding could not be provided to assert that “a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.”<sup>135</sup> That did not mean that LSC-funded attorneys were barred from helping their indigent clients, because “an LSC grantee could represent a welfare claimant who argued that an agency made an erroneous factual determination or that an agency misread or misapplied a term contained in an existing welfare statute.”<sup>136</sup>

The program at issue in *Velasquez* was analogous in some ways to the program at issue in *Rust*. In each, Congress had expressly limited what it was willing to fund<sup>137</sup>—Congress refused to promote abortion in *Rust*<sup>138</sup> and refused to promote challenges to the legality or constitutionality of particular laws in *Velasquez*.<sup>139</sup>

When analyzing the constitutionality of the LSC prohibition, the Court first offered its *Rosenberger* interpretation of *Rust*.<sup>140</sup> The *Rust* and *Velasquez* programs were distinguishable because “the LSC program was designed to facilitate private speech, not to promote a governmental message.”<sup>141</sup> Although the government needs to constrain the use of funds<sup>142</sup> when “establish[ing] a subsidy for specified ends,”<sup>143</sup> the *Velasquez* Court worried that up-

133 *Id.* at 536 (“This suit requires us to decide whether one of the conditions imposed by Congress on the use of LSC funds violates the First Amendment rights of LSC grantees and their clients.”).

134 *Id.* (“LSC’s mission is to distribute funds appropriated by Congress to eligible local grantee organizations ‘for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.’” (quoting 42 U.S.C. § 2996b(a) (2000)).

135 *Id.* at 537.

136 *Id.* at 538.

137 *See id.*, 531 U.S. at 553 (Scalia, J., dissenting) (explaining that like the scheme in *Rust*, the LSC Act placed restrictions on the use of funds).

138 *See supra* note 4 and accompanying text (noting that funds could not be used to support abortion as a method of family planning).

139 *See supra* note 135 and accompanying text (describing challenges to laws for which LSC funds could not be used).

140 *See Velasquez*, 531 U.S. at 541 (“As we said in *Rosenberger*, ‘[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.’” (alteration in original) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)); Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 457 (2003) (“The *Rosenberger* formulation was followed in *Legal Services Corp. v. Velasquez* . . .”).

141 *Velasquez*, 531 U.S. at 542.

142 *See id.* at 543 (“[C]ertain restrictions may be necessary to define the limits and purposes of the program.” (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983)).

143 *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991)).

holding the limitation would “insulate the Government’s interpretation of the Constitution from judicial challenge.”<sup>144</sup> Yet, as Justice Scalia noted in his dissent, “No litigant who, in the absence of LSC funding would bring a suit challenging existing welfare law is deterred from doing so by § 504(a)(16).”<sup>145</sup>

The difficulty posed in *Velasquez* was not in its refusal to hold that the attorneys were speaking for the government but in its apparent acceptance of the proposition that the doctors in *Rust* were speaking for the government. As Justice Scalia pointed out in dissent, “If the private doctors’ confidential advice to their patients at issue in *Rust* constituted ‘government speech,’ it is hard to imagine what subsidized speech would *not* be government speech.”<sup>146</sup> Further, if attorneys’ professional responsibilities might be compromised by agreeing to the imposed limitations at issue in *Velasquez*, the same would have been true of the physicians agreeing to the imposed limitations at issue in *Rust*.<sup>147</sup> Finally, the insulation of the government’s position from challenge would not be any greater as a result of the limitation on LSC funding than would have occurred had Congress provided no funding for these kinds of cases,<sup>148</sup> which mirrored the response offered by the Court to the challenge in *Rust* on the limitations on Title X funding.<sup>149</sup>

*Rust* and *Velasquez* became even more difficult to understand when the Court issued *United States v. American Library Association (ALA)*.<sup>150</sup> At issue was a congressional limitation imposed on federal funding of public libraries. Under the Children’s Internet Protection Act (“CIPA”),<sup>151</sup> “a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them.”<sup>152</sup>

By providing access to the internet, libraries offer their patrons a wealth of information.<sup>153</sup> But they also thereby provide ready access to a great deal of pornography, and many patrons, including minors, do online

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144 *Id.* at 548.

145 *Id.* at 554 (Scalia, J., dissenting).

146 *Id.*

147 *See id.* (“[T]he majority’s contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients . . .”).

148 *Cf. id.* at 556 (“It may well be that the bar of § 504(a)(16) will cause LSC-funded attorneys to decline or to withdraw from cases that involve statutory validity . . . . The same result would ensue from excluding LSC-funded lawyers from welfare litigation entirely.”).

149 *See Rust v. Sullivan*, 500 U.S. 173, 202 (1991) (stating that the difficulty a woman faces when a Title X project fails to provide abortion counseling or referral leaves her no worse off than she would have been had the government not enacted Title X).

150 539 U.S. 194 (2003) (plurality opinion).

151 20 U.S.C. §§ 9134 (2000).

152 *ALA*, 539 U.S. at 199.

153 *Id.* at 200.

searches for sexually explicit material.<sup>154</sup> Filtering devices can prevent patrons from accessing these pornographic sites,<sup>155</sup> although these filters not only block pornography but other material that is neither obscene nor pornographic.<sup>156</sup> The challenge to the restriction was that Congress had conditioned receipt of the funds on the libraries using filters that restricted constitutionally protected speech.<sup>157</sup>

The Court began its analysis by discussing whether the libraries themselves would violate constitutional guarantees by choosing to employ the filtering software.<sup>158</sup> Certainly, if libraries were constitutionally prohibited from limiting access to constitutionally protected information then Congress's attempting to induce libraries to do so would be constitutionally problematic.<sup>159</sup>

It did not take long for the Court to reject the claim that libraries are constitutionally required to provide "universal coverage."<sup>160</sup> Libraries are subject to financial constraints,<sup>161</sup> so libraries must of course "consider content in making collection decisions."<sup>162</sup> They would neither be able to purchase all the materials that they might like nor could they house all of those materials anyway.

One need not worry about space considerations in the same way when the issue involves the internet,<sup>163</sup> since the relevant space considerations involve the terminals themselves rather than all of the data that might be accessed using the terminals.<sup>164</sup> That said, however, space considerations are not the only

154 *Id.* (citing *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002), *overruled by ALA*, 539 U.S. 194 (plurality opinion)).

155 *Id.* ("[F]iltering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent such uses of library resources.").

156 *Id.* at 201 ("But a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter.").

157 *Id.* at 210 ("Appellees argue that CIPA imposes an unconstitutional condition on libraries . . . by requiring them, as a condition on their receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech.").

158 *Id.* at 203 ("To determine whether libraries would violate the First Amendment by employing the filtering software that CIPA requires, we must first examine the role of libraries in our society." (footnote omitted)).

159 *Id.* ("Congress may not 'induce' the recipient 'to engage in activities that would themselves be unconstitutional.'" (quoting *South Dakota v. Dole*, 483 U.S. 203, 210 (1987))).

160 *Id.* at 204 (quoting *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 421 (E.D. Pa. 2002), *overruled by ALA*, 539 U.S. 194 (plurality opinion)).

161 Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1127 (2000) ("[L]ibraries, due to their limited budgets, compile their collections based on the roles they choose for serving the needs, interests, and priorities of their community.").

162 *ALA*, 539 U.S. at 205.

163 Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 849 (2006) ("[V]irtual offerings are not subject to limits on shelf space or resources.").

164 That said, there may be limits on the number of terminals that can be provided, which might mean that libraries could not afford to offer patrons unlimited access. See Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography*

concern when libraries limit their collection, because libraries might want to impose some quality control on the materials that can be accessed.<sup>165</sup>

The *ALA* plurality suggested that the library's collection was "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."<sup>166</sup> But if users are prevented from seeing non-obscene, non-pornographic material, they might be limited in their efforts to learn, do research, or pursue recreational pursuits. Nonetheless, libraries must make choices in light of existing limitations and the current technology might not be sufficiently sophisticated to block out only the targeted materials.<sup>167</sup> Further, because libraries do not have the resources to decide which sites on the internet in particular should be blocked and which should not,<sup>168</sup> it seems reasonable for libraries to adopt restrictions that may not be perfectly tailored to keeping out only those contents that the library wishes to exclude.<sup>169</sup> For these reasons, the plurality held that libraries do not violate constitutional guarantees when using filters that restrict some constitutionally protected materials.<sup>170</sup>

Yet, the challenge at issue did not involve a policy the libraries had freely adopted but the congressionally imposed condition on the receipt of funds. The appellees had argued that that the congressional limitation was unconstitutional because it required the libraries, "as a condition on their

*on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 186 n.288 (2003) (citing *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 465 n.25 (E.D. Pa. 2002), *overruled by ALA*, 539 U.S. 194 (plurality opinion)) (discussing the district court's observation that, like "the scarcity of a library's budget and shelf space," "the scarcity of time at Internet terminals constrains the libraries' ability to provide patrons with unrestricted Internet access").

165 See *ALA*, 539 U.S. at 204 ("[L]ibraries collect only those materials deemed to have 'requisite and appropriate quality.'" (quoting *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 421 (E.D. Pa. 2002), *overruled by ALA*, 539 U.S. 194 (plurality opinion)); see also Goldstein, *supra* note 164 (suggesting that unlimited access might be counterproductive for the users).

166 *ALA*, 539 U.S. at 206.

167 See *id.* at 215 (Breyer, J., concurring in the judgment) (discussing how the employed technology both blocks material that should not be blocked and fails to block material that should be blocked).

168 *Id.* at 208 (plurality opinion) ("[L]ibraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not.").

169 *Id.* ("[I]t is entirely reasonable for public libraries to . . . exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality."); see also Thomas B. Nachbar, *Speech and Institutional Choice*, 21 WASH. U. J.L. & POL'Y 67, 76 (2006) ("The Court held that the burden imposed by the statute on library patrons was substantially reduced by the fact that libraries have traditionally exercised substantial discretion in deciding what materials to make available to the public. Given this, it was permissible for Congress to piggyback the CIPA filters on the libraries' institutional role as mediators of information to further the (ostensibly permissible) statutory objective of limiting children's access to indecent content.")

170 *ALA*, 539 U.S. at 208 ("A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source.")

receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech.”<sup>171</sup> The government had countered that “Government entities do not have First Amendment rights.”<sup>172</sup>

Rather than address whether public entities have First Amendment rights, the plurality instead addressed whether Congress had violated constitutional guarantees by conditioning the receipt of funds on the libraries filtering protected as well as unprotected speech. Citing *Rust*, the plurality explained: “Within broad limits, ‘when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.’”<sup>173</sup> This understanding of *Rust* was compatible with *Finley*,<sup>174</sup> but undermined the holdings in *Rosenberger*<sup>175</sup> and *Velasquez*.<sup>176</sup>

The plurality specifically addressed why *Velasquez* was not controlling, noting that “the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control.”<sup>177</sup> In contrast, libraries “have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.”<sup>178</sup>

Yet, the plurality’s analysis was misleading in a few different respects. First, in *Velasquez*, the LSC funding was *appropriately* used against the government in that LSC attorneys were permitted to represent an individual who (allegedly) had wrongly been denied benefits.<sup>179</sup> Perhaps the government had made a factual error or an agency had misinterpreted one of the relevant criteria for benefits.<sup>180</sup> The LSC attorneys were only restricted

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171 *Id.* at 210.

172 *Id.*

173 *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

174 For a discussion of *Finley*, see *supra* notes 99–130 and accompanying text.

175 For a discussion of *Rosenberger*, see *supra* notes 50–96 and accompanying text.

176 For a discussion of *Velasquez*, see *supra* notes 132–149 and accompanying text.

177 *ALA*, 539 U.S. at 213.

178 *Id.*; see also Lillian R. BeVier, *United States v. American Library Association: Whither First Amendment Doctrine*, 2003 SUP. CT. REV. 163, 172 (“[T]he plurality distinguished *Legal Services Corp. v. Velasquez* on the ground that, unlike legal advocates for the poor, public libraries do not occupy a role that ‘pits them against the Government.’” (quoting *ALA*, 539 U.S. at 213)). *But see Leading Cases*, 117 HARV. L. REV. 226, 355 (2003) (“[A] library’s interest may conflict with attempts by the federal government to control libraries’ collection decisions . . .”).

179 *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 538 (2001) (“LSC interpreted the statutory provision to allow indigent clients to challenge welfare agency determinations of benefit ineligibility under interpretations of existing law.”).

180 *Id.* (“[A]n LSC grantee could represent a welfare claimant who argued that an agency made an erroneous factual determination or that an agency misread or misapplied a term contained in an existing welfare statute.”).

from arguing against the government on certain matters, e.g., the unconstitutionality of welfare laws.<sup>181</sup>

Libraries might have a comparable role pitting them against the government insofar as they are to provide patrons with a wealth of materials. Consider the observation by the *Rust* Court that Congress could promote democracy without promoting communism or fascism.<sup>182</sup> Suppose that Congress conditioned receipt of federal funds on the library not acquiring books on a competing form of government, say, communism. Because libraries enjoy great discretion in making their choices about what to stock,<sup>183</sup> let us assume that it would be permissible for a library to choose to stock books on other subjects rather than on communism. But even if a library could choose to refrain from buying books about other political systems, that would hardly establish that it should do so. A library might well be pitted against the government if the government wanted to limit patron access to political information. Further, it might be noted that the *ALA* rationale would permit the government to condition the receipt of federal funding on a library choosing not to acquire certain political tracts, since the library itself could presumably decide to forego acquiring such tracts and the government is given great discretion with respect to which political messages it wishes to send or support.

In *Rust*, the Court explained that women were no worse off as a result of the Title X funding than they would have been had there been no federal funding of family planning.<sup>184</sup> However, in *ALA*, even computers bought with state funds had to be equipped with the filter,<sup>185</sup> so that constitutionally protected information that might otherwise have been accessible (because unfiltered) would now be inaccessible. This means that some patrons would be in a worse position as a result of the funding because denied access to materials that they might otherwise have seen.

In his dissent, Justice Stevens suggested that the plurality was engaging in a bit of sleight of hand. While admitting that libraries have discretion to make decisions about what is in their collection,<sup>186</sup> he argued that the issue

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181 *Id.* at 538–39 (“Under LSC’s interpretation, however, grantees could not accept representations designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws.”).

182 *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” (citing 22 U.S.C. § 4411(b) (1988)).

183 *ALA*, 539 U.S. at 205.

184 *Rust*, 500 U.S. at 202.

185 Barbara A. Sanchez, Note, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 492 (2005) (“CIPA conditions funding on installing filters on every single computer, even those wholly funded with state and local dollars.” (footnote omitted)).

186 *ALA*, 539 U.S. at 226 (Stevens, J., dissenting).

was more complicated than that. Congress would presumably be constitutionally precluded from penalizing libraries for failing to install the filtering software,<sup>187</sup> and an “abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty.”<sup>188</sup> Justice Stevens was the only member of the Court to note that the plurality’s description of *Rust* did not comport with the treatment of that decision in other cases: “[A]s subsequent cases have explained, *Rust* only involved, and only applies to, instances of governmental speech—that is, situations in which the government seeks to communicate a specific message.”<sup>189</sup>

*Agency for International Development v. Alliance for Open Society International, Inc. (AID)*<sup>190</sup> only made the analysis harder to understand. At issue was the constitutionality of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Leadership Act”).<sup>191</sup> The Act appropriated billions of dollars to be distributed to non-governmental organizations to help fight the spread of HIV/AIDS.<sup>192</sup> However, two conditions were imposed on that funding: (1) “no funds made available by the Act ‘may be used to promote or advocate the legalization or practice of prostitution or sex trafficking,’”<sup>193</sup> and (2) “no funds may be used by an organization ‘that does not have a policy explicitly opposing prostitution and sex trafficking.’”<sup>194</sup> At issue was whether the second provision violates the First Amendment rights of would-be recipients.<sup>195</sup>

The Court began its analysis by noting that Congress has broad discretion in deciding how to spend monies to promote the general welfare.<sup>196</sup> Further, the Court cited *Rust* for the proposition that Congress can “impose limits on the use of . . . funds to ensure they are used in the manner Congress intends.”<sup>197</sup> After all, a party objecting to a condition need not accept the funding, and this is true even when it is alleged that the condition affects “the recipient’s exercise of its First Amendment rights.”<sup>198</sup>

Yet, the Court reasoned that Congress was limited with respect to the conditions that could be placed on the receipt of federal funding. While

187 *Id.* (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997)).

188 *Id.* at 227.

189 *Id.* at 228; *cf.* *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting) (“We have read *Rust* to mean that ‘when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.’” (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995))).

190 133 S. Ct. 2321 (2013).

191 22 U.S.C. §§ 7601–7682 (2012).

192 *AID*, 133 S. Ct. at 2324.

193 *Id.* (quoting 22 U.S.C. § 7631(e) (2012)).

194 *Id.* at 2324–25 (quoting 22 U.S.C. § 7631(f) (2012)).

195 *Id.* at 2325.

196 *Id.* at 2327–28.

197 *Id.* at 2328 (citing *Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991)).

198 *Id.* (citing *United States v. Am. Library Ass’n*, 539 U.S. 194, 212 (2003) (plurality opinion)).



admitting that “[t]he line is hardly clear,” the Court argued that “the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”<sup>199</sup> To illustrate the distinction, the Court discussed *Rust* among other cases.<sup>200</sup>

*Rust* established that “Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem.”<sup>201</sup> But *Rust* recognized that there were limits on the restrictions that Congress could impose. The *AID* Court noted that *Rust* had distinguished between limitations on the grantee and limitations on the project,<sup>202</sup> and that the funding limitation only governed the project and did not govern other activities in which the grantee might be engaged.<sup>203</sup> The *AID* Court concluded that because the Title X “regulations did not ‘prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,’ they did not run afoul of the First Amendment.”<sup>204</sup>

While it is true that the *Rust* Court noted that grantees and their employees were permitted to discuss abortion outside of the Title X project,<sup>205</sup> it may be helpful to consider how to determine what was within the confines of the project and what was not. The *Rust* Court made clear that merely keeping Title X funds separate through careful bookkeeping would not suffice.<sup>206</sup> Instead, several factors would be considered in “a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities.”<sup>207</sup>

The approach at issue in *AID* was analogous to the approach in *Rust* in several respects. Funded organizations could work with independent organizations that did not espouse the official anti-prostitution position<sup>208</sup> as

199 *Id.*

200 *See id.* at 2321, 2328–30.

201 *Id.* at 2329–30 (citing *Rust v. Sullivan*, 500 U.S. 173, 193, 196 (1991)).

202 *Id.* at 2330 (citing *Rust*, 500 U.S. at 196).

203 *Id.* (citing *Rust*, 500 U.S. at 196).

204 *Id.* (alteration in original) (quoting *Rust*, 500 U.S. at 197).

205 *Rust*, 500 U.S. at 183 (“Title X grantees and their employees ‘remain free to say whatever they wish about abortion outside the Title X project.’” (quoting *New York v. Sullivan*, 889 F.2d 401, 412 (2d Cir. 1989), *aff’d sub nom. Rust* 500 U.S. 173)).

206 *Id.* at 180.

207 *Id.* at 180–81; *see also AID*, 133 S. Ct. at 2329 (“To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were ‘physically and financially separate’ from their other projects that engaged in the prohibited activities.” (quoting *Rust*, 500 U.S. at 180–81)).

208 *See AID*, 133 S. Ct. at 2326 (“The guidelines permit funding recipients to work with affiliated organizations that ‘engage [ ] in activities inconsistent with the recipient’s opposition to the practices of prostitution and sex trafficking’ as long as the recipients retain ‘objective integrity and inde-

long as those latter organizations were sufficiently independent from the grantee in light of certain objective criteria,<sup>209</sup> just as Title X facilities could refer to independent facilities that provided abortions among other services.<sup>210</sup> The *AID* Court noted that a “recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime.”<sup>211</sup> But performing the prohibited activity on one’s own dime and time (without doing additional things to establish separation) would have involved mere bookkeeping that would not have won the day in *Rust* either.<sup>212</sup> Indeed, the claim that Congress was acting unconstitutionally because limiting how non-Title-X funds would be used (e.g., where a facility received both Title X funding and other funding too) was expressly considered and rejected in *Rust*.<sup>213</sup> In *Rust*, any activity favoring abortion rights would not only have to have been on the organization’s own dime and time,<sup>214</sup> but also performed by different personnel and in a different physical location.<sup>215</sup>

The point here should not be misunderstood. The *AID* Court’s limitation on the degree to which Congress can impose restrictions on funding recipients may be compatible with certain cases.<sup>216</sup> Further, that approach may well have been very sensible as a matter of public policy, because there was testimony that requiring the agencies to espouse an anti-prostitution message would have impeded their ability to do their work.<sup>217</sup> But the *AID*

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pendence from any affiliated organization.” (alteration in original) (quoting 45 C.F.R. § 89.3 (2011); see also Nicholas Bruno, Note, Agency for International Development v. Alliance for Open Society International: *An Alternative Approach to Aid in Analyzing Free Speech Concerns Raised by Government Funding Requirements*, 93 TEX. L. REV. 1569, 1575 (2015) (“If the NGO had ‘objective integrity and independence’ from such an affiliate organization, the NGO could still receive funding from the HIV/AIDS program even if the affiliate organization did not explicitly oppose prostitution.” (quoting § 89.3)).

209 *AID*, 133 S. Ct. at 2326–27 (“Whether sufficient separation exists is determined by the totality of the circumstances, including ‘but not . . . limited to’ (1) whether the organizations are legally separate; (2) whether they have separate personnel; (3) whether they keep separate accounting records; (4) the degree of separation in the organizations’ facilities; and (5) the extent to which signs and other forms of identification distinguish the organizations.” (quoting 45 C.F.R. § 89.3(b)(1)–(5) (2011))).

210 See *supra* note 15 and accompanying text.

211 *AID*, 133 S. Ct. at 2330.

212 See *supra* note 207 and accompanying text.

213 See *Rust v. Sullivan*, 500 U.S. 173, 187–88 (1991).

214 See *AID*, 133 S. Ct. at 2330.

215 See *supra* note 207 and accompanying text.

216 See *AID*, 133 S. Ct. at 2328–29 (claiming that the account explains *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) and *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984)). But see *id.* at 2334 (Scalia, J., dissenting) (“None of the cases the Court cites for its holding provide support.”).

217 *Id.* at 2326 (majority opinion) (“Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of

Court's account of *Rust* was not plausible. Further, the previous jurisprudence which (sometimes) suggested that the government had great discretion when hiring individuals to communicate its own message would seem to support the government's having had discretion to prefer certain groups rather than others to carry out its program.<sup>218</sup> A separate question is whether the government was impeding its own efforts by requiring organizations to articulate an anti-prostitution message, but that consideration seemed to speak to the wisdom of the policy rather than to whether Congress in light of the past jurisprudence had the power to condition the receipts of funds in this way.<sup>219</sup>

### CONCLUSION

*Rust* has been cited both for the proposition that the state has great discretion when attaching conditions to the receipt of state funding and that the state *only* has great discretion when funding its own message. Neither position is absurd on its face and each might be adopted if in line with the past case law. The difficulty posed by *Rust* has been that the Court has oscillated between these holdings when deciding cases even when the alternative holding would have required a different result.

One expects jurisprudence to evolve, so the fact that a case no longer stands for what it once did need not be a basis for criticism. What is so unusual about *Rust* is that the Court seesaws between incompatible accounts of the case with no explanation of why one account rather than another is offered. The Court thereby promotes the perception that its holdings are result-oriented and unprincipled, and offers no guidance to those who wish to act in accord with the law. This cavalier treatment of *Rust* is likely to have spillover effects, undermining the Court's credibility in First Amendment matters more generally. The Court must stop treating cases as lumps of clay, ready to be pressed into whatever shape is desired for the creation of the day. First Amendment jurisprudence and the Court's own integrity hang in the balance.

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their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS.”).

218 *See id.* at 2332 (Scalia, J., dissenting) (“This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS.”).

219 *Cf. id.* at 2333 (“The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program.”).

