Denver Law Review

Volume 79 | Issue 1 Article 7

January 2001

The Supreme Court's Decision in Legal Services Corporation v. Velazquez and the Analysis under the Unconstitutional Conditions Doctrine

Christian Hammond

The Supreme Court's Decision in Legal Services Corporation v. Velazquez and the Analysis under the Unconstitutional Conditions Doctrine

THE SUPREME COURT'S DECISION IN *LEGAL SERVICES CORPORATION V. VELAZQUEZ* AND THE ANALYSIS UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

INTRODUCTION

The First Amendment of the United States Constitution guarantees every individual the right to speak freely,[1] meaning that the government cannot impose restrictions on a person's right to speak unless they have compelling reasons. Often, the government provides financial funding to certain individuals or groups who will then convey a governmental message. Yet, when the government provides subsidies or grants to particular individuals, groups or corporations, First Amendment principles are often at odds. On one hand, the government has the right to delineate the scope of their grant programs and can require grant recipients to abide by certain conditions or restrictions.[2] Yet, these conditions are unconstitutional if they penalize individuals for exercising their constitutional rights.[3]

In *Legal Services Corp. v. Velazquez*,[4] the United States Supreme Court had to decide whether a federal grant program was unconstitutional because it restricted the legal arguments government-funded attorneys could assert on behalf of their indigent clients.[5] In holding that the restriction was unconstitutional, the Court failed to follow traditional unconstitutional conditions analysis and instead announced a novel theory that the restriction distorted the attorney's role in the judicial system.[6]

Part I of this paper examines the formation of the Legal Services Corporation ("LSC") and the restrictions that have been placed on this corporation.[7] Part II discusses the legal precedent in government subsidy

---

1. U.S. CONST. amend. I. (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

2. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) (recognizing that the government may define its programs); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983) (describing that when the government creates a limited public forum, certain restrictions may be necessary to define the limits and purposes of the program).

3. *See* Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) (acknowledging the exercise of constitutional rights may not be a basis for refusing recipient benefits); Perry v. Sinderman, 408 U.S. 593, 597 (1972) (forbidding the government from denying benefits based on the exercise of constitutional rights, especially speech). This is called the "unconstitutional conditions" doctrine. *See generally* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

4. 121 S. Ct. 1043 (2001).

5. *Legal Servs. Corp.*, 121 S. Ct. at 1045.

6. *Id.* at 1050.

7. *See infra* notes 12-24 and accompanying text.

cases.[8] Part III describes the procedural posture and the Court's analysis in *Legal Services Corp. v. Velazquez*.[9] Part IV argues that the majority's opinion did not follow established precedent and that the distortion principle they announced is erroneous.[10] In conclusion, Part V looks to the future of government subsidy cases.

I. HISTORICAL BACKGROUND

A. *The History of The Legal Services Corporation*

Congress created the private, nonprofit LSC when it enacted the Legal Services Corporation Act of 1974.[11] The LSC's purpose is to provide "financial support for legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance."[12] The LSC does not actually represent indigent clients but instead administers grants to qualified local legal aid offices (called "grantees") rendering free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually.[13]

Congress has placed significant restrictions on the scope of activities in which LSC grantees may participate.[14] While President Carter strengthened the LSC in the late 1970's, President Reagan's administration established many restrictions that were "designed to rein in the per-

---

8. *See infra* notes 25-58 and accompanying text.

9. *See infra* notes 59-104 and accompanying text.

10. *See infra* notes 105-115 and accompanying text.

11. 42 U.S.C. § 2996 *et seq.* (2000).

12. *Id.* § 2996b(a). Furthermore, the Act states that:

[t]he Congress finds and declares that—

(1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;

(2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;

(3) providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this chapter;

(4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;

(5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and

(6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

Id. §2996.

13. Velazquez v. Legal Servs. Corp., 164 F.3d 757, 759 (2nd Cir. 1999) (citing Texas Rural Legal Aid v. Legal Servs. Corp., 940 F.2d 685, 688 (D.C. Cir. 1991)). The LSC also ensures that the grantees abide by the restrictions imposed by Congress. *Id.*

14. *See* Clifford M. Greene et al., *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734 (noting that the LSC Act prohibits LSC offices from becoming involved in any form of political organizing or lobbying); Stephen K. Huber, *Thou Shalt not Ration Justice: A History and Bibliography of Legal Aid in America*, 44 GEO. WASH. L. REV. 754 (1976) (describing the history of the LSC).

ceived left-wing radicals allegedly in control of legal services programs across the country."[15] When Republicans gained the majority in Congress in 1994, they again tried to dismantle the LSC but were ultimately vetoed by President Clinton.[16] As a compromise, Congress agreed to retain the LSC in exchange for the imposition of new restrictions on grantees.[17] Consequently, Congress passed the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA")[18] which reduced LSC's funding by thirty percent and established new restrictions on grantees.[19] One such restriction was the so called "suit-for-benefits" exception.

B. The "Suit-for Benefits" Restriction

The "suit-for-benefits" restriction is found in section 504(a)(16) of the OCRAA and prohibits LSC grantees from participating in "litigation . . . involving an effort to reform a Federal or State welfare system."[20] Furthermore, LSC-funded attorneys may represent a client "who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law."[21] If an LSC-funded attorney determines that a client seeks to involve her in prohibited litigation, the attorney must advise the client that she will be unable to accept the representation;[22] or if the litigation is underway, the attorney must withdraw.[23] Consequently, this restriction meant that LSC-funded attorneys would continue to receive federal grants as long as they did not challenge the validity of existing welfare law. The plaintiff-respondents in *Velazquez* argued that this condition infringed their First Amendment free speech rights.[24]

II. CONSTITUTIONAL ANALYSIS IN GOVERNMENT SUBSIDY CASES

When challenges are made to the constitutionality of restrictions imposed on recipients of government subsidies, the Supreme Court has traditionally relied on two competing doctrines: the right-privilege dis-

---

15. Joseph A. Dailing, Their Finest Hour: Lawyers, Legal Aid and Public Service in Illinois, 16 N. ILL. U. L. REV. 7, 21 (1995).

16. See J. Dwight Yoder, Note: Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services, 6 WM. & MARY BILL RTS. J. 827, 834 (1998).

17. *Id.*

18. Omnibus Consolidated Rescissions and Appropriations Act of 1996 (hereinafter "OCRAA"), Pub. L. No. 104-134, 110 Stat. 1321.

19. See Megan E. Lewis, Note: Subsidized Speech and the Legal Services Corporation: The Constitutionality of Defunding Constitutional Challenges to the Welfare System, 74 N.Y.U. L. REV. 1178, 1178-1179 (1999).

20. 45 C.F.R. § 1639.3 (2000).

21. *Id.* § 1639.4.

22. Petitioner's Opening Brief at 11, Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (2001) (Nos. 99-603, 99-960).

23. 45 C.F.R. § 1626.9 (2000).

24. Velazquez v. Legal Servs. Corp., 164 F.3d 757, 761 (2nd Cir. 1999).

tinction and the unconstitutional conditions doctrine.[25] The right-privilege distinction focuses on the inherent differences between constitutional rights and privileges granted by the government.[26] The doctrine is based on the principle that because rights are Constitutional guarantees, the government cannot restrict them unless its justification is compelling.[27] Privileges on the other hand are viewed more as a public charity and "may be initially given to recipients on the condition that they surrender or curtail the exercise of constitutional rights that they would otherwise enjoy."[28] However, this doctrine has been severely criticized making the unconstitutional conditions doctrine the primary analytical tool in government subsidy cases.[29]

The unconstitutional conditions doctrine mandates that a government-funded benefit may not obligate the recipient to surrender a constitutional right, even if the government could have withheld that benefit altogether.[30] For example, in *Speiser v. Randall*,[31] a California law conditioned the receipt of veteran property tax exemptions on the individual's signing a declaration disavowing a belief in overthrowing the government by force or violence.[32] In holding this law unconstitutional, the Court said: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[33]

However, the Court has inconsistently applied the unconstitutional conditions doctrine in government subsidy cases making its understanding and application perplexing.[34] According to one commentator, ana-

---

25. Yoder, *supra* note 16, at 845. *See generally* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69, 72 (1982) (arguing that despite its reported demise, the right-privilege distinction is alive and well and is an important principle in constitutional law).

26. Yoder, *supra* note 16, at 845.

27. *Id* at 845-46.

28. Smolla, *supra* note 25, at 72 (citing United Pub. Workers v. Mitchell, 330 U.S. 75, 80 (1947)). *See also* McAuliffe v . New Bedford, 29 N.E. 517, 517 (1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

29. *See* Perry v. Sinderman, 408 U.S. 593, 596 (1972) (criticizing the right-privilege distinction and endorsing the unconstitutional conditions doctrine). *But see* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 735 (1964) (criticizing the right-privilege doctrine and arguing that the distinction is an anachronism in an era where people depend on government for so much that is essential to survival); *see also* Charles A Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965) (arguing that government benefits "are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.").

30. Sullivan, *supra* note 3, at 1415.

31. 357 U.S. 513 (1958).

32. *Speiser*, 357 U.S. at 514-15.

33. *Id.* at 518. *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (explaining that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly.").

34. *See e.g.*, Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546 (1983) (refusing to follow the doctrine and upholding a federal tax law provision that conditioned tax

lyzing the constitutionality of restrictions imposed on government funded grantees is particularly difficult because:

> It renders uncertain the status of speakers, forcing us to determine whether speakers should be characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government. And it renders uncertain the status of government action, forcing us to determine whether subsidies should be characterized as government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas.[35]

Accordingly, the analysis must begin by determining the nature of the relationship between the government and the restricted grantee.[36] When the government provides funding to governmental speakers, "the unconstitutional conditions analysis is more deferential to the government because the state is considered a participant in the public discourse and, therefore, has the ability to organize its resources in such a way to achieve its goals."[37] However, when private speakers are the funding recipients, the analysis is similar to that applied when no governmental subsidies are involved.[38]

The Court's determination of this relationship has resulted in outcomes that are difficult to reconcile with one another. For example, in *Rust v. Sullivan*,[39] the government chose to subsidize doctors conducting family planning counseling on the condition that they did not "encourage, promote, or advocate abortion as a method of family planning."[40] The Court held that the government's use of private speakers to convey a government message amounted to governmental speech.[41]

---

exempt status on the prerequisite that the organization not participate in lobbying or partisan political activities and explaining that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [Taxation with Representation's] lobbying."); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (refusing to apply the doctrine explaining that

> [t]he 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. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.)

For discussions and analysis explaining why the doctrine is confusing, *see* Yoder, *supra* note 16, at 854-60; Sullivan, *supra* note 3, at 1417-20; Lewis, *supra* note 19, at 1182-91; Cole, *supra* note 3, at 682-702.

35. Robert C. Post, *Essay: Subsidized Speech*, 106 YALE L.J. 151, 152 (1996).

36. *Id.* at 155 (explaining that understanding this relationship is critical because "substantive First Amendment analysis will depend on whether the citizen who speaks is characterized as a public functionary or as an independent participant in public discourse.").

37. Yoder, *supra* note 16, at 849.

38. *See* Post *supra* note 35, at 152-54 (explaining that the analysis is similar to that described in the text accompanying notes 48-57 *infra*).

39. 500 U.S. 173 (1991).

40. *Rust*, 500 U.S. at 180.

41. *Id.* at 193.

Similarly, in *Rosenberger v. Rector of the University of Virginia*,[42] the state made a choice regarding what student organizations would receive government funding.[43] Yet, in *Rosenberger* the choice was held to be unconstitutional because:

> [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. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage diversity of views from private speakers.[44]

Consequently, in both *Rust* and *Rosenberger*, the state "selectively fund[ed] a program to encourage certain activities it believe[d] 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."[45] Yet, in *Rust* the speaker was considered a government actor, whereas in *Rosenberger* the speakers were private. Because both of these cases involve governmental decisions concerning the allocation of federal subsidies, the decisions are difficult to reconcile and have therefore caused confusion regarding the proper analysis for determining the government-recipient relationship.

Once this relationship is determined, the analysis follows traditional free speech principles.[46] Consequently, courts must examine the forum where the speech occurs as well as the condition's neutrality and precision.[47]

When the funding recipient is a private actor and not an agent of the government, the government has created a limited public forum.[48] When the government establishes a limited public forum, it is not required to allow persons to engage in all types of speech.[49] However, restrictions on speech must be content-neutral - meaning it cannot discriminate on the

---

42. 515 U.S. 819 (1995).

43. *Rosenberger*, 515 U.S. at 824-25.

44. *Id.* at 833-34 (citations omitted).

45. *Rust*, 500 U.S. at 193.

46. *See* Yoder, *supra* note 16, at 850.

47. *Id.*

48. Id. at 851. See also David A. Stoll, Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society For Krishna Consciousness, Inc. v. Lee, 59 BROOK. L. REV. 1271, 1271 (1993) (describing the public forum doctrine).

49. Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2100 (2001).

basis of viewpoint[50]- and the restriction must be reasonable in light of the purpose served by the forum.[51]

On the other hand, where the funding recipient is an agent of the government, no public forum is created and the government can impose content-based restrictions on the recipient so long as the restrictions are proportional to the government's funding[52] and are related to the government's message.[53]

Finally, under "precision" analysis, the court will ensure that the restrictions are not overbroad or vague.[54] A restriction is unconstitutionally vague if a reasonable person cannot determine what speech is prohibited and what is permitted.[55] Furthermore, a restriction is overbroad if it restricts speech that is otherwise protected.[56] Accordingly, restrictions must be narrowly tailored so as to ensure clarity in what speech is prohibited and limit the types of speech that are covered by the restriction to only those that are absolutely necessary to achieve the government's purpose.

As the above discussion shows, the unconstitutional conditions doctrine is confusing because of the Court's inconsistent application. The decisions seem to indicate that if the Court wants to uphold a restriction, it determines that the government is making a legitimate choice to fund one activity and not others.[57] On the other hand, if the Court wants to strike down a restriction, it determines that the speaker is a private actor and the government is unconstitutionally conditioning their free speech rights.[58] In *Velazquez*, the Court had the opportunity to define the parameters of the doctrine thereby clarifying its meaning. However, as discussed in Part IV, the Court utterly failed to take advantage of this opportunity and instead announced a novel rationale for its decision.

---

50. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983); Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 512 (2000) (defining "viewpoint" to mean "expression representing a particular perspective by a speaker or class of speakers.").

51. Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829 (1995).

52. In other words, "the government must allow for adequate alternative channels for engaging in restricted speech or activities using nongovernment funds." Yoder, *supra* note 16, at 854.

53. Rust v. Sullivan, 500 U.S. 173, 194-95 (1991).

54. *See* Yoder, *supra* note 16, at 851.

55. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

56. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984).

57. *See, e.g.*, *Rust*, 500 U.S. at 193.

58. *See, e.g.*, Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 833-34 (1995).

III. THE VELAZQUEZ DECISION

A. *Procedural Posture*

LSC-funded attorneys from New York City, along with private LSC contributors, and state and local officials who donated to LSC grantees ("respondents") filed suit against the LSC[59] ("petitioners") in the United States District Court for the Eastern District of New York. The respondents sought a preliminary injunction alleging that the "suit-for-benefits" restriction violated their rights under the First Amendment to the United States Constitution.[60] The district court denied the respondents' motion holding that the regulation was appropriately tailored to the government's legitimate interests and it permitted adequate channels for respondents to conduct restricted activities.[61] On appeal, the Second Circuit reversed stating that because the "suit-for-benefits" restriction allows the distribution of funds to those who represent clients who will not challenge the existing rules of law, but denies funding to those who will challenge existing rules, the provision "clearly seeks to discourage challenges to the status quo," and is therefore an impermissible viewpoint-based restriction on expression.[62] The LSC, challenging the Court of Appeals' conclusion that the restriction was unconstitutional, filed a petition for certiorari with the United States Supreme Court, which the Court granted.[63]

B. *The Majority Opinion*

Justice Kennedy, joined by four other Justices,[64] delivered the opinion of the Court which affirmed the Second Circuit's decision.[65] The Court's analysis began by examining the government-recipient relationship.[66] It recognized that the rationale for allowing the government latitude to restrict speech when the speech delivers the government's message is based on the fact that the government is accountable to the electorate and if the restriction is unpopular, newly elected government officials can promote a different message.[67] However, this rationale does not

---

59. Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (2001). The United States Government intervenened as a defendant in this case.

60. Velazquez v. Legal Servs. Corp., 985 F.Supp. 323, 326 (E.D.N.Y. 1997). The plaintiffs also challengenged several other restrictions enumerated in the 1996 Act, but since the issue before the Supreme Court only dealt with the "suit-for-benefits" restriction, the challenges to these other restrictions are beyond the scope of this paper.

61. *Velazquez*, 985 F. Supp. at 326-27.

62. Velazquez v. Legal Servs. Corp., 164 F.3d 757, 769-70 (2nd Cir. 1999).

63. *See* Legal Servs. Corp. v. Velazquez, 529 U.S. 1052 (2000).

64. Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (Justices Stevens, Souter, Ginsburg and Breyer joined the majority opinion).

65. *Legal Servs. Corp.*, 121 S. Ct. at 1053.

66. *See supra* notes 35-45 and accompanying text.

67. *Legal Servs. Corp.*, 121 S. Ct. at 1048-49 (citing Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000)).

apply when the speech is private.[68] Here, like the program at issue in *Rosenberger*,[69] the LSC program promoted private speech rather than governmental speech;[70] when a lawyer argues on behalf of his client, this cannot be considered government speech.[71]

With the government-recipient relationship established, the Court then discussed forum.[72] Because this case involved a subsidy, limited forum cases[73] were not controlling but did provide guidance.[74] Here, the limitation foreclosed alternative forums of expression because LSC lawyers could not undertake representation of a particular client if the client's case would question the validity of current welfare laws.[75] The premise behind the LSC program is to provide legal representation "to persons financially unable to afford legal assistance."[76] Therefore, in cases where the LSC attorney must withdraw, the indigent client will be unlikely to find another attorney, and will therefore not have another source from which they can receive legal assistance pertaining to their constitutional challenge to welfare laws.[77]

Consequently, by not allowing LSC attorneys to advise or advocate for their clients concerning the validity of a particular welfare statute, the "suit-for-benefits" restriction altered the traditional role these attorneys play in the legal system.[78] As Justice Kennedy explained, "[b]y seeking to prohibit the [federally funded] analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper

---

68. *Id.* at 1049 (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).

69. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 822-23 (1995) (discussing subsidies to student organizations).

70. *Legal Servs. Corp.*, 121 S. Ct. at 1049. According to the majority, this was the critical distinction between this case and *Rust*. The *Rust* Court held that the speech at issue there was governmental speech because the government was using private speakers to promote a governmental message. Here, however, the advice an attorney gives to her client and the arguments the attorney makes to the court cannot be classified as governmental speech. *Id.*

71. *Id.*

72. *See supra* notes 48-53 and accompanying text.

73. *See* Perry Ed. Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 45-46 (1983) (establishing three types of government property: public forums, limited public forums, and nonpublic forums); *see also*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391-394 (1993) (holding that once the school district chose to open its facilities to community groups it could not discriminate against those engaging in religious speech unless strict scrutiny was met).

74. These cases are not controlling because by granting a subsidy, the government has merely made choices about how to spend its money; it has not created a forum in the true sense of the word. *See generally Yoder*, *supra* note 16.

75. *Legal Servs. Corp.*, 121 S. Ct. at 1050.

76. *Id.* at 1051. (quoting 42 U.S.C. § 2996(a)(3)).

77. *Id.*

78. *Id.* at 1050. The Court stated "[b]y providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the State and Federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities." *Id.* Therefore, by restricting the arguments LSC-funded attorneys can make, the program distorts this critical relationship. *Id.*

exercise of the judicial power."[79] In other words, because the LSC attorneys are unable to represent their clients zealously, there may be incomplete analysis in certain cases that will cause the public to question the sufficiency and integrity of the judicial system.[80]

This, in turn, raises separation of powers concerns because Congress has tried to insulate Congressional welfare legislation from judicial review.[81] Justice Kennedy explained, "[t]he statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider."[82] However, as was established in *Marbury v. Madison*, "[i]t is emphatically the province and the duty of the judicial department to say what the law is."[83]

Finally, Justice Kennedy rejected the petitioners' argument that the "suit-for-benefits" restriction was necessary to define the scope of the federal program.[84] Since the effect of the restriction was to insulate welfare laws from constitutional attack, the condition endangered the basic principle that the First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[85] Accordingly, the Constitution does not allow Congress to suppress ideas that are thought to be adverse to the best interests of the government, which is what Congress had done here.[86]

C. The Dissent

Justice Scalia, joined by three other Justices, dissented.[87] The dissent initially pointed out that despite the majority's agreement that the "suit-for-benefits" restriction did not directly regulate speech, did not create a public forum, and did not discriminate on the basis of viewpoint, the Court refused to apply traditional government subsidy analysis and instead "applie[d] a novel and unsupportable interpretation of [the Court's] public-forum precedents."[88] The dissent argued that *Rust* was controlling and that the majority's attempts to distinguish that case were misguided.[89]

---

79. *Id.* at 1051.
80. *Id.*
81. *Id.* at 1052.
82. *Id.* at 1051.
83. *Id.* at 1050 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).
84. *Id.* at 1051.
85. *Id.* at 1052 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964)).
86. *Id.* (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540, 548 (1983)); Speiser v. Randall, 357 U.S. 513, 519 (1958).
87. *Id.* at 1053 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist, Justice O'Conner and Justice Thomas.
88. *Id.*
89. *Id.* at 1058.

Applying *Rust*'s traditional government subsidy analysis, the dissent argued the restriction was viewpoint neutral because LSC attorneys cannot represent clients who seek to challenge welfare laws or clients who seek to defend welfare laws.[90] Furthermore, the restriction does not foreclose alternative sources of legal assistance because LSC lawyers can express their opinions concerning the constitutional validity of a welfare law and may refer the client to another non-LSC attorney who can pursue the matter.[91]

Moreover, because the LSC Act is a federal subsidy program rather than a federal regulatory program, it does not directly restrict speech and will only indirectly restrict speech if the program is "manipulated to have a coercive effect on those who do not hold the subsidized position."[92] Proving coercion in a limited spending program that does not create a public forum (like the LSC Act) "is virtually impossible, because simply denying a subsidy does not coerce belief."[93] Furthermore, the test for unconstitutionality is "whether denial of the subsidy threatens to drive certain ideas or viewpoints from the marketplace."[94] If this threat does not exist, "the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[95]

Justice Scalia then attacked the majority's contention that the restriction distorts the usual functioning of an existing medium of expression.[96] He argued that this assertion was wrong on the law because there was no precedent to support it; the three cases the majority cited never mentioned this new principle.[97] He argued it was also wrong on the facts

---

90. *Id.* at 1053-54.

91. *Id.* at 1054.

92. *Id.* (internal quotations omitted).

93. *Id.* (quoting Lyng v. Automobile Workers, 485 U.S. 360, 369 (1988)).

94. *Id.* (quoting Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998)).

95. *Id.* (quoting *Nat'l Endowment*, 524 U.S. at 587, 588).

96. *Id.* at 1055.

97. *Id.* at 1056. One case the Court cited was Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995). According to Justice Scalia, this case did not stand for the principle that the usual functioning of student newspapers is to express many different points of view, "but rather *that the spending program itself* had been created 'to encourage a diversity of views from private speakers.' What could not be distorted was the *public forum* that the spending program had created." *Id.* (quoting *Rosenberger*, 515 U.S. at 834) (emphasis in original). Additionally, Justice Scalia argued that Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998), "discussed the nature of television broadcasting, not to determine whether government regulation would alter its usual functioning and thus violate the First Amendment[,] . . . but rather to determine whether state-owned television is a 'public forum' under our First Amendment jurisprudence." *Id.* (quoting *Forbes*, 523 U.S. at 673-74). Finally, in FCC v. League of Women Voters of Cal. 468 U.S. 364 (1984), the Court stated that "of course, the restriction on editorializing would plainly be valid if Congress were to adopt a revised version of [the statute] that permitted [public radio] stations to establish affiliate organizations which could then use the station's facilities to editorialize with nonfederal funds." *Id.* (quoting *FCC*, 468 U.S. at 400). Justice Scalia asserted that this is what occurred under the LSC Act since the regulations allow grantees to establish affiliate organizations to represent clients on matters that fall outside the scope of the LSC Act. *Id.*

because there was no foundation for the assertion that because LSC attorneys cannot advise or argue concerning the validity of welfare laws, this restriction distorts the function of the judicial system.[98] Justice Scalia stated that it is not the function of the courts to inquire into the validity of statutes in all cases.[99] The courts must only focus on the issues presented and argued by the parties, "and if the Government chooses not to subsidize the presentation of [questions concerning the validity of statutes], that in no way 'distorts' the courts' role."[100]

Finally, the dissent rejected the majority's irrelevant concern that in cases in which an LSC attorney must withdraw, the client will unlikely obtain other counsel.[101] This fact is irrelevant to Justice Scalia because the client will be in "no *worse* condition than he would have been in had the LSC program never been enacted."[102] Justice Scalia emphasized that the Government is not required to provide welfare recipients with free legal representation.[103] In other words, the LSC program is a government *benefit*, not a Constitutional right. Therefore, "[i]t is hard to see how providing free legal services to some welfare claimants (those whose claims do not challenge the applicable statutes) while not providing it to others is beyond the range of legitimate legislative choice."[104] Accordingly, the dissent would have found the "suit-for-benefits" restriction constitutional.

IV. ANALYSIS

As previously mentioned, the Court's *Velazquez* analysis could have gone a long way towards clarifying the analytical framework courts should apply under the unconstitutional conditions doctrine. For example, the Court could have elaborated on the characteristics that make a recipient of federal funds a government speaker rather than a private speaker. Instead, without clearly explaining its rationale, the Court applied a fact specific analysis and simply carved out a niche of non-governmental speech for advice and advocacy given to a client by an attorney.[105] This means that courts will continue to guess regarding the appropriate nexus needed to make speech governmental – ultimately resulting in inconsistent decisions.

---

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1057.
102. *Id.* (emphasis in original).
103. *Id.* The majority also conceded this point but argued that the scope of the restriction was unconstitutional because it insulated welfare laws from judicial review. *See id.* at 1052.
104. *Id.* The dissent also focused on the issue of severability which was decided by the Second Circuit but which was not argued or briefed before the Supreme Court. *See id.* at 1058-60. This issue is beyond the scope of this paper.
105. *Id.* at 1049.

The Court's opinion was also erroneous in that it did not discuss viewpoint discrimination. As the dissent emphasized, the "suit-for-benefits" restriction is not viewpoint based because the restriction prohibits litigation that either challenges or defends welfare laws.[106] At most the restriction is content-based discrimination because it prohibits all forms of litigation dealing with the validity of the welfare system; in other words, Congress was merely defining the scope of the LSC program. As the Court stated in *Rosenberger*, "in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between . . . content discrimination, which may be permissible if it preserves the purpose of that limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[107] Here, the purpose of the program is to provide "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[108] The purpose is not to create a forum for litigants to challenge the validity of welfare laws. Therefore, because the restriction prohibits all litigation concerning welfare reform – pro or con – the restriction is not viewpoint based.

Nonetheless, instead of following this traditional analytical framework, the majority relied on the imprecise theory that the "suit-for-benefits" restriction distorted the role of attorneys in the judicial system.[109] Yet, the majority did not point to any proof that the restriction had in fact distorted the attorney's role in any actual case. The Court simply hypothesized that in cases where the LSC funded attorney must withdraw from representation, "the client is *unlikely* to find other counsel."[110]

However, this is simply wrong because as the dissent emphasized, LSC-funded attorneys who must withdraw "are also free to express their views of the legality of the welfare law to the client, and they may refer the client to another attorney who can accept the representation."[111] Moreover, as LSC explained in its brief:

> the regulations do not prohibit part-time employees of LSC grantees -- including lawyers -- from participating in the restricted activities as employees of non-LSC funded organizations. . . . [Additionally], full-time employees of LSC-funded organizations are free to engage in the restricted "advocacy" activities in their individual capacity, on their own behalf, and on their own time. As a result, LSC-funded attorneys can express their personal opposition to existing welfare laws,

---

106. *Id.* at 1053-54.

107. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829-30 (1995). *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n,103 S.Ct. 948, 955 (1983).

108. 42 U.S.C. § 2996b(a) (2000).

109. *See supra* notes 79-84.

110. *Legal Servs. Corp.*, 121 S. Ct. at 1051 (emphasis added).

111. *Id.* at 1054.

> and their personal views on welfare reform, as long as these unsubsidized activities occur outside the LSC program.[112]

Therefore, if LSC-funded attorneys are unable to represent a client on their own time, they are free to refer the client to an attorney who can represent him. This referral should be effective since attorney ethical rules encouraged at least fifty hours of pro-bono work per year.[113] Therefore, contrary to the majority's contention that the restriction leaves "no alternative channel for expression,"[114] there are ample alternative outlets for those who seek to challenge the validity of welfare laws – either through LSC attorneys when they are working on their own time, or private attorneys who accept the client's case pro-bono. Accordingly, "[t]he [restriction] did not distort the traditional adversarial role of the lawyer; it simply insisted that constitutional challenges or defenses of welfare rules be undertaken by non-subsidized attorneys to leave more resources for more routine non-constitutional welfare litigation in which courts would still enjoy the final word."[115]

Finally, the "suit-for-benefit" restriction was one of many restrictions intended to define the scope of the LSC program. Because the government is providing a subsidy that it does not have to grant, it should be able to define the scope of that program by prohibiting activities that are designed to defeat the welfare system that it is trying to promote. The program was designed to provide equal access to the legal system for those with insufficient means. The program was not designed to use tax dollars to promote welfare litigation aimed at welfare reform. This type

---

112. Petitioner's Opening Brief at 11, Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (Nos. 99-603, 99-960) (citations omitted).

113. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2001). The American Bar Association Model Rules of Professional Conduct Rule 6.1 states:

> A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means.

Furthermore, the issue of pro bono legal service has been the subject of considerable scholarly discussion. *See, e.g.*, Thomas Bradley, *The Private Bar and the Public Lawyer: An Essential Partnership*, 4 NOVA L.J. 357 (1980) (advocates partnership of private bar and public lawyers to help provide legal services to poor); The Honourable Mr. Justice Brian Dickson, *The Public Responsibilities of Lawyers*, 13 MANITOBA L.J. 175 (1983) (discussion of pro bono responsibilities); Stephen T. Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973 (1987) (studies responsibility to make legal aid available to poor in Florida); B. George Ballman, Jr., Note, *Amended Rule 6.1: Another Move towards Mandatory Pro Bono? Is That What We Want?*, 7 GEO.J. LEGAL ETHICS 1139 (Spring 1994) (traces history of pro bono and suggests that mandatory pro bono equates to involuntary servitude, which courts choose to ignore in preference to benefits of mandatory pro bono).

114. *Legal Servs. Corp.*, 121 S. Ct. at 1051.

115. Bruce Fein, *Free Speech Don Quixote*, WASHINGTON TIMES, Mar. 6, 2001, at A16 (Mr. Fein is general counsel for the Center for Law and Accountability, a public interest law group headquartered in Virginia).

of activity should be left for the legislative branch because it is accountable to the electorate.

V. CONCLUSION

The Supreme Court's government subsidy cases have created tremendous confusion and uncertainty. In *Velazquez*, the Court had the opportunity to clarify the appropriate analysis under the unconstitutional conditions doctrine. Instead of following traditional unconstitutional conditions analysis, the Court announced the faulty distortion principle. Because the government provides millions of dollars each year towards subsidies and grants, the boundaries of what the government can and cannot do need to be better defined.

Furthermore, as the Court correctly explained, the legislative branch cannot pass laws and then forbid the judicial branch from examining those laws because this would create a separation of powers problem. However, as explained above, this problem does not exist under the LSC program because there are several alternate forums from which challenges to welfare laws can originate.

In practice, the unconstitutional conditions doctrine is superior to the right-privilege distinction because the right-privilege distinction gives the government too much power. The unconstitutional conditions doctrine is a check on the government ensuring that it does not unjustifiably infringe the constitutional rights of individuals. Nonetheless, the doctrine needs to be examined and explained so courts across the country can understand what is prohibited and what is not. For the most part, the Court avoided this task in the *Velazquez* case and instead applied an erroneous distortion doctrine. One can only hope that the next time the Court has the opportunity to expound on the unconstitutional conditions doctrine, it will not dodge its responsibility.

Christian Hammond