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PRIOR RESTRAINT BY THE BACKDOOR: CONDITIONAL RIGHTS

STEVEN HELLE*

I. INTRODUCTION

THE prior restraint doctrine has been variously described as a doctrine “showing signs of age”¹ and having “outlived its usefulness,”² yet it persists. Defense attorneys regularly attempt to cast their speech and press cases in the prior restraint mold because the label of prior restraint retains its talismanic significance.³ Perhaps because of the imposing pedigree and impassable constitutional hurdle, however, courts often are reluctant to extend the doctrine to new situations and the speech at issue may be left uncategorized—and thus unprotected.⁴

This hesitancy on the part of the courts to expand the prior restraint doctrine may explain why the words “prior restraint” appear nowhere in the case of *Rust v. Sullivan*,⁵ a case involving an

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1. Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 440 (1987).

2. Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?*, 49 COLUM. L. REV. 1001, 1006 (1949), quoted in Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955).

3. Floyd Abrams, one of the country's best known media attorneys, said he was very tempted to characterize everything he plausibly could as a prior restraint because of the taboo associated with it. See Donald M. Gillmor, *Prologue*, 66 MINN. L. REV. 1, 8 (1981) (summarizing Abrams' comments as moderator of *Near v. Minnesota* 50th Anniversary Symposium). Professor Kalven concurred: “[A]s a matter of advocacy there is undoubtedly much ‘good’ language in the cases about the presumption against prior restraint; it is still a great label to be able to attach to what one is opposing.” Harry Kalven, Jr., *The Supreme Court, 1970 Term—Foreword: Even When a Nation is at War*, 85 HARV. L. REV. 3, 33 (1971) (citation omitted).

4. See, e.g., *Alexander v. United States*, 113 S. Ct. 2766, 2771-73 (1993) (stating that “petitioner stretched the term ‘prior restraint’ well beyond the limits established by our cases” and holding that destruction of entire inventory of sexually explicit magazines and videotapes is not prior restraint after seven were found to be obscene); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (stating that protective order banning dissemination of discovered information before trial “is not the kind of classic prior restraint that requires exacting First Amendment scrutiny”); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (holding that zoning restriction on film exhibitors is not prior restraint); *In re a Minor*, 595 N.E.2d 1052, 1055 (1992) (finding “not persuasive” petitioner's argument that it is unconstitutional prior restraint to order newspaper not to disclose names of juvenile victims of physical and sexual abuse).

5. 500 U.S. 173 (1991).

explicit ban on abortion counseling at family planning clinics receiving Title X funds from the government. The United States Supreme Court ruled that the government could use its spending power selectively to fund certain speech and, as a condition of accepting the money, require abstinence from any speech regarding abortion.⁶ If government banned speech regarding abortion outright, it would be an unconstitutional prior restraint. The power of the purse, however, enabled the state to achieve the same result without constitutional objection.

Rust may represent the new breed of prior restraint, a form of prior restraint by the backdoor. If courts allow the government to use its largesse to condition the exercise of First Amendment rights, the potential for governmental control is enormous. As the petitioners in *Rust* suggested, grants for health, research and education,⁷ subsidies for public forums, and entitlements for programs such as Medicare, Medicaid and Veterans' Disabilities,⁸ to name just a few,⁹ offer abundant possibilities as "instruments of censorship in a marketplace dominated by government largesse."¹⁰ It is particularly troubling that the subject of the prior restraint in *Rust* was the exercise of a constitutional right to abortion.¹¹ Imagine public defender offices subsidized by the state, "where lawyers are forbidden to inform their clients of the right to remain silent and are forbidden to refer their clients to lawyers free to do so."¹² Of course, certain members of the Court may have viewed *Rust* as primarily an abortion case. Thus, their general opposition to the abortion right may have affected their vote regarding the First Amendment dimension of the case.¹³ Nonetheless, questionable precedent is *still*

6. For a discussion of the holding of *Rust*, see *infra* notes 159-97 and accompanying text.

7. Reply Brief for Petitioners at 2, *Rust v. Sullivan*, 500 U.S. 173 (1991) (No. 89-1391).

8. Brief for Petitioners at 17, *Rust* (No. 89-1391).

9. For a discussion of other programs that could be used for purposes of censorship, see *infra* note 216.

10. Reply Brief for Petitioners at 2, *Rust* (No. 89-1391).

11. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) (affirming constitutional right to obtain abortion without undue interference from state); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that women have constitutional right to abortion).

12. Reply Brief for Petitioners at 5 n.10, *Rust* (No. 89-1391).

13. The vote in *Rust* broke down roughly along the lines of the vote in *Webster v. Reproductive Health Service*, 492 U.S. 490 (1989), which narrowed the scope of the protection afforded abortion by *Roe*. Chief Justice Rehnquist wrote the majority opinion in both *Rust* and *Webster*, and was joined in both by Justices White, Kennedy and Scalia. Justices Blackmun, the author of *Roe*, Marshall, and Stevens dissented in both. Justice O'Connor joined the majority in *Webster*, but

precedent, and *Rust* may well have relegated the doctrine against prior restraint to constitutional backwaters.

Questions regarding the scope and rationale of the prior restraint doctrine were not addressed in *Rust*, including: Whether government should be able to impose conditions on the exercise of a constitutional right and whether a citizen may waive a right to free speech or press. This article examines the phenomenon heralded by *Rust* and suggests the Court erred in overlooking the prior restraint doctrine as the critical issue. The article begins by exploring the history and rationale of the prior restraint doctrine. Next, the Article discusses Supreme Court cases that have applied the doctrine including illustrations of the Court's underlying premises. The article then considers contrary premises as well as what First Amendment attorney Floyd Abrams calls the "music" of *Rust*.¹⁴ Finally, the article concludes that the prior restraint doctrine should be applied on a basis consistent with its historical and philosophical premises.

II. NO PREVIOUS RESTRAINTS

Perhaps no academic debate regarding freedom of speech and press has been as fervent as the one involving what the Framers meant when they adopted the First Amendment.¹⁵ The argument essentially is whether the Framers merely meant that expression was free if it could be published without a license, or whether they intended freedom of expression to include freedom to publish without government approval as well as freedom from penalty after publication. In other words, whether the Framers intended to protect citizens' freedom from prior restraint and subsequent punishment.¹⁶

dissented in *Rust*. Justice Brennan had dissented in *Webster*, but his replacement on the bench, Justice Souter, filled out the five-member majority in *Rust*.

14. For a discussion of Floyd Abrams' analysis of *Rust*, see *infra* text accompanying note 239.

15. Leonard Levy recounted how a reviewer of a book written in response to his first work in the field, *Legacy of Suppression*, "concluded that I had 'generated about as much scholarship as anyone in recent memory.'" LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS*, at xxi (1985) (quoting Richard F. Hixson, *American Revolutionary Press Examined in New Collection of Essays*, 7 *JOURN. HIST.* 114, 114 (1980) (reviewing *THE PRESS AND THE AMERICAN REVOLUTION* (Bernard Bailyn & John B. Hench eds., 1980))). In fact, "[p]rompted by the scholarship of Leonard Levy, legal historians have begun re-examining contemporary sources on the press clause and have opened a debate that should last for many years." JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM—The Ideology of Early American Journalism* 4 (1988).

16. As with all generalizations, this capsulization of the two camps merits fur-

It is generally accepted that the Framers contemplated liability after publication for damage to the reputation of private individuals. However, the more divisive issue is whether they also intended to hold writers liable for statements tending to injure the government's reputation—seditious libel.¹⁷ The narrow constructionists, led by Leonard W. Levy, believe the Framers only intended to endorse the English common law understanding of free speech.¹⁸ Their arguments inevitably quote from William Blackstone's *Com-*

ther explanation. Although Levy argued that freedom of the press meant only freedom from prior restraint in his first book, a quarter century later he admitted that he may have been wrong and that the Framers may also have had some procedural protections regarding subsequent punishment in mind. LEVY, *supra* note 15, at xi. He gave ground grudgingly, though, and contradicted his change of heart later in the same book:

Even the Zengerian proposition that truth should be a defense against a charge of seditious libel had no wide acceptance in 1789. The only simple acknowledged principle about freedom of the press in 1789 remained Blackstonian in character: one had freedom to publish whatever he pleased subject to his criminal liability for abusing that freedom. *Id.* at 323.

Passage of the Sedition Act in 1798 can be read as evidence that the Framers confined themselves to protection from prior restraint only, but a closer look reveals that the Act put a greater burden on the prosecution than Blackstone would have contemplated. *See id.* at 13 n.23 (noting that Blackstone rejected "the right of the defendant to prove the truth of his alleged libel"). The Act incorporated truth as a defense, allowed the jury to decide whether the expression was seditious and required a showing of criminal intent rather than a "bad tendency." *Id.* at 297. Levy noted, however, that the requirement of proving criminal intent was an "empty protection." *Id.* at 151. Juries, he also wrote, "proved to be as susceptible to prevailing prejudices as judges when they decided the fate of defendants who had expressed unpopular sentiments in times of crisis. Only one verdict of 'not guilty' was returned in the numerous prosecutions under the Sedition Act of 1798." *Id.* at 128. In fact, in an English case about the time of the Sedition Act, a jury convicted despite the court's recommendation of acquittal. *See id.* at 286-87 (recounting story of Baptist minister who spoke in favor of French Revolutionary ideals and was convicted despite court's recommendation of acquittal). Truth likewise proved to be an elusive protection. *See id.* at 129, 201-03, 303 (noting that truth as defense is "illusory" and "cannot always be proved").

17. Levy cites the common law understanding of seditious libel as "any malicious criticism about the government that could be construed to have the bad tendency of lowering it in the public's esteem, holding it up to contempt or hatred, or of disturbing the peace." *Id.* at 8; *see also id.* at 271 (stating legal definition of seditious libel as "malicious, scandalous falsehoods of a political nature that tended to breach the peace, instill revulsion or contempt in the people, or lower their esteem for their rulers"). The Sedition Act of 1798 incorporated falsity into the definition. *See id.* at 297 (stating "[t]he Sedition Act made criminal 'any false, scandalous and malicious writings, utterance, or publications against the government'").

18. For a general discussion of Levy's views, *see supra* note 16. Professor Kurkland concurred with the narrow constructionists. *See Philip B. Kurkland, The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 *DRAKE L. REV.* 1, 4-5 (1979-1980) (noting that "original and limited meaning" of First Amendment included only freedom from prior restraint, although this definition today "sounds too restrictive of liberty we cherish").

mentaries on the Law of England, written in the late 1760s, more than twenty years before the First Amendment:

The *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.¹⁹

The *Commentaries* were the standard reference for much of the common law on both sides of the Atlantic, with an even greater impact in this country, and were the most important legal work since Justinian's *Institutes* fourteen centuries earlier.²⁰ Levy therefore observed, in support of his narrow construction of freedom of expression, that English common law was the basis for many of the other amendments in the Bill of Rights,²¹ and that a number of American writers both before and after the adoption of the First Amendment endorsed the Blackstonian view of freedom of the press. Levy concluded that the Framers intended to adopt the English common law understanding of freedom of the press in the First Amendment.

Professor Jeffery Smith, who advocated a broader understanding of the First Amendment, responded that "Levy's thesis stumbles

19. 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52, quoted in LEVY, *supra* note 15, at 12-13. The broad constructionists cited the passage from Blackstone in their arguments as well, but with less sympathy. See SMITH, *supra* note 15, at 61-62, 66 (commenting on Federalist and Republican attempts to characterize Blackstone's works during period of Sedition Act controversy). In drafting the Bill of Rights, the Senate rejected text that expressly would have adopted the Blackstonian interpretation of a free press. See *id.* at 70 (discussing legislative history of Bill of Rights). Levy, however, interprets the defeat of the motion as ambiguous because the rationale could have been that the conception of freedom was too narrow or that the language was unnecessary in the sense of being superfluous. LEVY, *supra* note 15, at 262.

20. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (Beacon Press edition, 1958); see also JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY 162-63 (1992) (examining Blackstone's popularity among American thinkers). According to Boorstin, the *Commentaries* were exceeded only by the Bible in their impact on American institutions. BOORSTIN, *supra*, at iii (preface to Beacon Press edition).

21. LEVY, *supra* note 15, at 324. The common law of England before the Revolution was expressly adopted by twelve states unless it conflicted with a statutory provision of that state. *Id.* at 197.

on crucial points.”²² He argued that England’s common law concept of freedom of the press was fundamentally inconsistent with the principles of the United States Constitution and a democratic republican government.²³ Additionally, there was the inherent contradiction in how a law that allowed prosecutions for seditious libel could be in effect when the speech and press of the eighteenth century overflowed with criticisms of government. More to the point, as Professor Harold Nelson noted, “[c]ourt trials for seditious libel ended as a serious threat to printers in the American colonies with the Zenger case [in 1735].”²⁴

Countering such criticism, Levy argued that Smith undervalued the significance of “scores of persons, probably hundreds”²⁵ who were brought before legislatures, “that acclaimed bastion of the people’s liberties,”²⁶ and were found in contempt or breach of legislative privilege for expression that made the legislators unhappy. Perhaps most telling of all was Levy’s point that “the Sedition Act, passed less than seven years after the ratification of the First Amendment, suggests that the generation that framed the amendment did not consider the suppression of seditious libel to

22. SMITH, *supra* note 15, at 11. Smith read 8,000 eighteenth century newspapers in preparing his rebuttal of Levy. *Id.* at viii. For a summary of the broad constructionists, see LEVY, *supra* note 15, at xiii-xiv & n.11.

23. SMITH, *supra* note 15, at 6, 72-73, 162-63 (quoting James Madison); see also GEORGE HAY (pseud. HORTENTIUS), AN ESSAY ON THE LIBERTY OF THE PRESS; RESPECTFULLY INSCRIBED TO THE REPUBLICAN PRINTERS THROUGHOUT THE UNITED STATES 26-29, 48-49 (Phila. 1799) (urging that Sedition Act was “not warranted by the Constitution of the United States”); James Madison, *Amendments to the Constitution*, in 12 THE PAPERS OF JAMES MADISON 196, 203 (Charles F. Hobson & Robert A. Rutland eds., 1979).

24. Harold L. Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEGAL HIST. 160, 164 (1959), *quoted in* LEVY, *supra* note 15, at 17 n.4. Nelson found “little to refute this hypothesis” in doing his research, but admitted he may have missed some unexplored court records. Nelson, *supra*, at 164, 170; see also SMITH, *supra* note 15, at 7-8, 83 (noting how trials for seditious libel ceased to threaten printers after Zenger trial in 1735). Levy acknowledged the point, stating: “But prosecutions were infrequent, the press habitually scurrilous The law threatened repression; the press conducted itself as if the law scarcely existed.” LEVY, *supra* note 15, at 271. He admitted he was “puzzled by the paradox,” and that he had been wrong in the preface of *Legacy of Suppression*, when he wrote that “the American experience with freedom of political expression was as slight as the theoretical inheritance was narrow.” *Id.* at ix. But Levy was unpersuaded that the common law changed just because seditious libel was common. He analogized to the present day, noting “obscenity is still illegal, though we live in a society saturated by it and witness few prosecutions; their paucity does not illumine the meaning of obscenity.” *Id.* at xvi.

25. LEVY, *supra* note 15, at 18 (quoting MARY P. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 117 (1943)). Levy maintained that Smith “botch[ed]” his analysis of these cases. *Id.* at 83.

26. *Id.* at 17.

be an abridgement of freedom of speech or press."²⁷

In response to Levy's counter-attack, however, Smith could cite James Madison, author of the First Amendment, who passionately proclaimed the Sedition Act violated the First Amendment and who excoriated the Congress for returning America to "ancient ignorance and barbarism."²⁸ Indeed, based upon claims by narrow constructionists, one is left to wonder why a sedition statute was even necessary, given that the common law of the United States already recognized prosecutions for seditious libel and was unchanged by the First Amendment.²⁹ This is a corollary to the argument of the broad constructionists who question why a First Amendment was necessary if it merely embraced freedom from prior restraint, when prior restraint had not been practiced in this country for almost seventy years.³⁰ Of course, assuming that prior restraints were so

27. *Id.* at 269.

28. SMITH, *supra* note 15, at 71-73 (quoting James Madison, *Address of the General Assembly of the People of the Commonwealth of Virginia*, in THE WRITINGS OF JAMES MADISON 332-33, 339 (G.P. Putnam's Sons 1900-1910)). Smith also criticized Levy's contention that the use of parliamentary privilege continued after the Revolution up to the adoption of the First Amendment, by stating that Levy "is unable to cite any instances." *Id.* at 9.

29. Madison blamed partisan politics for passage of the Sedition Act. SMITH, *supra* note 15, at 59, 72. Levy concurred in this determination. LEVY, *supra* note 15, at 298; *see also id.* at 280 (examining partisan division over Sedition Act and noting that "[n]ot a single Federalist in the United States opposed the constitutionality of the Sedition Act"). Levy contended, though, that the Sedition Act had a virtue in that it inspired its opponents to develop a progressive, broad libertarian theory of the First Amendment. *Id.* at 282-349. Smith also noted the outpouring of opposition, but saw it differently, arguing that the opponents had been "prepared by a century of libertarian thought to make cogent responses to the majority party's maneuver and to reject emphatically the Blackstonian position on freedom of expression which the Federalists used." SMITH, *supra* note 15, at 84.

30. *See Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (stating that it was impossible that Framers intended "narrow view then reflected by the law of England that [press] freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice"); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 534-35 (1983) (questioning Levy's thesis and arguing that to accept it as true would require belief in proposition "that the press clause was directed at what was in America a non-issue—prior restraint—rather than at seditious libel, which had been the primary form of government restraint during the colonial period"); Smith, *supra* note 1, at 458 (1987) (stating that "[v]ery few Americans alive at the time of the ratification would have had any firsthand experience with prior restraint" and "discussion of government censorship as such largely was absent from the ratification debates"). *But see* W.R. Vance, *Freedom of Speech and of the Press*, 2 MINN. L. REV. 239, 248 (1918) (noting that prevailing view of American courts interpreting First Amendment freedom is freedom from prior restraints).

One might also suggest that prior restraint of speech was never at issue because, as Gallatin and Cooley observed, a person cannot effectively be stopped from speaking beforehand. *See* LEVY, *supra* note 15, at 302-30 (noting Gallatin's theory that prior restraint on speech was unthinkable and impractical because

obviously forbidden, the question remains as to why the doctrine against prior restraint reemerged as an issue 140 years after the adoption of the First Amendment, ultimately gaining the endorsement of the slimmest of Supreme Court majorities in *Near v. Minnesota ex. rel. Olson*?³¹

In examining this period, historians have been forced to draw numerous inferences using a bewildering number of obscure letters, newspaper columns, and speeches to buttress their points. A neutral observer, though, might find two points beyond debate: (1) the Framers shared no one viewpoint; and (2) while the Framers disputed the application of the First Amendment to specific situations, they agreed that it was intended as a limitation upon government. Some would have put the barrier higher, some lower, but the language of the amendment itself, the intent behind the Bill of Rights and the libertarian tenor of the times demonstrate irrefutably that “fences” were intended between speakers and government.³²

Commentary from sources as diverse as the Federalist Papers,³³

Congress could not “seal mouths or cut out tongues of the citizens of the Union”—so First Amendment must have banned subsequent punishment; Kalven, *supra* note 3, at 32 n.147 (“[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship”) (quoting 2 J. COOLEY, CONSTITUTIONAL LIMITATIONS 855-56 (8th ed. 1927)); *cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (stating that “[i]t is always difficult to know in advance what an individual will say”); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 91 (1984) (noting that “a court or prosecutor could not know of the planned solicitation before it is spoken”).

31. 283 U.S. 697 (1931); *see also* Gillmor, *supra* note 3, at 3 (summarizing paper presented by Garry Wills at *Near v. Minnesota* 50th Anniversary Symposium, May 1981). Even though the United States Supreme Court did not address the issue until 1931, the prior restraint doctrine did not lay dormant in state courts, which endorsed the doctrine against prior restraint, although not always enthusiastically. *See* Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts prior to Gitlow*, in *THE FIRST AMENDMENT RECONSIDERED—NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS* 14, 25-26 (Bill Chamberlin & Charlene Brown eds., 1982) (outlining state courts’ adoption of prior restraint and stating that it “did not always please state court judges”).

32. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72-73 (1963) (Douglas, J., concurring) (stating that “the Bill of Rights was designed to fence in the Government and make its intrusion on liberty difficult”).

33. *See The Federalist No. 51* (James Madison), in *II THE DEBATE ON THE CONSTITUTION* 163, 164 (B. Bailyn ed., 1993) (“If angels were to govern men, neither external nor internal controuls [sic] on government would be necessary. . . . A dependence on the people is no doubt the primary controul [sic] on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

"Brutus,"³⁴ "Agrippa,"³⁵ the "Federal Farmer"³⁶ and the "Plough Jogger,"³⁷ as well as more recent authority,³⁸ illustrate vividly that the central concern of the debate over the new Constitution was the limitation of governmental power.³⁹ In response to this concern, a

34. See "Brutus I," in *I id.* at 164, 174 ("In so extensive a republic, the great officers of government would soon become above the controul [sic] of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them."); "Brutus IX," in *II id.* at 40 (stating that government ought not have any control over certain rights and should be restricted as much as possible in exercise of powers operating to injury of community, which principles are not only common sense but great principles of late revolution); "Brutus XI," in *II id.* at 129, 134 (warning that men in office are "tenacious of power" and will "extend their power," so courts can be expected to "enlarge the sphere of their own authority").

35. See "Agrippa XVIII" (James Winthrop), in *II id.* at 155, 157 ("The experience of all mankind has proved the prevalence of a disposition to use power wantonly. It is therefore as necessary to defend an individual against the majority in a republick [sic], as against the king in a monarchy.").

36. See "Letters from the 'Federal Farmer' to 'The Republican,'" in *I id.* at 245, 277 (letter IV) (stating general presumption that "men who govern, will, in doubtful cases, construe laws and constitutions most favourably [sic] for encreasing [sic] their own powers").

37. See "Plough Jogger," in *II id.* at 414, 414-15 (recognizing need for more efficient government than prescribed by Articles of Confederation, consistent with liberties of people, but stating every possible check should be put on those having supreme power in our politics).

38. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55-77 (1967) (discussing how "disposition of power" was central controversy of revolution); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 23, 241 (1988) (examining principles founding American Republicanism and stating that ideology of Founding Fathers "posited an eternal struggle between liberty and power"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529-38 ("The tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present.").

39. Proponents of the new Constitution acknowledged that the document accorded power to the various branches, but contended that it granted no more power than was necessary and contained sufficient checks. See James Iredell *Urges Ratification, and a Vote is Taken*, in *II THE DEBATE ON THE CONSTITUTION* 910, 913 (B. Bailyn ed. 1993) (stating that to create power is to create potential for its abuse, but this Constitution represents medium between tyranny and anarchy, two extremes equally dangerous to liberty); "A Landholder" (Oliver Ellsworth III), in *I id.* at 329, 330 (stating that "[a] government capable of controlling the whole and bringing its force to a point is one of the prerequisites for national liberty."); *The Federalist No. 23* (Alexander Hamilton), in *id.* at 570, 573-74 ("The powers are not too extensive for the OBJECTS of foederal [sic] administration, or in other words, for the management of our NATIONAL INTERESTS; nor can any satisfactory argument be framed to shew [sic] that they are chargeable with such an excess."); *The Federalist No. 46* (James Madison), in *II id.* at 109, 115-16 (stating that "the powers proposed to be lodged in the Foederal [sic] Government are as little formidable to those reserved to the individual states, as they are indispensably necessary to accomplish the purposes of the Union"); *To Be or Not To Be? Is the Question*, in *II id.* at 406 ("To have energy, we must give power; to preserve liberty, that power must have sufficient checks." (emphasis in original)); George Washington to the Marquis de Lafayette, in *II id.* at 178, 179 (stating "the general Government is not invested with more Powers than are indispensably necessary to perform the functions of a good Government"); *The Weaknesses of Brutus Exposed: "A Citizen of Philadelphia"* (Pelatiah

Bill of Rights was promised. While urging approval of the Bill of Rights in his pivotal speech to the First Congress, James Madison proclaimed that “the great object in view is to limit and qualify the powers of government.”⁴⁰ He referred several times to the potential for abuse of governmental power and necessity of barriers,⁴¹ concluding: “I think we should obtain the confidence of our fellow citizens, in proportion as we fortify the rights of the people against the encroachments of the government.”⁴²

Rather than attempt to pinpoint which doctrine or rule of common law that a group, or even an individual, embraced in the late eighteenth century, it might be more useful to begin with this common constitutional philosophy of limiting government and use that to inform current thinking on the appropriate scope of the prior restraint doctrine.⁴³ As Thomas Jefferson urged, we should “recollect the spirit manifested in the debates” when interpreting the constitutional text.⁴⁴ Those who construe First Amendment liberty must be true to that spirit. It would be grossly anomalous to preserve a common law doctrine as it was understood in 1791 when

Webster), in *I id.* at 176, 187 (stating that “government may be safe and practicable, where the controuling [sic] authority . . . is strong enough to effect the ends of its appointment, and at the same time, [is] sufficiently checked to keep it within due bounds, and limit it to the objects of its duty”).

40. James Madison, *Amendments to the Constitution*, in 12 THE PAPERS OF JAMES MADISON, *supra* note 23, at 196, 204.

41. *See id.* at 199 (stating that all power is subject to abuse, so abuse of power by government is to be guarded against); *id.* at 203 (stating that many have thought it necessary to raise barriers against all government power, and bills of rights in federal and all state constitutions will have such salutary tendency); *id.* at 204 (arguing that legislative branch is more powerful and likely to abuse power than executive in our government, so declaration of rights must be levelled at legislative branch); *id.* at 205 (recognizing that discretionary powers, such as evidenced by necessary and proper clause, may admit of abuse, so argument is not conclusive that infringement of people’s rights is impossible because government may exercise only enumerated powers); *id.* at 206-07 (arguing that independent tribunals of justice will be motivated by declaration of rights to consider themselves guardians of those rights and impenetrable bulwark against every assumption of legislative or executive power); *id.* at 208 (advocating that equal right of conscience, freedom of press and trial by jury in criminal cases should be protected against state interference by including them in article one, section ten because “every government should be disarmed of powers which trench upon those particular rights”).

42. *Id.* at 209.

43. The futility of attempting to determine the Framers’ intent as a whole might be illustrated by the fact that the individuals changed their minds about the meaning of free speech and press. *See* LEVY, *supra* note 15, at 320-25 (explaining how Madison’s views changed “dramatically”). If one cannot even generalize about an individual, how can one generalize about a group?

44. SMITH, *supra* note 15, at 4; *see also* LEVY, *supra* note 15, at 348 (“The principles and not their Framers’ understanding and application of them are meant to endure.”).

the spirit in which it was endorsed would dictate its expansion or rejection under changed circumstances. To do so would exalt processes over substance.

The doctrine against prior restraint was emblematic of the Framers' philosophy of limited government.⁴⁵ Opposition to subsequent punishment for seditious libel was consistent with that philosophy as well, although some framers saw that more clearly than others. All agreed, however, that prior restraint was antithetical to freedom as they conceived it in the eighteenth century.⁴⁶ During the seventeenth century, when the press was entirely without liberty and prior restraint was the norm, achieving freedom from licensing was a huge step—a radical reform. The doctrine against prior restraint to this day, therefore, carries a certain cachet, a reminder of the baseline of freedom. Its symbolic value should not be underestimated.

III. PREMISES OF PRIOR RESTRAINT

Professor Vincent Blasi identifies three premises of prior restraint that are inconsistent with a constitutional scheme of limited government: (1) prior restraint implies trust in the state rather than in the individual and public; (2) speech is too risky in a democracy; and (3) individuals have no autonomy from the state.⁴⁷

Attributing his insight to John Milton whose *Areopagitica* stands as the classic attack on prior restraint, Blasi writes that a system of

45. See LEVY, *supra* note 15, at 272-73 (theorizing that freedom of press and exemption from prior restraints were essential to American governmental scheme of checks and balances).

46. See LEVY, *supra* note 15, at xi (stating that “[i]n any case, freedom of the press merely began with its immunity from previous restraints”); Emerson, *supra* note 2, at 652 (noting that current cases and commentary maintain eighteenth century distinction between strongly disfavored prior restraint and subsequent punishment); see also Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 4-5 (1989) (noting that label of prior restraint “is tantamount to a declaration that the law is unconstitutional”).

47. Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 69-82, 85 (1981). Similar principles apply when the issue is compelled speech rather than restrained speech:

True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs.

West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943) (invalidating compelled salute and pledge of allegiance to flag by schoolchildren).

ensorship is an indignity to both writers and readers because the inherent paternalism of the state associated with censorship implies a general distrust of speakers and audiences.⁴⁸ The state is a “suspicious, omnipresent tutor” if it must oversee and approve everything that is disseminated. Blasi concludes that “[n]o system of political authority premised on the consent of the governed can admit the state to that role, whatever the behavioral consequences.”⁴⁹

Although prior restraint contemplates a “particularly active and absolute form of intervention by the state,” some would welcome that role because of their suspicions regarding the rational capacities of the public. However, according to Blasi, while the rationality of the citizenry may be distrusted, the lesson of the First Amendment is that the state is distrusted even more. Blasi thus concludes that “[t]o trust the censor more than the audience is to alter the relationship between the state and citizen that is central to the philosophy of limited government.”⁵⁰

The second “troublesome premise” implicit in prior restraint is that speech is no different than any other hazardous activities that are licensed or enjoinable.⁵¹ However, according to Blasi, licensing is a method of enforcing social norms. Free speech, by its nature, does not observe such norms; social conformity distorts public discourse. As Blasi notes, “[o]nly when the public views controversial speakers as normal people, with a legitimate role to play in the social system, can the fragile state-individual balance be maintained.”⁵² Speech, like democracy in general, is risky, but that is its

48. Blasi, *supra* note 47, at 70-71; see also 4 WILLIAM BLACKSTONE, COMMENTARIES *152 (“To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”).

49. Blasi, *supra* note 47, at 71.

50. *Id.* at 73; cf. *Buckley v. Valeo*, 424 U.S. 1, 257 (1976) (Burger, C.J., concurring in part and dissenting in part) (“[F]reedom is hazardous, but some restraints are worse.”); *Pennkamp v. Florida*, 328 U.S. 331, 351 (1946) (Frankfurter, J., concurring) (stating that basis for democracy is “reason not authority”).

51. Blasi, *supra* note 47, at 78-79; cf. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 27 (1975) (arguing that states license or regulate restaurants, pool halls, and Turkish baths, so why not abortion clinics or doctors’ offices?). See generally LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986) (exploring extremist speech within context of First Amendment).

52. Blasi, *supra* note 47, at 79; see also *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (explaining that function of free speech under our system is to invite dispute, induce unrest, create dissatisfaction, or even stir anger).

Freedom of speech must contemplate more than protection of inoffensive speech expressing mainstream attitudes. Recognition of this truism prompted the Supreme Court to observe:

We can have intellectual individualism and the rich cultural diversities

virtue.

The third and perhaps most obvious premise of prior restraint is its subordination of individual autonomy. Blasi contends that prior restraints, such as

licensing systems and injunctions coerce or induce speakers to relinquish full control over the details and timing of their communications. These regulatory systems must be premised, therefore, on the notion that either such control is not an essential attribute of the autonomy of speakers, or that such autonomy need not be respected. Either premise is objectionable.⁵³

Thus, prior restraints could not be consistent with the concept of a limited government.

Of particular interest to this essay is Blasi's use of the word "induce" in the preceding excerpt. At least historically, coercion and not inducement characterized prior restraint. In Tudor-Stuart England, those who published without permission risked not only the Crown's "most high displeasure and indignation," but imprisonment and the forfeiture of all goods, chattels and bonds;⁵⁴ destruction of press and type;⁵⁵ torture on the rack;⁵⁶ amputation;⁵⁷ and execution.⁵⁸ Prior restraint was enforced by vicious subsequent punishment, leaving one to wonder about the validity of the distinction.

Governmental inducements also pose a threat to the libertarian values that Blasi articulated.⁵⁹ Particularly if the state finds coercion unacceptable for legal or political reasons, it may turn to

that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).

53. Blasi, *supra* note 47, at 85.

54. FREDRICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 49 (1952).

55. *Id.* at 73-74.

56. *Id.* at 100.

57. *Id.* at 91-92.

58. *Id.* at 50.

59. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

more sophisticated means of suppressing speech and depreciating autonomy. The state may find the threat of subsequent punishment an appealing alternative to the direct coercion of most prior restraints. All laws authorizing subsequent punishments of expression can be considered tantamount to prior restraints, however, because laws penalizing behavior are intended to induce avoidance of that behavior.⁶⁰ Nearly every commentator on prior restraint feels compelled to note the dubious distinction in actual effect.⁶¹

60. Scordato, *supra* note 46, at 8-9.

61. See *Alexander v. United States*, 113 S. Ct. 2766, 2779, 2782-83 (1993) (Kennedy, J., dissenting) (criticizing majority for relying on distinction between prior restraints and subsequent punishments and arguing that "[t]he rights of free speech and press in their broad and legitimate sphere cannot be defeated by the simple expedient of punishing after in lieu of censoring before"); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (stating that penal statute no less effective or, if impermissible, less pernicious than censorship by licensing system); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931) ("[T]he liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."); LEVY, *supra* note 15, at 13, 316 (looking to writings of Madison and concluding that "a law inflicting penalties would have the same effect as a law authorizing a prior restraint"); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, at xiii (1993) (calling failure to hold as unconstitutional subsequent punishments for speech "a jarring conclusion"); Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 551 (1977) (analyzing "prior-subsequent distinction"); Blasi, *supra* note 47, at 11, 25-27, 73 (stating that question is whether licensing and injunctions induce significantly more self-censorship); Emerson, *supra* note 2, at 648, 660 (noting that subsequent punishment "may prove a greater obstruction" than prior restraint of speech); John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 427 (1983) (comparing injunctions to subsequent punishments); Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 185-86 (1981) (stating that subsequent punishment is prior restraint for all practical purposes because "[i]ts object is to prevent publication, not to impose punishment"); Thomas R. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 521 (1977) ("The threat of criminal and civil penalties can inhibit arguably protected expression from reaching the public just as effectively as injunctions or licensing schemes."); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 253, 265, 269-70, 276-78 (1982) (arguing that "[s]ubsequent punishment is calculated to suppress, and does indeed suppress, the publication of speech"); Scordato, *supra* note 46, at 8-9 (stating that all laws intend to influence behavior before its actual occurrence; virtually all laws are therefore prior restraints); Diane F. Orentlicher, Comment, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662, 667 (1981) (arguing that traditional distinction is "somewhat misleading" because both purpose and probable effect of subsequent punishment is to deter communications, and also prior restraints may be disobeyed, with sanctions for violation occurring after the fact as with any subsequent punishment); cf. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1318 (1984) (recognizing that "fines may deter no less thoroughly than the threat of prison and taxes no less effectively than fines"). But see Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 90 (1984) (arguing that there are significant distinctions between subsequent punishments and prior restraints).

The inducements that Blasi considers infringements on individual autonomy are subtler, however, than those present in a system that prefers subsequent punishment over prior restraint. Blasi actually endorses subsequent punishment over a system of prior restraint that includes government intrusions in the formative stage of expression to "bargain" over the content or timing of expression. Such licensing and injunctive systems tend to bring speakers and regulatory agents together before the speech, opening the door to negotiations and conditions.⁶² However, noting that if the speakers are not mandated to bargain and are doing so of their own free will, Blasi questions whether the autonomy of an individual is infringed. Blasi states: "Speakers tempted to bite at the apple of compromise

Professor Mayton even dubbed subsequent punishment the "paradigmatic prior restraint." Mayton, *supra*, at 249. Mayton theorized that not only are punishments after the fact more effective than attempted restraints beforehand because of the widespread self-censorship that is induced, but the general deterrence associated with subsequent punishments is cheaper than the specific deterrence of individualized prior restraints; therefore, the state prefers subsequent punishment. *Id.* at 266-72. Mayton cited *Southeastern Promotions, Ltd. v. Conrad* for the phrase often quoted in homage to a system of prior restraint: "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Id.* at 269 (quoting *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 559 (1965)). Mayton then responded:

Of course it would. Because only a "few" will be hardy enough to speak in violation of a criminal statute, subsequent punishment carries with it diminished enforcement costs. In contrast, to "throttle them and all others beforehand," as by injunctive relief, imposes large enforcement costs: Such selective means of enforcement require judicial process for each instance of suppression.

Id. at 269-70. To further support his theory, Mayton related the example of the *Progressive* case, in which the government dropped its attempts at suppression by injunction when a number of publishers gained access to the information. *Id.* at 272 (citing *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979)). The Justice Department reportedly was unable to maintain all of the different litigations necessary to suppress the articles. *Id.* at 272 & n.170.

Publishers might actually prefer the certainty, reduced risk and normally lesser sanctions of prior restraint. Emerson, *supra* note 2, at 659; *see also* Blasi, *supra* note 47, at 26-27, 39, 48-49 (arguing that license is kind of "passport" to pursue certain controversial enterprises); *cf.* Mayton, *supra*, at 271-72 (stating that, "as rational cost avoiders," publishers prefer preventive relief in face of subsequent punishment system, thus "telling us something about the relative costs of the two systems"). Justice Black, though, has wondered whether "a statutory scheme of censorship" might be less of a deterrent to speech than the threat of contempt of court for speech that might have a "reasonable tendency" to obstruct justice." *Bridges v. California*, 314 U.S. 252, 269 (1941) (finding reasonable tendency test constitutionally insufficient).

62. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71-72 (1963) (noting that private consultations between government and publishers for advertisement purposes is constitutionally permissible); *cf.* Kreimer, *supra* note 61, at 1373 (stating that "while government must expend resources to find victims of penal sanctions, recipient of benefits seeks out government").

are in no position to complain on libertarian grounds about the government's failure to protect them from their own willpower."⁶³ He adds, however, that the individual's actions would have consequences for other individuals and our constitutional premises:

Although a succession of individual speakers may freely accept the intrusion of government into the formulative stages of the communicative process, the collective effect of such a pattern of intervention can amount to a fundamental reallocation of roles in the direction of greater authority for the state and less authority for the individual. . . . That is true even when the immediate actors in the regulatory drama remain insensitive to the dimension of role allocation, or cravenly choose to ignore it.⁶⁴

In short, even when individuals are willing to sacrifice principles for practical rewards, the state is not relieved of its constitutional responsibility to forgo speech regulation. Whether the state restrains speech through outright coercion or through inducement to accept its conditions, the state has violated the philosophy of the First Amendment contemplated by the Framers and the libertarian premises of limited government.

IV. ILLUSTRATING THE PREMISES OF THE DOCTRINE AGAINST PRIOR RESTRAINT

While the courts have applied the prior restraint doctrine in a wide variety of cases, they have declined to apply it in an even larger number of cases that arguably could have qualified.⁶⁵ Where the

63. Blasi, *supra* note 47, at 81.

64. *Id.* at 81-82; *see also* Kreimer, *supra* note 61, at 1387. The Keimer article states:

The case for recognition of waivers rests on the conviction that constitutional rights protect individual choice. But many constitutional rights protect other values or protect individual choice only as a means to the realization of other ends. For such rights, there is no paradox in asserting that the choice of the individual should not decide the applicability of the right in question. . . . To the extent that a right is the result of a definition of the structure and power of government, an individual decision to waive it is irrelevant.

Id. (footnotes omitted).

65. In a number of cases arguably involving prior restraint, the Justices never address the issue. *See, e.g.,* Florida Star v. B.J.F., 491 U.S. 524, 541 n.9 (1989) (acknowledging that Court did not address impermissible prior restraint argument concerning constitutionality of statute that prohibited publishing name of victim of sexual offense); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-02 (1979) ("The resolution of this case does not turn on whether the statutory grant of authority to the juvenile judge to permit publication of the juvenile's name is, in and of itself, a prior restraint."). There is likewise little or no mention of the prior

doctrine has applied, generally the Supreme Court labels the regulation at issue a prior restraint, with perhaps a few words about the

restraint doctrine in whole areas of speech in which elaborate systems of licensing or other prior restraints are imposed, as in broadcast licensing, commercial speech bans and S.E.C. regulations of speech. *See, e.g.*, *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 359 (1986) (Stevens, J., dissenting) (advertising of casino gambling); *Lowe v. SEC*, 472 U.S. 181, 227, 234 (1985) (White, J., concurring) (involving publication of newsletters containing investment advice).

For examples of decisions in which the dissent contended prior restraint was at issue, but a majority disagreed, see *Alexander v. United States*, 113 S. Ct. 2766, 2779 (1993) (Kennedy, J., dissenting) ("The admitted design and one overt purpose of the forfeiture in this case are to destroy an entire speech business and all its protected titles, thus depriving the public of access to lawful expression. This is restraint in more than theory. It is censorship all too real."); *CNN v. Noriega*, 498 U.S. 976, 976 (1990) (Marshall, J., dissenting from denial of writ of certiorari) (arguing that enjoining CNN from broadcasting taped conversations of defendant in criminal proceeding without any finding on part of Court that suppression was necessary to protect defendant's right to fair trial was prior restraint and thus unconstitutional); *Ward v. Rock Against Racism*, 491 U.S. 781, 808-12 (1989) (Marshall, J., dissenting) (contending that "city's exclusive control of sound equipment" is prior restraint); *Snapp v. United States*, 444 U.S. 507, 526 (1980) (Stevens, J., dissenting) (concluding that remedy against CIA agent who wished to publish book was prior restraint); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 (1976) (Blackmun, J., dissenting) (reaffirming rejection of "notion that First Amendment protection is diminished for 'exotic materials' " and stating that Court should not be influenced by characterization of ordinance as merely zoning ordinance or by "adult" content of material); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 394-95 (1973) (Burger, C.J., dissenting) (stating that "I believe the First Amendment freedom of press includes the right of a newspaper to arrange the content of its paper . . . as it sees fit" and concluding that commission's order acts as prior restraint); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 446 (1957) (Warren, C.J., dissenting) (holding that by judging quality of literature or art, Court imposed prior restraint); *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting) (holding that indictment based on conspiracy to organize communist party and use speech or newspapers to advocate overthrow of government "is a virulent form of prior censorship of speech and press, which . . . the First Amendment forbids"); *Kovacs v. Cooper*, 336 U.S. 77, 101 (1949) (Black, J., dissenting) (arguing that ban on all sound trucks goes beyond prior censorship).

Of course, in the leading prior restraint decision, *Near v. Minnesota ex rel. Olson*, the majority thought the case involved prior restraint but the dissent disagreed. 283 U.S. 647, 733-36 (1931) (Butler, J., dissenting). For examples of similar disagreements, see *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 792 (1988) (White, J., dissenting) (criticizing majority's characterization of ordinance which allows mayor to deny newsrack permit as prior restraint); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 565 (1975) (White, J., dissenting) (disagreeing with Court's conclusion that city's refusal to rent its theater, thus disallowing performance of rock musical, constituted impermissible restraint); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 222 (1964) (Harlan, J., dissenting) (disagreeing with Court's holding because "lurking" in plurality opinion was "unarticulated premise" that case involved prior restraint); *Bridges v. California*, 314 U.S. 252, 269, 290 (1941) (although dissent thought contempt of court did not constitute "a censorship in advance but a punishment for past conduct," majority talked of its "censorial quality" and compared it to "deliberate statutory scheme of censorship"); *see also* *Mayton, supra* note 61, at 263-64 (discussing Justice Harlan's dissent in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

evils of censorship, but without offering a definition of prior restraint, much less an explanation as to why the given regulation qualifies. Given the Court's approach, there seems to be no single, coherent definition of prior restraint. As one commentator has stated, the absence of a definition is "remarkable" in light of the "historical significance of the concept."⁶⁶

Despite the Court's failure to articulate a definition, a prior restraint might be defined as an attempt by government to stop publication because of content in advance of publication.⁶⁷ This definition is generally limited to licensing systems and injunctions, thus excluding statutory restrictions, which are relegated to the realm of subsequent punishments. However, because the Court has

66. Scordato, *supra* note 46, at 8 n.38 (1989). One commentator has gone so far as to say that "[m]odern prior restraint doctrine defies definition." Smith, *supra* note 1, at 470; see also *Alexander v. United States*, 113 S. Ct. 2766, 2780 (1993) (Kennedy, J., dissenting) ("To be sure, the term prior restraint is not self-defining.").

67. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) ("New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned.")

Other courts and scholars have offered their versions. See *Alexander v. United States*, 113 S. Ct. 2766, 2779 (1993) (Kennedy, J., dissenting) ("In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents."); Blasi, *supra* note 47, at 11, 14-15 n.17 ("The doctrine of prior restraint embodies a temporal preference. Acts of expression that could be sanctioned by means of criminal punishment or a civil damage award may not be regulated 'in advance.'"); Emerson, *supra* note 2, at 648 (defining prior restraint as "official restrictions imposed upon speech or other forms of expression in advance of actual publication"); Jeffries, *supra* note 61, at 410 ("The doctrine imposes a special disability on official attempts to suppress speech in advance of publication—a disability that is independent of the scope of constitutional protection against punishment subsequent to publication."); Mayton, *supra* note 61, at 245 ("The prior restraint doctrine precludes, except in certain limited circumstances, state-imposed restraints with respect to the publication of speech."); Redish, *supra* note 30, at 53 ("Under the prior restraint doctrine, the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination."); Scordato, *supra* note 46, at 6-7, 30-31 (stating that no implicit definition can be gleaned from pattern of Supreme Court cases, but proposing definition that would "include all government actions, and only those government actions, that result in the physical interception and suppression of speech prior to its public expression"). Media attorney Floyd Abrams emphasized the presence of discretion in the definition of prior restraint, because total bans entail subsequent punishment. See Jon Dilts & Steve Helle, *PLI Communication Law Seminar Addresses Important Changes in Media Law During 1993*, 21 MEDIA L. NOTES 4, 5 (Winter 1994) (according to Abrams, prior restraint exists only if censors have discretion); see also Mayton, *supra* note 61, at 253, 281 (proounding that core concern of prior restraint doctrine is loose, discretionary censorship without judicial oversight, and that is same problem with subsequent punishment).

explored what Professor Jeffries calls the “latent plasticities”⁶⁸ of the concept, the notion of prior restraint has diverged further from the practices of the licenser to which Blackstone referred.⁶⁹ Even the broad definition in this paragraph proves insufficient as the Court has resorted to the doctrine against prior restraint in the case of a nongovernmental commission;⁷⁰ when no attempt was made to stop publication, but merely to classify the content;⁷¹ to erect procedural safeguards that nonetheless provided for screening content;⁷² and in cases involving statutes that discouraged publication with penalties that might otherwise be considered subsequent punishment.⁷³ Those cases in which the Court has condemned the regulation as a prior restraint do, however, aptly illustrate the libertarian principles that provide the intellectual foundation for the doctrine against prior restraint, namely: (1) distrust of government; (2) acceptance of the risk inherent in speech; and (3) individual autonomy from government.

A. *Distrust of Government*

Distrust of government is a primary rationale underlying the doctrine against prior restraint. For example, in *Near v. Minnesota ex rel. Olson*,⁷⁴ which first explicitly adopted the doctrine against

68. Jeffries, *supra* note 61, at 413.

69. See 4 WILLIAM BLACKSTONE, COMMENTARIES *152 (“To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the . . . infallible judge of all controverted points.”); see also Mayton, *supra* note 61, at 247-48 (reviewing licensing practices in Blackstone era).

70. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

71. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968) (reviewing actions of Texas administrative board that classified films as “suitable for young persons” or “not suitable for young persons”). The phrase “prior restraint” did not explicitly appear in the case, but the case was characterized after the fact as such. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 n.8 (1975) (discussing Court’s classification in *Interstate Circuit* as prior restraint).

72. See *Southeastern Promotions*, 420 U.S. at 563 (Douglas, J., concurring in part, dissenting in part) (providing for procedural safeguards in choosing musical acts at outdoor theater and stating that “[t]he critical flaw in this case lies, not in the absence of a few procedural safeguards, but rather in the very nature of the content screening in which respondents have engaged”); *Freedman v. Maryland*, 380 U.S. 51, 61-62 (1965) (Douglas, J., concurring) (providing for procedural safeguards relating to movie distribution and stating “[a]ny authority to obtain a temporary injunction gives the State ‘the paralyzing power of a censor’”).

73. See *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1939) (finding subsequent punishment “results in a continuous and pervasive restraint on all freedom of discussion”); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 735 (1931) (Butler, J., dissenting) (discussing statute that provided for injunction if party printed proscribed speech).

74. 283 U.S. 697 (1931).

prior restraint as constitutional law in 1931, the Court referred repeatedly to the danger of the regulation at issue in deterring criticism of government. Governmental abuse of its authority, with regard to both official misconduct and the exercise of the discretion necessary to implement the regulation, was the principal concern in *Near*.⁷⁵ The statute at issue was intended to quell seditious libel, and in striking the statute, the Court served notice that prior restraint doctrine had broken free from its historical moorings.⁷⁶ The *Near* case involved a governmental ban on speech in advance of publication based on its content, although the ban was in the form of a nuisance statute enforced by judicial injunction.⁷⁷ Plaintiff *Near* was ordered, under contempt of court, to stop publishing malicious and scandalous libels adjudged to be nuisances.⁷⁸

Striking down the statute because it was the “essence of censorship,”⁷⁹ the majority in *Near* maintained that such statutory schemes “must be tested by [their] operation[s] and effect[s].”⁸⁰ Liberty of

75. *See id.* at 712-13 (observing that judicial determination of whether allegations of official misconduct consistent with public welfare was “essence of censorship”); *see also* *Poulos v. New Hampshire*, 345 U.S. 395, 426 (1953) (Douglas, J., dissenting) (“The nature of the particular official who has the power to grant or deny the authority does not matter. Those who wrote the First Amendment conceived of the right to free speech as wholly independent of the prior restraint of anyone. The judiciary was not granted a privilege of restraint withheld from other officials. For history proved that judges too were sometimes tyrants.”); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (“Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint . . .”).

76. Jeffries, *supra* note 61, at 416. Professor Jeffries observed that the statute in *Near* was only a “repackaged version of the law of seditious libel.” The hostility of the Justices to such a scheme created “pressure, so typical of this doctrine, to cram the law into the disfavored category of prior restraint, even though it in fact functioned very differently from a scheme of official licensing.” *Id.*

77. *Near*, 283 U.S. at 701-03.

78. *Id.* at 703-04.

79. *Id.* at 713.

80. *Id.* at 708, 713, 723; *cf. id.* at 712 (referring to “object and effect of the statute”). The Court in *Near* went on to state that “in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . .” *Id.* at 708. The Court referred to the importance of substance on two other occasions. *Id.* at 711, 713. This would seem contrary to the assertions of some commentators that the doctrine of prior restraint “deals with limitations of form rather than of substance.” Emerson, *supra* note 2, at 648; *see also* Jeffries, *supra* note 61, at 410-11 (quoting Professor Emerson and adding “that the doctrine must be justified by considerations dependent on form and not simply by reference to the substantive coverage”).

The dissent contended that this was not a licensing system within the historical meaning of previous restraint, but a remedy for past transgressions. *Near*, 283 U.S. at 735 (Butler, J., dissenting); *see also* Emerson, *supra* note 2, at 654 (asserting that statute involved in *Near* was ostensibly “a system for subsequent punishment by contempt procedure,” although in practice “a serious prior restraint”).

the press, historically and as endorsed by the Constitution, "was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct."⁸¹ Writing for the Court, Chief Justice Hughes interpreted the statute at issue as directed not just at libels of private citizens, "but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty."⁸² Based upon this statutory interpretation, Chief Justice Hughes concluded that the statute normally operated "in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers."⁸³ This was a somewhat remarkable proposition, given that the Court cited no specific language in the statute at issue,⁸⁴ or anything in either of the Minnesota Supreme Court opinions⁸⁵ in the case, to support its conclusion that the statute concerned primarily libels of public officers. Therefore, while the Minneapolis mayor, a chief of police and a county attorney had been libeled by the defendant, so also had grand jurors, two newspapers and the "Jewish race."⁸⁶ Interestingly, however, the Court seemed to emphasize operation and effect again when it observed that suppression of the newspaper or periodical was attributable to "charges [leveled by the newspaper or periodical] of official misconduct and the fact that the newspaper or periodical [was] principally devoted

81. *Near*, 283 U.S. at 717. Freedom of the press consists, among other things, of communication on the administration of government, "whereby oppressive officers are shamed or intimidated, into more honourable [sic] and just modes of conducting affairs." *Id.* (quoting Letter from the Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774)).

82. *Id.* at 710.

83. *Id.*

84. The Minnesota statute is excerpted at the outset of the opinion. *Id.* at 702-03. The Court did cite the Minnesota libel statute as authority for its conclusion that the statute at issue in *Near* was concerned with concealing the derelictions of public officers, noting that the libel statute provided a defense for fair comment regarding "the conduct of a person in respect to public affairs" that was not in the nuisance statute involved in *Near*. *Id.* at 710-11 n.3. However, the absence of any privilege for fair comment in the nuisance statute does not suggest a negative inference that it was solely or even primarily for the benefit of public officers, because the fair comment privilege covers expression relating to anybody involved in matters of public interest or concern, which can include, for example, corporations. See ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* 238-41 (2d ed. 1994) (describing individuals and entities subject to fair comment).

85. *Near*, 283 U.S. at 705-06 (citing *State ex rel. Olson v. Guilford*, 228 N.W. 326 (1929), *rev'd sub nom. Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) and *State ex rel. Olson v. Guilford*, 219 N.W. 770 (1928)).

86. *Id.* at 703-04.

to that purpose."⁸⁷ The Court mentioned a concern for the protection of expression regarding official misconduct seventeen times in its opinion.⁸⁸ Skepticism of the government's capacity to oversee publications that criticized the government itself was hardly ameliorated by allowing a judge to determine if future issues were "consistent with the public welfare."⁸⁹ In the final analysis, if the statute in *Near* operated to suppress expression critical of official misconduct, the doctrine against prior restraint was designed to thwart its operation as well as its effect.

The *Near* majority's expansion of the notion of prior restraint to encompass judicial injunctions, as well as administrative licensing systems, initiated an academic debate that continues to this day.⁹⁰ It is significant that in *Near*, the Court's first pronouncement on prior restraint, the Court signaled its intention not to be bound by classical conceptions of prior restraint. Not coincidentally, it is also significant that the *Near* opinion stands as tribute to the checking function, which the Framers held dear⁹¹ and which presupposes governmental abuse of its authority.⁹² In subsequent cases, the

87. *Id.* at 711.

88. *See id.* at 710 (twice), 711 (three times), 712 (twice), 713 (twice), 717 (twice), 718 (twice), 719, 721, 722, 723.

89. *Id.* at 713.

90. Compare Blasi, *supra* note 47, at 24 (contending that injunctions merit status accorded to them by Court as prior restraints deserving of treatment similar to that given licensing systems) and Emerson, *supra* note 2, at 654-56 (same) and Howard Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 293-95 (1982) (same) and Thomas R. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 539, 552 (1977) (same) with Barnett, *supra* note 61, at 549-51 (disagreeing with conclusion that injunctions deserve treatment similar to that given to licensing schemes characterized as prior restraints) and Jeffries, *supra* note 61, at 433 (same) and Mayton, *supra* note 61, at 249-53, 275-81 (same) and Redish, *supra* note 30, at 90 (same).

The truly unfortunate aspect of *Near*, though, is not that it broadened the scope of prior restraint, but that it diluted the concept. In dicta, the Court alluded to the "exceptional cases" where speakers would not be immune from previous restraint: when the nation is at war, cases involving the "requirements of decency" or cases involving incitements to violence. *Near*, 283 U.S. at 716. Before the *Near* decision, the doctrine against prior restraint had been understood as unqualified and without exception. *See* Smith, *supra* note 1, at 457, 462, 470 (arguing that "historical evidence supports the absolutists' position that the Framers intended that the press clause prohibit not only prior restraint, but also all content-based controls available to government").

91. *See* Blasi, *supra* note 38, at 527-28, 533 (discussing development of First Amendment due to framers' concern that government should be "checked").

92. *Id.* at 529 & n.24, 541. Government's role in the formerly private sector is extensive and growing. *See* Kreimer, *supra* note 61, at 1295-96 (discussing government's increased participation in traditionally private areas by conditioning funding on various social goals as well as government's expanding role in private economy).

Court continued to emphasize its concern for governmental exercise of discretion in matters relating to speech in a line of prior restraint cases,⁹³ many of which were closer in kind to the licensing system contemplated by Blackstone.⁹⁴ However, the first prior restraint case following *Near* illustrated that the Court also considered taxation of the press and suppression of seditious libel as within the scope of prior restraint. The constant characteristic in all of these opinions on prior restraint issues has been a concern for government's abuse of its authority.

In *Grosjean v. American Press Co., Inc.*,⁹⁵ the Supreme Court invalidated as an unconstitutional prior restraint a Louisiana tax on selected newspapers that, on its face, did not seem even to qualify as a subsequent punishment.⁹⁶ The tax was imposed, not on content,

93. See *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992) (holding that "First Amendment prohibits the vesting of [arbitrary and] . . . unbridled discretion in a government official"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-60, 763-64, 766-72 (1988) (holding that "unfettered" discretion by government officials is not permitted); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (holding that "the danger of censorship . . . is too great where officials have unbridled discretion"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952) (criticizing law where "the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies"); *Kunz v. New York*, 340 U.S. 290, 294-95 (1951) (explaining that lack of standards governing official action invalidates city ordinance); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) (discussing "the invalidity of . . . limitless discretion"); *Saia v. New York*, 334 U.S. 558, 559-60 (1948) (holding that city ordinance that places right to be heard in "uncontrolled" discretion of police chief is unconstitutional on its face); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (stating that issuance of permit by mayor's discretion if "proper or advisable" is "administrative censorship in an extreme form"); *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940) (explaining that act allowing government official to use unguided discretion "is a denial of the liberty protected by the First Amendment"); *Schneider v. State*, 308 U.S. 147, 163-64 (1939) (striking down statute allowing "police officer to determine, as a censor, what literature may be distributed").

94. See Jeffries, *supra* note 61, at 417 & n.29 (noting that line of prior restraint cases following *Near* "hark[en] back to the original meaning of prior restraint as official licensing").

95. 297 U.S. 233 (1936). Professor Emerson was particularly critical of the Court's application of the prior restraint doctrine in the tax cases. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 511 (1970). The doctrine could only be relevant, he wrote, if it applied to any regulation that inhibited First Amendment freedom. *Id.* As Emerson noted "[w]hen employed in this way the concept becomes so broad as to be worthless as a legal rule". *Id.*

96. See *Grosjean*, 297 U.S. at 240-41 (providing detailed description of tax at issue). The tax was part of a 1934 legislative package that would introduce, among other things, various new taxes and repeal the Louisiana poll tax and personal property tax on cars, all the brainchild of Huey Long, former governor of the state, but serving at that time as United States Senator. T. HARRY WILLIAMS, *HUEY LONG* 716 (1969). Long, in attempting to bring Louisiana's highway system and schools into the twentieth century and implement his populist program (not to mention create a base for his challenging Franklin Delano Roosevelt for the presidency),

but on the basis of circulation. All newspapers that circulated more than 20,000 copies weekly were required to pay a tax of two percent on gross receipts.⁹⁷ The tax was statutory, and the penalty for failure to pay the tax was a possible fine of up to \$500 as well as imprisonment not exceeding six months.⁹⁸

The Court traced the history of "taxes on knowledge" to the English experience, taking judicial notice of the Framers' familiarity with that legacy.⁹⁹ Writing for the unanimous Court, Justice Sutherland observed that stamp taxes and taxes on advertising historically had not been intended to gain revenue but to control the flow of information regarding government.¹⁰⁰ These taxes shared that characteristic with prior restraint, but of course, the same might have been said of seditious libel laws, which constituted subsequent punishments and which operated concurrently with the English system of taxes on the press. Justice Sutherland concluded his survey of English repression of the press with a quote from Thomas Erskine: "The liberty of opinion keeps governments themselves in due subjection to their duties."¹⁰¹ The quote, although it is not clear from Sutherland's opinion, dates to 1792, the year after the First Amendment was enacted, and was made in defense of free-

exercised political power that was marked in its audacity, scope and complete control. *Id.* at 305-09. This did not endear him to the Old Regulars, who comprised the establishment business interests, including the conservative newspapers of the state, which controlled politics before Long came along. *Id.* at 190-91. When the 1934 package of bills languished in the legislature with many of them becoming ineligible for consideration, Long returned from Washington, D.C., and personally rammed them through in a display of raw political maneuvering that was as breathtaking as it was ingenious. *See id.* at 717-21 (discussing Long's political maneuverings). The state of the tax bills concerned him particularly. *Id.* at 717-18.

This colorful legislative history never made it into the *Grosjean* opinion, beyond vague references to the "suspicious" form of the tax and the "deliberate and calculated" purpose of penalizing publishers and limiting information. *Grosjean*, 297 U.S. at 250-51. Long was assassinated in the year before the opinion, so perhaps the Justices were being charitable to the dead. But almost 50 years later, the Court referred explicitly to allegations in the brief and argument of the publishers as to how the tax on 13 of 124 newspapers in the state was Huey Long's revenge on the "lying newspapers" that had "ganged up" on him. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r*, 460 U.S. 575, 579-80 (1983). The Court in *Minneapolis Star & Tribune* noted the general conclusion that the tax had been motivated by "improper censorial goals" and indicated the result in *Grosjean* was perhaps partially attributable to the reaction of the *Grosjean* Court to Long's stated interest in imposing a "tax on lying" upon those who criticized him. *Id.* at 580.

97. *Grosjean*, 297 U.S. at 240.

98. *Id.* at 241.

99. *Id.* at 245-47.

100. *Id.* at 247.

101. *Id.* at 247-48 (quoting 1 ERSKINE'S SPEECHES, High's edition 525).

dom for seditious libel.¹⁰² More importantly, it expressed the idea that free expression had a definite role to play in controlling governmental abuse of authority.

The *Grosjean* case, thus, articulates the checking function of the press and the threat that governmental abuse of its authority poses to that essential value of freedom of the press. Using the British government as its example, the Court in *Grosjean* assailed the "persistent effort" to curtail any criticism, true or false.¹⁰³ The Court then noted that the "predominant purpose" of the First Amendment was "to preserve an untrammelled press as a vital source of public information."¹⁰⁴ It described public opinion as "the most potent of all restraints upon misgovernment."¹⁰⁵ Therefore, because the key to informed public opinion is a free press performing the vital function of the Fourth Estate, the Court determined that to allow the press "to be fettered is to fetter ourselves."¹⁰⁶ The Court in *Grosjean* ultimately concluded that the First Amendment was meant to preclude "any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods," referring to a stamp tax and a tax on advertising.¹⁰⁷ In assessing its overall importance, *Grosjean* might be considered just another product of a confused Court looking to slap a "talismanic" symbol on a regulation that the Justices abhorred.¹⁰⁸

102. For a discussion of Erskine's defense of Thomas Paine, including the quotation in question, see LEVY, *supra* note 15, at 285-86.

103. *Grosjean*, 297 U.S. at 245.

104. *Id.* at 250.

105. *Id.* The aim of the century-long struggle in England for freedom of the press was "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." *Id.* at 247.

106. *Id.* at 250.

107. *Id.* at 249.

108. See *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 222 (1964) (Harlan, J., dissenting) (quoting Justice Frankfurter in *Kingsley Books* and explaining rationale for doctrine against prior restraints); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) ("'[P]rior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test.").

In an earlier case, Justice Frankfurter had warned against substituting formulas for considered judgment, stating:

This Court sits to interpret, in appropriate judicial controversies, a Constitution which in its Bill of Rights formulates the conditions of a democracy. But democracy is the least static form of society. Its basis is reason not authority. Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most mischievous when contending claims are those not of right and wrong but of two rights, each highly important

On the other hand, however, the case might be read as abandoning an antiquated notion of prior restraint as limited to administrative licensing and giving more weight to "operation and effect," while being guided by a timeless philosophy of limited government.

Professors Jeffries and Redish emphasize that the doctrine of prior restraint presumes a dichotomy between prior restraint and subsequent punishment, with lesser protection, if any, accorded the latter.¹⁰⁹ The doctrine of prior restraint, they contend, actually inhibits development of a doctrine regarding whether some speech ought to be fully protected from both prior restraint and subsequent punishment.¹¹⁰ However, one might suggest that this might be a legitimate basis for reconceptualizing and revitalizing the doctrine, because even subsequent punishment constitutes a prior restraint. Professors Litwack, Mayton and Smith may be closer to the mark, observing that while the doctrine no longer fits its historical mold, it deserves great reverence nonetheless.¹¹¹

A virtue of the prior restraint doctrine, as it has come to be construed, is that it puts a heavy burden, indeed an insurmountable burden if case outcomes are any indication, on government. While various tests have been advocated in the same breath as the doctrine against prior restraint, the great strength of the doctrine is that it brings historical weight to bear in asserting outright skepticism of government. Prior restraints are presumed unconstitutional, and it is up to government to bear the heavy burden of attempting to overcome that presumption.¹¹² The doctrine has a pedigree that no test of compelling or overriding interests can match. The lessons embodied in the doctrine against prior restraint should not be forgotten, but they can easily be lost through mere balancing. The danger is not that the doctrine has outlived

to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it.

Pennekamp v. Florida, 328 U.S. 331, 350-51 (1946) (Frankfurter, J., concurring).

109. Jeffries, *supra* note 61, at 410-12; Redish, *supra* note 30, at 59.

110. Jeffries, *supra* note 61, at 411, 430-31 n.67, 433-34; Redish, *supra* note 30, at 54 & n.6 (1984).

111. See Litwack, *supra* note 61, at 521-22 (suggesting that historical definition of prior restraint may be too limited but nonetheless can be expanded beyond traditional scope); Mayton, *supra* note 61, at 249, 262-63, 281 (contending that expansion of doctrine against prior restraint to include injunctions in *Near* was deviation from "functional basis" of doctrine, but subsequent punishment should be on par with licensing and likewise disfavored because it is "paradigmatic prior restraint"); Smith, *supra* note 1, at 470-71 (noting that current doctrine of prior restraint is protective in some cases, but First Amendment Framers intended ban on *all* government control of content).

112. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (citations omitted).

its usefulness, but that courts will avoid applying it in cases where they tread new ground or simply succumb to the government's siren song of worst case scenarios triggered by failure to proscribe speech.

B. *Acceptance of Risk*

As identified by Blasi, worst case scenarios are integral to establishing risk aversion, the second premise implicit in a system of prior restraint.¹¹³ In imposing prior restraint, government is attempting to avert the consequences of speech that has not yet been uttered. This necessarily requires the government, including the courts that are passing on the constitutionality of the prior restraint, to gaze into crystal balls. Therefore, rationalizing the need for prior restraint lends itself to posing the worst possible consequence of the speech, if it were to occur. Those urging restraint of speakers ironically are compelled to suggest the most unrestrained imaginings of alleged danger.¹¹⁴ Professor Emerson alluded to this when he asserted that one of the negative aspects of prior restraint regimes "is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration."¹¹⁵ Put more succinctly, "[t]he function of the censor is to censor."¹¹⁶

The only antidote for the threats of worst case scenarios is a straightforward acknowledgement that while speech involves risks, a commitment to freedom must predominate, including freedom for the potent as well as the impotent. As Justice Holmes wrote, "[t]hat at any rate is the theory of our Constitution. . . . We . . . wager our salvation . . . upon imperfect knowledge."¹¹⁷ Justice Holmes addressed the penchant for concocting worst case scenarios head-on

113. Blasi, *supra* note 47, at 69-82, 85 (discussing three premises implicit in prior restraint).

114. *See* Board of Trustees v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991). The National Heart, Lung, and Blood Institute claimed that it needed to impose a contractual, all-inclusive prior restraint on the release of any findings by Stanford medical researchers in order not to raise unwarranted hopes in prospective patients. *Id.* at 477 & n.16. The claim received no sympathy from Judge Harold Greene who wrote that it constituted "a strange and attenuated way of protecting health and safety. Neither these defendants nor any other public officials have statutory or other authority to regulate citizens' hopes." *Id.*

115. Emerson, *supra* note 2, at 658.

116. *Id.* at 659; *see also* Blasi, *supra* note 47, at 59 (suggesting that "[licensing] officials can be expected to begin their chores with a predisposition to regulate expression").

117. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

when he urged citizens to be “eternally vigilant against attempts to check the expression of opinions that [they] loathe and believe to be fraught with death.”¹¹⁸ Freedom is not for the faint of heart.

Justice Holmes’ caveat against caution was tested in *New York Times Co. v. United States*, popularly known as the *Pentagon Papers* case.¹¹⁹ In this case, the government asserted that if documents classified as secret were published in the newspapers, then the alleged resultant danger would be “the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,” as well as prolonging the Vietnam War and greatly delaying the release of United States prisoners.¹²⁰ Dangers do not get any worse.

One might have wondered at this characterization of the danger, however, given that the Pentagon Papers were historical documents detailing the United States involvement in the Vietnam War.¹²¹ Not only did the Papers not give away any planned troop movements or strategic objectives, but they contained no information not already known to the North Vietnamese.¹²² Indeed, the people most ignorant of their content was the constituency of the government that was attempting to conceal them. The Papers, for example, revealed that the U.S. government had deliberately engaged in a manipulative public relations campaign aimed at U.S. citizens and foreign allies, with little relation to the actual war effort or negotiations—issues in which the North Vietnamese were, of course, intimately aware.¹²³ Justice Black, voting with the majority, identified what might have been the real danger that the U.S. government perceived: its own embarrassment.¹²⁴

118. *Id.* (Holmes, J., dissenting).

119. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

120. *Id.* at 763 (Blackmun, J., dissenting).

121. *See id.* at 722 n.3 (Douglas, J., concurring) (noting that documents in question were “not under any controlled custody” nor did they relate to any “future events”); NEIL SHEEHAN, *A BRIGHT SHINING LIE—JOHN PAUL VANN AND AMERICA IN VIETNAM* 685-86, 739 (1988) (describing origin and content of Pentagon Papers).

122. *See New York Times*, 403 U.S. at 722 n.3 (Douglas, J., concurring) (explaining that documents related only to history prior to 1968 and nothing about future acts).

123. SHEEHAN, *supra* note 122, at 554.

124. *New York Times*, 403 U.S. at 717 (Black, J., concurring). Justice Black stated:

[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspa-

In the last opinion he wrote before his death, Justice Black zeroed in on the government's use of "national security" as its cover for censorship in the case.¹²⁵ The phrase demonstrates a felicitous choice of words by the government.¹²⁶ An advocacy of "security" is meant to be comforting, an appeal to our natural tendency to avoid risk. Such an appeal also casts the newspaper's attempts to disclose the Papers in the unappealing role of exposing the country to hazards. Justice Black, however, cautioned that the word "security" was "a broad, vague generality."¹²⁷ He seemed to be suggesting that a government, whose capacity for deception in conducting war was revealed in the Papers, would not hesitate to deceive its citizens by promising security.¹²⁸ According to Justice Black, free speech does involve risks, but the Framers of the First Amendment, who fully appreciated what it took to defend a nation, nevertheless understood that free speech provided the only real security.¹²⁹

This paradox of security through risk is only one of many associated with the First Amendment: a freedom to espouse no freedom, freedom for the speech we hate, and a right to be wrong. All, however, share an implicit acknowledgement of the risk of free speech. Such paradoxes perhaps explain why Professor Emerson wrote that the theory of freedom of expression "does not come naturally to the ordinary citizen, but needs to be learned."¹³⁰ One does not ordinarily choose the more hazardous course, much less associate risk with security. Prior restraint appeals to that impulse favoring the safer path. The doctrine against prior restraint, how-

pers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

Id.

125. *Id.* at 718 (Black, J., concurring).

126. See Erwin Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161, 161-62 (1981) (stating that "government claims of national security constitute the ultimate threat to the first amendment").

127. *New York Times*, 403 U.S. at 719 (Black, J., concurring).

128. *Id.* (Black, J., concurring).

129. See *id.* (Black, J., concurring). Commenting on the opinions of Justices Black and Douglas in *New York Times*, one commentator stated:

One thing is clear to me. It is touched on eloquently by Justices Black and Douglas in their opinions. In a democracy the merits of war, even while we are fighting it, must be kept in the public forum. It has been a great American achievement of the past two decades, whatever the vexations, that so vigorous, searching, and uncharitable a critique of our wars has gone on while we were fighting them. This can never have happened before in the history of civilized peoples.

Kalven, *supra* note 3, at 35.

130. EMERSON, *supra* note 95, at 12.

ever, teaches not only that the government's worst case scenarios seem not to come true when information is ultimately published,¹³¹ but that attempts to achieve security through suppression pose the greater risk.¹³² The risk is not in speech being published, but in it *not* being published. That, as Justice Holmes said, "at any rate is the theory of our Constitution."¹³³

C. *Regard for Individual Autonomy*

The final premise of prior restraint that is also at odds with a constitutional system of limited government is a depreciation of individual autonomy. The Court in *Schneider v. State*,¹³⁴ for example, took note several times of the police power to promote the public

131. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). In this case the government characterized the danger as "thermonuclear proliferation" if *The Progressive* magazine were to publish its article on "The H-bomb Secret." *Id.* at 995. But the argument of the defendants and, indeed, the point of the article was that the information was *not* secret and that constrained access to plutonium, trained scientists, and considerable financial wherewithal were what kept countries from building their own nuclear weaponry, if they were deterred at all. *Id.* at 993-94. Howard Morland, author of the article at issue, contended that secrecy only furthered the policies of the U.S. government because it left key decisions on exporting plutonium, for example, to "experts" without the bother of interference from the public. See Howard Morland, *The H-Bomb Secret—How We Got It, Why We're Telling It*, *THE PROGRESSIVE*, Nov. 1979, at 14. The government declined to press its case for a permanent injunction when a number of newspapers demonstrated that the same information at issue in the *Progressive* case could be obtained from public sources. See DONALD M. GILLMOR ET AL., *MASS COMMUNICATION LAW: CASES AND COMMENT* 112 (5th ed. 1990) (explaining government's decision to discontinue fight for injunction). Thus, there was no more danger of thermonuclear proliferation after publication by *The Progressive* than there was before.

132. See *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting). Justice Brennan stated that when the "government seeks to manipulate private behavior by depriving citizens" of information, it 'strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them.'

Id. (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring)); see also Knoll, *supra* note 126, at 168 ("Prior restraint is, perhaps, the most obnoxious form of governmental abuse because it puts the government's own conduct beyond public scrutiny. . . . The government needs to offer no public justification for imposing secrecy; the justification itself is secret.").

133. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

134. 308 U.S. 147 (1939).

interest in regulating the public streets.¹³⁵ However, when municipal ordinances sought to license the dissemination of leaflets on those thoroughfares, the Court found that the ordinances infringed not only on individual speech, but on a system of government:

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

. . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.¹³⁶

If speaking in a public forum imposes burdens or inefficiencies on the state, such is the price of maintaining individual autonomy.¹³⁷ The ordinance addressed in *Schneider* was particularly odious to the Court in that it allowed a police officer, acting "as a censor," to determine what literature could be distributed and who would distribute it, and required pamphleteers to submit to questioning, photographing and fingerprinting.¹³⁸ Such censorship struck at the heart of free expression because it placed discretion in the officer rather than the speaker.¹³⁹ Moreover, the Court made clear that individual autonomy extended not only to the message but to the site of the speech: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."¹⁴⁰

135. *Id.* at 160, 163, 165.

136. *Id.* at 161 (footnote omitted).

137. *See id.* at 162 (discussing resultant littering as "indirect consequence" of disseminating pamphlets that can be addressed by prosecution of anti-littering laws without abridging speech).

138. *Id.* at 163-64.

139. *Id.*

140. *Id.* at 163. Contrast this deference regarding location with the test for regulation of time, place or manner of expression, which asks if ample alternative forums are available as well as requiring content neutrality and narrow tailoring (but not consideration of less restrictive alternatives) to further a significant governmental interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The considerably less discretion afforded speakers subject to a time, place or manner regulation can be problematic if the threat to content is not overt on the face of

The Court has also indicated that individual discretion regarding the timing of expression cannot be subject to prior restraint.¹⁴¹ Speakers whose content is judicially enjoined may be held to the collateral bar rule, however, which requires obedience to a judicial ruling until overturned or face contempt of court regardless of the ultimate validity of the ruling.¹⁴² Nonetheless, because of the transparent unconstitutionality of prior restraint, speakers, unlike other violators of judicial orders, likely would still be able to choose when to speak if prompt judicial review is unavailable.¹⁴³

the regulation, but the regulation has the potential to act as a prior restraint. *See id.* at 808-11 (Marshall, J., dissenting) (discussing city's ability to censor musical expression indirectly using regulation of sound equipment). *See generally* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 730 (1980) (describing content neutrality as "alluring mirage"); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981) (analyzing development of content distinction, theoretical bases of distinction, "conceptual difficulties inherent in its use" and possible remedies); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982) (proposing "that a broad content neutrality rule not only obscures free speech questions but is antithetical to any rational analysis of freedom of expression").

Additionally, the Court's rejection of least-restrictive-alternative analysis in cases ostensibly involving regulation of time, place or manner seems to greatly reduce individual autonomy and the burden on the state, eliminating it in all cases but those involving the most gratuitous regulations. *See Ward*, 491 U.S. at 806 (Marshall, J., dissenting) ("Indeed, after today's decision, a city could claim that bans on handbill distribution or on door-to-door solicitation are the most effective means of avoiding littering and fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise.").

141. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976); *see* Blasi, *supra* note 47, at 82 ("When government possesses the power to delay communications that it cannot suppress, speakers cannot be said truly to control, in the sense required for autonomy, their own communicative endeavors.").

142. Barnett, *supra* note 61, at 552-53. Professors Fiss and Barnett argue that the presence of the collateral bar rule supplies the only rationale for treating injunctions—as well as licensing systems—as prior restraints because, in the absence of the rule, the process of imposing sanctions for violations of injunctions seems to have much in common with any other subsequent punishment. *See* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 69-74 (1978) (explaining effects of disobedience of court-ordered injunctions when collateral bar rule applies); Barnett, *supra* note 61, at 552-53, 558 (indicating that injunctions are more effective if collateral bar rule exists and stating removal of rule would undermine effectiveness of injunctions). Blasi, however, concludes that even in the absence of the collateral bar rule, injunctions share with licensing a propensity for overuse and enforcement without careful consideration of the actual consequences of the speech, as well as the premise that speech is abnormally risky. Blasi, *supra* note 47, at 89-92. Because of their common features, as he perceived them, Blasi would maintain that both injunctions and licensing systems should be treated as prior restraints, even in the absence of the collateral bar rule. *Id.* at 92. If the collateral bar rule remains viable in the speech realm, its enforcement treads particularly heavily on individual autonomy. *Id.* at 83-84.

143. *See In re Providence Journal Co.*, 820 F.2d 1354, 1355 (1st Cir. 1987) (per curiam) (en banc) (stating "that it is not asking much . . . to require a publisher,

The concept of individual autonomy answers the fundamental question in each prior restraint case of "who is to decide?" The choice of what, when and where to speak is either left to the discretion of the speaker or overruled by the state. Autonomous speech is the condition precedent to the autonomous citizenship contemplated in the democratic model. As Robert Post described it, "[c]ensorship cuts off its victims from participation in the enterprise of autonomous self-government, and the fundamental democratic project of replacing the 'unilateral respect of authority by the mutual respect of autonomous wills' is *pro tanto* circumscribed."¹⁴⁴

Post writes that the ideal of an autonomous speaker as integral to democracy is under attack from those who criticize the allegedly "disreputable state of contemporary democratic dialogue" and offer a collectivist model as the alternative.¹⁴⁵ The critics contend that autonomy is not an end in itself, and if it produces anemic public discourse, then it should be abandoned in favor of promoting the public interest and effective collective self-determination.¹⁴⁶ Post observes, however, that these critics are attacking not only laissez-faire speech, but a system of government founded on self-determinism.¹⁴⁷ First Amendment doctrine, with its "focus on autonomy," may be "quaint," but it is one of the last areas of constitutional law to uphold the democratic tradition as it has traditionally been understood.¹⁴⁸ If autonomy in speech is rejected, Post concludes, the

even when it thinks it is the subject of a transparently unconstitutional order of prior restraint, to make a good faith effort to seek emergency relief from the appellate court"), *cert. dismissed*, 485 U.S. 693 (1988).

144. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1116 (1993) (quoting JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 366 (Marjorie Gabain trans., 1948)).

145. *Id.* at 1109; see also Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 20-27 [hereinafter Helle, *The News-Gathering/Publication Dichotomy*] (explaining role of government in social responsibility theory of freedom of press as limited to intervention only in instances where public benefits as a result); Steven Helle, *Whither the Public's Right (Not) to Know? Milton, Malls, and Multicultural Speech*, 1991 U. ILL. L. REV. 1077, 1080-85, 1093-95 [hereinafter Helle, *Whither the Public's Right (Not) to Know?*] (discussing development and advocates of liberal and collectivist theory).

146. See COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 17-19 (1947) (explaining need for freedom of press but emphasizing that with freedom comes accountability); Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (stating that free expression is "a romantic conception" and that "only by responding to the present reality of mass media's repression of ideas can the constitutional guarantee of free speech best serve its original purpose"); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (expressing concerns regarding "the Tradition" of free speech).

147. Post, *supra* note 144, at 1136-37.

148. *Id.* at 1137.

implications go to the core of our belief in self-government, and "beguiling visions of progressive reform" should not obscure that democratic legitimacy, and not just autonomous speech, are at issue.¹⁴⁹

Government, however, is charged with furthering the collective interest of the public, and may not act contrary to that interest.¹⁵⁰ Government also engages in speech.¹⁵¹ As may any speaker, government may choose not to speak.¹⁵² Government commonly chooses not to reveal its records, open its meetings or provide its constituents with a full account of all it knows.¹⁵³ In this sense, governmental inducements to non-governmental speakers to refrain from speaking carry a double implication.

First, such governmental inducements raise a question as to the propriety of silence; because government is obligated to advance the public's right to know, induced silence presumptively deserves that objective.¹⁵⁴ Second, however, when government chooses not to speak and coerces or induces non-governmental speakers to abide by that policy choice, such state action constitutes prior restraint of the speakers. Just as compelling a non-governmental speaker to express a message approved by government can be considered government speech, so too may governmentally imposed silence be considered a form of government communication.

149. *Id.*

150. See *The Federalist No. 51* (James Madison), in II THE DEBATE ON THE CONSTITUTION 47, 48 (B. Bailyn ed. 1993) ("[W]here power is to be conferred [upon political institutions], the point first to be decided is whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.").

151. See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 5 (1983) ("Governments not only act, but communicate—through . . . speeches."); Helle, *The News-Gathering/Publication Dichotomy*, *supra* note 145, at 51 ("Government, too, has a right of speech."); see also *First Amendment Implications of the Rust v. Sullivan Decision: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 23 (1991) (statement of Floyd Abrams) (asserting that Congress has rights under First Amendment and should speak out if it disagrees with Supreme Court) [hereinafter *Hearing*].

152. YUDOF, *supra* note 151, at 9-10. Silence may speak volumes, as illustrated by one commentator's observation that "government secrecy may itself be thought of as a powerful communications device." *Id.* at 10.

153. *Id.*

154. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (involving right to "open public trial"); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508-10 (1984) (same); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982) (stating that First Amendment ensures that discussion of governmental affairs is informed); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573-76 & n.9 (1980) (plurality opinion) (emphasizing right to open public trial guaranteed by First Amendment).

In either case, the focus should be solely on government. The theme of limited government permeating our constitutional polity requires no less. If the government scheme is found to be inconsistent with the premises of the doctrine against prior restraint—skepticism toward government, acceptance of the risk inherent in speech, and regard for individual autonomy that give expression to the prerequisite of limited government—the scheme must fail. No balancing, no three-part tests, no artful doctrinal constructs can save it. To hold otherwise is to contradict the one thing that is clear about our Constitution generally and the First Amendment specifically: it is aimed at limiting government, not individual speakers.

V. PRIOR RESTRAINT IN *Rust*

The theory that government can control governmentally funded speech is, therefore, of major concern. The battles about the constitutionality of classic prior restraints, involving straightforward coercion, have been fought and won; yet government now seems to see the advantage in using its immense wealth to achieve what it cannot do outright. The analysis, however, should be no different if government exercises raw power by censoring speech through injunction or by offering funds whereby a speaker becomes an agent of government's silence.

Professor Reich noted in 1964 the potential for government's power becoming complete if doctrine did not keep up with this new threat to rights.¹⁵⁵ He warned of the government's power "to 'purchase' the abandonment of constitutional rights."¹⁵⁶ Such abuses not only have already occurred, but courts have approved the government's action in a number of instances where government funding is conditioned upon meeting certain requirements.¹⁵⁷ Twenty years later, Professor Kreimer surveyed the landscape of conditioned rights and remarked that "increasingly

155. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 764 (1964).

156. *Id.*; see *Wyman v. James*, 400 U.S. 309, 327-28 (1971) (Douglas, J., dissenting) (objecting to government buying up constitutional rights).

157. See *South Dakota v. Dole*, 483 U.S. 203, 207-10 (1987) (conditioning of federal highway funds on states' agreement to raise drinking age held constitutional despite Tenth Amendment challenge based on states' rights); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (involving government employment conditioned on agreement to pre-publication review); *Buckley v. Valeo*, 424 U.S. 1, 99 (1976) (per curiam) (conditioning politicians' speech in exchange for campaign financing); Jim Carlton, *The Trade-Off: Project Residents Gain Freedom from Crime, But Pay Price in Rights*, WALL ST. J., Apr. 26, 1994, at A1 (describing how residents in HUD-controlled Los Angeles housing projects exchange constitutional freedom from search and seizure for security against crime); cf. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) (upholding stat-

visible governmental actions substantially impinge on individual lives without invoking the threat of mayhem or incarceration. The greatest force of a modern government lies in its power to regulate access to scarce resources."¹⁵⁸

Thus, a case such as *Rust v. Sullivan*¹⁵⁹ presents a troubling precedent for the doctrine against prior restraint. *Rust* involved the constitutionality of regulations prohibiting Title X-funded family-planning clinics from any counseling or referral regarding abortions.¹⁶⁰ Although a clinic could provide abortion counseling in a

ute requiring college students to register for draft, if eligible, as condition of receiving federal financial aid).

158. Kreimer, *supra* note 61, at 1295-96; see also Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990) (discussing problem of conditions placed on public assistance benefits); Kreimer, *supra* note 61, at 1396 (explaining that allocative sanctions by government should not escape "constitutional scrutiny"); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461-62 (1968) (stressing expanding role of government into traditionally private areas); Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 605 (1993) ("[T]he welfare state wields as much power by withholding benefits as by coercive force. In a society where survival depends on inclusion in an economy dominated by government welfare of one sort or another, the consequences of exclusion may be more devastating than criminal punishment."); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1103-04 (1987) (asserting that conditional government spending has played large role in manipulating individuals' and businesses' behavior).

The conditioning of rights by the government increasingly has become a problem for constitutional scholars. As one commentator noted:

Many of the most vexing questions in constitutional law result from the rise of the modern regulatory state, which has allowed government to affect constitutional rights, not through criminal sanctions, but instead through spending, licensing, and employment. It may well be in these areas that constitutional doctrine is least well developed. It is here that constitutional law promises to receive its most serious tests in the next generation.

Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 593 (1990). But see *id.* at 608 (stating that "current doctrine contains a core and unavoidable insight: Funding, regulating, and licensing decisions are indeed sometimes different from criminal punishment").

159. 500 U.S. 173 (1991).

160. *Id.* at 178-81. The regulations subsequently were codified at 42 C.F.R. § 59.8-10 (1993). During the first eighteen years of the Title X program, family planning clinics were under no restrictions regarding counseling of patients. *Rust*, 500 U.S. at 178-79. In 1988, however, the Department of Health and Human Services implemented the "Gag Rule," prohibiting any counseling regarding abortion. *Id.* at 179-80 (referring to 42 C.F.R. § 59.8(a)(1)-(a)(3) (1993)). President William J. Clinton, in one of his first acts after assuming office, directed that the "Gag Rule" be suspended. President's Memorandum of Jan. 22, 1993, *The Title X "Gag Rule,"* 58 Fed. Reg. 7455 (1993). The Department subsequently issued revised regulations suspending the rule. Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (1993) (to be codified in 42 C.F.R. § 59) (interim rule).

segregated program subsidized with non-Title X funds, the most a doctor in a Title X-funded program could do was advise a patient that "advice regarding abortion is simply beyond the scope of the program."¹⁶¹ Those employed with Title X funds could discuss abortion when not working at the clinic, but when employed on a Title X project, the Court held that the employees voluntarily accepted the conditions attached to the funds.¹⁶²

A. *Facilitating Speech, But Not Freedom of Speech*

A remarkable number of conclusory statements permeate the majority opinion.¹⁶³ Chief Justice Rehnquist wrote that there was "no question"¹⁶⁴ as to the constitutionality of the statutory provision, apparently overlooking that the four dissenting Justices¹⁶⁵ and two lower courts¹⁶⁶ had all raised just such a question regarding the construction of the statute at issue. The Chief Justice further main-

161. *Rust*, 500 U.S. at 200.

162. *Id.* at 198-99.

163. The reasoning of the majority opinion in *Rust* has found little favor among commentators. See SUNSTEIN, *supra* note 61, at 117-18 (asserting that whether laws relate to funding decisions or pre-existing property, they must be assessed in terms of their operation and effect on speech, and proposition that government may allocate funds in any way it chooses is anachronistic idea regarding relationship between citizen and state); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 693 (1992) (describing Court's analysis in *Rust* as "hopelessly inconsistent"); Roberts, *supra* note 158, at 615 (claiming "Court's reliance on neutral principles . . . masked the regulations' violence" to poor women and "overlooked broader issues of social power"); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185, 213 (1992) (calling *Rust* opinion complicated and ambiguous). *But cf.* Theodore C. Hirt, *Why the Government Is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1904 (1988) (in article written before *Rust* was decided, Department of Justice attorney Hirt contended that "withholding governmental support for abortions through restrictions on abortion counseling and referral does not, however, violate the first amendment").

164. *Rust*, 500 U.S. at 192.

165. See *id.* at 206 n.1 (Blackmun, J., dissenting, joined in this part of his opinion by Marshall, J., and O'Connor, J.) (asserting that majority's statement regarding constitutionality of statute "simply begs the question"); *id.* at 221-22 (Stevens, J., dissenting) (arguing that regulations in question are unconstitutional when "read in the context of the entire statute"); *id.* at 223-25 (O'Connor, J., dissenting) (explaining that "longstanding" rules of statutory construction deem statute unconstitutional).

166. See *Planned Parenthood Fed'n v. Sullivan*, 913 F.2d 1492, 1504 (10th Cir. 1990) (holding that Title X regulations violate First and Fifth Amendment rights of providers and patients); *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 65, 75 (1st Cir. 1990) (finding Title X regulations unconstitutional because they pose obstacle to freedom of choice and violate First Amendment rights of public), *cert. granted and jud. vacated*, *Sullivan v. Massachusetts*, 500 U.S. 949 (1991).

tained that specifying that the counselors could discuss any form of family planning except abortion was not a case of government "discriminat[ing] on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."¹⁶⁷ Such bold examples of "I say it's so, so it must be so" are not unknown in Supreme Court opinions,¹⁶⁸ but they can leave the reader breathless at the thought of decades of precedent sensitive to content regulation teetering on the precipice.¹⁶⁹

When the Court states that, in excluding abortion counseling from the allocational subsidy, the government was "simply insisting that public funds be spent for the purposes for which they were authorized,"¹⁷⁰ one is reminded of Professor Chafee's example of the testator who is not obligated to leave anything to his children, but who divides his estate among all but one: "You cannot argue to the child who is cut out of the will that he has merely failed to receive a favor."¹⁷¹ The confusion in the opinion, however, is compounded when, at the same time the Court claims that this was just a matter of selective discretionary funding, it also states that the "government is not denying a benefit to anyone."¹⁷² The Court provides no clue as to how the funding might be characterized if it was neither entitlement nor benefit.

The government may have been under no obligation, but the speakers were. Those who received Title X funds were required to

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

168. See Kreimer, *supra* note 61, at 1337-38 (describing similar assertions in *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Flemming v. Nestor*, 363 U.S. 603 (1960)).

169. See Cole, *supra* note 163, at 678-79 (asserting that *Rust* Court did not "overrule decisions mandating strict content neutrality" when government selectively supports speech, but "such decisions are inconsistent with broad reading of *Rust*"); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1466 (1989) (stating that in reviewing lower court cases prior to their consolidation in *Rust* case before Supreme Court, ban on abortion counseling would "undoubtedly" be "impermissible viewpoint censorship" if it had been imposed directly); see also *Hearing, supra* note 151, at 18-19 (statement of Lee C. Bollinger) (claiming that core perspective of case is at war with established jurisprudence and may be nothing more than a "wrong turn" that is "unwise and unlikely" to survive). *But see Hearing, supra* note 151, at 10 (statement of Leslie H. Southwick) (stating that *Rust* is not anomaly but another in long line of decisions holding government may fund some viewpoints and not others as long as no speakers stopped from using other resources to speak).

170. *Rust*, 500 U.S. at 196.

171. ZECHARIAH CHAFEE, JR., 1 GOVERNMENT AND MASS COMMUNICATIONS 306 (1947) (cited in Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1367 (1984)).

172. *Rust*, 500 U.S. at 196.

advise pregnant women to seek prenatal care, irrespective of any expressed desire to terminate the pregnancy, as well as make it “abundantly clear” that they could not promote abortion.¹⁷³ Any clinic that was determined to counsel patients regarding abortions “simply¹⁷⁴ [was] required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.”¹⁷⁵ Segregation of abortion counseling from other family planning counseling is decidedly not simple, and no one outside the Court pretended it was.¹⁷⁶ Indeed, the regulation was deliberately framed, not to encourage separate abortion counseling components of family planning clinics, but with the transparent purpose of suppressing certain individual speech and requiring other speech in order to manipulate a private decision.¹⁷⁷ The crit-

173. *Id.* at 209 (Blackmun, J., dissenting) (quoting from Department of Health and Human Services' description of its regulations in the Federal Register, 53 Fed. Reg. 2927 (1988)). According to the Department's interpretation of the regulations, Title X-funded clinics could keep a phone book including yellow pages on the premises, but could not provide them to a patient because the listing of health care providers would include those performing abortions. See *New York v. Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) (Cardamone, J., concurring) (stating that such interpretation of regulation is “[a] small and petty contrivance, inconsistent with our nation's high principles [and] . . . woefully short of the tolerant spirit that gave birth to and should continue to animate our constitutional system”). But see *id.* at 406 & n.1 (although in minority at *this point*, Circuit Judge Winter in his majority opinion maintained that if regulations contemplated “keeping” of phone book on premises, they must have contemplated “providing” it upon request).

174. The frequency of the use of the word “simply” must have approached a record in this case, with the majority and Justice Blackmun's dissent each using it seven times. In Justice Blackmun's defense, some of those uses were references to the majority opinion. As with the word “clearly,” though, when “simply” is used by lawyers, the assertion is never so simple nor so clear as the author would have the reader believe.

175. *Rust*, 500 U.S. at 196. This proposition seems to conflict with the general rule that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); see also *Rust*, 500 U.S. at 213 (Blackmun, J., dissenting) (citing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)) (stating that it is irrelevant that speech outside workplace remained unregulated in deciding constitutionality of compelled speech within workplace); *Hearing*, *supra* note 151, at 19 (statement of Lee C. Bollinger) (stating fact that recipients of Title X funds could discuss abortion in other institutions is inconsistent with many First Amendment decisions rejecting speech limitations).

176. Roberts, *supra* note 158, at 595. Professor Roberts noted that many clinics would be forced to abandon abortion counseling altogether, or shut down if that option proved too unappealing. *Id.* Planned Parenthood of New York estimated that segregating abortion counseling would cost an additional \$1 million. *Id.* at n.36.

177. See 53 Fed. Reg. 2943-44. The preamble to the regulations acknowledged a “bias” favoring childbirth and opposed to abortion, as well as an intent to send a message “that the federal government does not sanction abortion.” *Id.*

ical funding provided under Title X was intended to facilitate speech, but not freedom of speech.

Petitioner Rust complained of the incursion on freedom of speech as viewpoint discrimination¹⁷⁸ and an unconstitutional condition on a right.¹⁷⁹ The unconstitutional conditions doctrine holds that government may not restrict the exercise of a right as a condition of receiving a benefit.¹⁸⁰ The Chief Justice responded to

178. Brief for Petitioners at 14-23, *Rust* (No. 89-1391).

179. *Id.* at 24-30; Reply Brief at 1, 12-15, *Rust* (No. 89-1391).

180. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317 (1994) (holding that government may not require person to give up constitutional right in exchange for discretionary benefit conferred by government where property sought has little or no relation to benefit); *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) (holding that government cannot prohibit radio editorializing as condition of receiving federal funds); *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (finding employment conditioned on political partisanship violates First Amendment); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (stating that government may not deny benefit to person on basis that infringes upon freedom of speech); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (reasoning that it would be unconstitutional to deny tax benefit for engaging in certain forms of speech unless speech itself is criminal). Justice Sutherland gave the doctrine its classical articulation:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of one constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

For valuable insight into the doctrine, see Baker, *supra* note 158, at 1193-97 (discussing unconstitutional conditions doctrine generally); Richard A. Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988) (providing detailed analysis of unconstitutional conditions doctrine); Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 99-117 (1988-89) (discussing different aspects of unconstitutional conditions doctrine); Kreimer, *supra* note 61, at 1293 (providing framework for analyzing unconstitutional conditions questions); Rosenthal, *supra* note 158, at 1120-23, 1142-60 (discussing unconstitutional conditions doctrine and various government spending programs under which issue arises); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982) (discussing in general terms right-privilege distinction in relation to unconstitutional conditions); Sullivan, *supra* note 169, at 1415 (providing critical analysis of unconstitutional conditions issue); Sunstein, *supra* note 158, at 593 (providing detailed analysis of issues involved in unconstitutional conditions doctrine).

both arguments with a defense of the government's selective exercise of its spending power; asserting his preferred arguments,¹⁸¹ Rehnquist characterized the regulation as a nonsubsidy rather than a penalty¹⁸² and contended the greater power includes the lesser.¹⁸³ The nonsubsidy/penalty distinction is merely a matter of

The doctrine, as the preceding partial listing of sources attests, has received considerable scrutiny lately, much of it critical, with one commentator even contending that "all constitutional cases are really unconstitutional conditions cases." SUNSTEIN, *supra* note 61, at 117-18 (1993). Whatever the status or validity of the unconstitutional conditions doctrine, this Article takes as its touchstone the prior restraint doctrine. Conditions that do not amount to prior restraints are beyond the purview of this piece.

Generally, though, the subsidization of rights with attached conditions is little different than the taxing of rights, in the sense that the government is using economic means to accomplish political purposes. In the First Amendment realm, both would involve efforts to regulate speech by regulating access to financial resources upon which that speech was dependent. In cases of differential taxation, such regulation is subject to strict scrutiny, even where the intent to control speech is not obvious. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r*, 460 U.S. 575, 585-86, 592 (1983) (applying strict scrutiny test to use tax imposed on cost of paper and ink). Differential taxation is constitutionally suspect under the First Amendment if it singles out the press, targets a small group of speakers, or discriminates on the basis of the content of taxpayer speech. See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect . . ."). Differential subsidy of speech contingent on government-imposed conditions might invite similar analysis. For a partial summary of Professor Kreimer's proposed analysis of the constitutionality of allocations affecting liberties, see *infra* note 218.

181. *Rust v. Sullivan*, 500 U.S. 173, 193-98 (1991). Chief Justice Rehnquist has become a most ardent advocate of the greater-includes-the-lesser argument. See *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986) (asserting greater-includes-lesser argument); *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974) (plurality opinion) (holding that when substantive right is inextricably intertwined with limitations on procedure used to determine right, litigant "must take the bitter with the sweet"); *Baker*, *supra* note 158, at 1190 n.12 (stating Justice Rehnquist most frequently invokes greater-includes-lesser argument among sitting justices); *Kreimer*, *supra* note 61, at 1308-10 (discussing Justice Rehnquist's use of greater-includes-lesser argument). Chief Justice Rehnquist also might see his majority opinion in *Rust* as a vindication of his dissent in *FCC v. League of Women Voters*, where he characterized the disputed regulation as a nonsubsidy rather than a penalty. 468 U.S. 364, 403, 408 (1984).

182. The distinction was pivotal. See *Rust*, 500 U.S. at 193 (arguing that government has not discriminated on basis of viewpoint, but "has merely chosen to fund one activity to the exclusion of the other"); *id.* at 194-95 (stating *Rust* is not case of singling out speech content, but "a case of the Government refusing to fund activities, including speech"); *id.* at 198 ("Congress has merely refused to fund such activities out of the public fisc . . ."); see also Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 29-30 (1992) (discussing majority's holding in *Rust* which treated restriction of funding as nonsubsidy).

183. *Rust*, 500 U.S. at 195 n.4. The greater-includes-the-lesser argument was advanced in *Rust* when Rehnquist wrote: "We have recognized that Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* He further alluded to it later in the opinion when he stated that the "general rule that the

picking the appropriate baseline to reach the desired result: Should the Court consider the denial of funding for abortion counseling from the baseline of no funding at all or from the baseline of funding without any conditions?¹⁸⁴ The Chief Justice chose the

Government may choose not to subsidize speech applies with full force." *Id.* at 200. For a discussion of the greater-includes-the-lesser argument, see *infra* notes 185-80 and accompanying text.

184. Adoption of the former model suggests that no funding for abortion counseling is consistent with the government nonsubsidy or inaction regarding family planning generally. But adoption of the latter baseline would suggest that the government's excepting abortion counseling from funding is a penalty or form of harmful action directed at a protected right. See Sullivan, *supra* note 169, at 1439 ("This penalty/nonsubsidy distinction has increasingly determined the outcomes of unconstitutional conditions challenges."); see also *id.* at 1466 (discussing effect of penalty/nonsubsidy distinction on public policy and decisions in lower courts).

Adoption of different baselines was the only difference between the majority and dissent in *FCC v. League of Women Voters*, where the Court invalidated a law that denied federal funding to public broadcasting stations that editorialized. 468 U.S. 364 (1984). The issue essentially was whether the law should be considered from the baseline of funding for all public broadcasting speech or the baseline of no funding at all. The majority viewed the law as a penalty, while then-Justice Rehnquist's dissent opined that it should be characterized as a rational and neutral exercise of the federal spending power (including, of course, the power *not* to spend). Compare *id.* at 398 (stating that law "simply silences all editorial speech" and is restriction constituting significant abridgement of speech) with *id.* at 403 (Rehnquist, J., dissenting) (stating that law is "simply" determination that "public funds shall not be used to subsidize 'editorializing'") and *id.* at 408 (Rehnquist, J., dissenting) (stating statute is "rational exercise of [congressional] spending powers and strictly neutral").

As justification for concluding the Title X exemption for abortion counseling was not a penalty, the *Rust* majority pointed to the option of funding abortion counseling with segregable non-Title X funds. See *Rust*, 500 U.S. at 197-98 (citing *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding tax-deductible contributions to charitable organizations cannot be used to support lobbying, but lobbying affiliate supported with non-deductible contributions may be established). That option is only relevant, however, if the baseline is no funding. Moreover, the Court never addressed whether such rigid segregation of funds and speech was itself a burden on constitutional rights. See Sullivan, *supra* note 169, at 1468 (indicating courts have not examined if segregation of funding itself burdens constitutional rights).

This confusion over baselines might lead to the conclusion that the Justices chose baselines to suit the result they wished to reach. The distinction between penalties and nonsubsidies seems unhelpful as "the ordering principle of unconstitutional conditions doctrine." *Id.* at 1442; see also Sunstein, *supra* note 158, at 602-03 (discussing problem with penalty/nonsubsidy distinction in context of denying Medicaid entitlements). For a further discussion of the nonsubsidy/penalty distinction, see *infra* note 222.

Professor Roberts saw the distinction as an attempt to reduce the issue to abstraction. See Roberts, *supra* note 158, at 600-01. She stated that this abstraction allows the Court to distance itself "from the violence of its decision." *Id.* at 603. A characterization of the regulation as governmental "inaction" upheld the distribution of wealth and privilege under the status quo, and meant the "women's suffering results from the circumstances of poverty, for which the judges hold no responsibility." *Id.* at 602-03. Professor Roberts went on to state:

former.

The “greater includes the lesser” argument maintains that the governmental power not to bestow a privilege at all—in *Rust*, funding for family planning clinics—includes the lesser power to provide it with conditions attached.¹⁸⁵ The deductive logic in the greater-includes-the-lesser argument had been questioned since al-

[T]he ease with which the regulations can be characterized alternatively as a mere failure to subsidize abortion counseling or as the affirmative manipulation of women’s choices demonstrates the futility of the action/inaction distinction as a basis for judging the regulations. We can easily recharacterize government omission as affirmative interference: The state actively protects the rights of affluent women through laws that require informed consent, while deliberately promoting ignorance of medical information among poor women.

Id. at 604.

185. See *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 542 (1876) (holding that Wisconsin could cancel license of foreign insurance company to do business in Wisconsin if company removes any case from state court to federal court); Baker, *supra* note 158, at 1190 & n.12 (discussing “greater includes the lesser” rationale and cases employing it); Kreimer, *supra* note 61, at 1305-10 (discussing Supreme Court’s use of “greater includes the lesser” rationale). The greater-includes-the-lesser argument is the “traditional antagonist” of the unconstitutional conditions argument. *Serpas v. Schmidt*, 827 F.2d 23, 39 (7th Cir. 1987), *cert. denied*, 485 U.S. 904 (1988). Included within the greater-includes-the-lesser argument is the right-privilege distinction: “If a certain benefit is found to be a privilege, and not a right, then it may be denied entirely at the government’s discretion. This greater power then justifies the imposition of conditions.” Kreimer, *supra* note 61, at 1308 n.43.

The most famous proponent of the greater-includes-the-lesser was Justice Holmes. See *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 52-54 (1910) (Holmes, J., dissenting) (“I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power.”); *Commonwealth v. Davis*, 39 N.E. 113, 114 (1895) (holding that as legislature could end public use of public place, it could prevent certain uses of public place), *aff’d*, 167 U.S. 43 (1897); Baker, *supra* note 158, at 1190 n.12 (discussing, *inter alia*, cases where Justice Holmes discussed doctrine); Kreimer, *supra* note 61, at 1306-07 & n.34 (discussing cases where Justice Holmes used doctrine); Sunstein, *supra* note 158, at 597-98 (discussing “Holmesian” analysis of greater-includes-the-lesser argument). The greater-includes-the-lesser argument occasionally finds its way into opinions of members of the Court other than Rehnquist, but it has also been rejected often enough to raise doubts as to its general acceptance. See *City of Lakewood v. Plain-Dealer Publishing Co.*, 486 U.S. 750, 762-68 (1988) (demonstrating flaw in logic of “greater includes the lesser” argument); *Vitek v. Jones*, 445 U.S. 480, 490 n.6 (1980) (discussing superiority of constitutional due process over statutory limitation of rights and repudiating *Arnett v. Kennedy*); Kreimer, *supra* note 61, at 1309 n.46 (noting that Court has explicitly rejected “greater includes the lesser” argument).

Fundamentally, the argument is at odds with the philosophical underpinnings of the doctrine against prior restraint because the greater-includes-the-lesser argument depends heavily upon unconditional governmental prerogative to impose conditions on individuals, thus reversing the prerogatives implicit in the doctrine against prior restraint. For a discussion of the premises underlying the doctrine against prior restraint, see *supra* notes 45-154 and accompanying text.

most the beginning of the century.¹⁸⁶ If it were sound logic, the syllogism in the *Rust* case would look like this: (1) the state has the power not to fund family planning clinics at all; (2) X is a family planning clinic; (3) therefore, X family planning clinic is one upon which the state may impose any condition whatsoever. But, as one commentator noted, “[a]ll that can be deduced logically from the power to deny a benefit absolutely is the power to deny it absolutely.”¹⁸⁷

186. See Kreimer, *supra* note 61, at 1310 & n.54 (quoting Thomas Reed Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 110-11 (1916)) (asserting that “greater includes the lesser” argument has been questioned for 75 years).

187. *Id.* at 1310-11. Professor Baker sounded the same note when he wrote that the foremost logical flaw in the argument is the assumption that a conditional denial of a benefit is qualitatively identical to an absolute denial. Baker, *supra* note 158, at 1191. Professor Sunstein considered it an “implausible idea that the government’s power not to create the program necessarily includes the power to impose whatever condition it chooses.” Sunstein, *supra* note 158, at 606. He continued: “The Constitution limits the reasons for which government may act and the effects of its actions. A welfare program limited to Democrats is unconstitutional because of the first amendment [sic]; points about voluntary participation and the ‘greater power’ are simply a diversion.” *Id.*

Kreimer also pointed out that the argument looks only to the consequences of government action, but many, if not most, constitutional constraints on government concern procedure or method. The argument therefore is “wholly inapplicable” to the many cases where the constitution is directed at the means by which government attains its ends. Kreimer, *supra* note 61, at 1311-12. Perhaps Kreimer’s most insightful critique of the argument, though, is that it depends on the assumption that government could wield the greater power when it may be the case, for either practical or political reasons, it actually cannot. *Id.* at 1313-14. Despite the ruling in *United States Postal Service v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981), the supposedly greater power to abandon postal service altogether does not justify a lesser power to prohibit private parties from using mailboxes—because the power to abandon postal service can hardly even be called theoretical under current conditions. See Kreimer, *supra* note 61, at 1313-14 & n.65 (discussing government’s theoretical alternative power). Similarly, the potential denial of all funding to family planning clinics may not justify conditioning funding once granted because the former may be such a remote possibility in view of political realities. As Professor Kreimer wrote, “[i]n reality, selective deprivation may be the less controlled and hence the more dangerous power.” *Id.* at 1313.

Finally, the greater-includes-the-lesser argument glosses over the issue of comparative injustice. It may be more constitutionally acceptable for the state to exercise the greater power than to selectively discriminate against rightholders. No unemployment compensation program may be preferable to one that would exclude certain claimants because of their free exercise of religion. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (stating that while state can exercise control over its unemployment program, it cannot deny benefits based on religion of claimant); Kreimer, *supra* note 61, at 1312 (discussing psychological distinction between denial to individual because of religion and knowledge that no unemployment program exists). Likewise, it may be preferable not to fund family planning clinics at all if the alternative was to create a scenario in which some patients could be advised of all their family planning options and others could not. See Roberts, *supra* note 158, at 604 (discussing potential negative effects of biased information at Title X clinics as opposed to having to seek alternative information if there were no such clinics).

Chief Justice Rehnquist disposed of the viewpoint discrimination and unconstitutional conditions arguments, but he never addressed the argument that the regulation violated the doctrine against prior restraint.¹⁸⁸ Perhaps he thought the doctrine was irrelevant because the regulation did not fit the traditional administrative licensing or judicial order mold of prior restraints. Although the regulation did not embody an explicit subsequent punishment either, he may have thought it fell into that ambiguous realm of speech restraints not susceptible to easy pigeonholing, such as food stamp exemptions for strikers,¹⁸⁹ labeling requirements for foreign films considered propaganda,¹⁹⁰ zoning regulations for adult bookstores,¹⁹¹ or second-class mail limitations.¹⁹²

Other than the fact that it was not a typical licensing system or a judicial injunction, however, the restraint at issue in *Rust* had the same temporal quality of a prior restraint in that it explicitly banned speech in advance of speaking, it emanated from government, and it was aimed at certain content. Moreover, it violated the premises underlying the doctrine against prior restraint.¹⁹³ If the *Rust* Court had considered the operation and effect of the regulation, as the Court did in *Near v. Minnesota*, this was a pristine prior

188. See Brief for Petitioners at 14, *Rust v. Sullivan*, 500 U.S. 173 (1991) (No. 89-1391) ("Moreover, the regulations would unquestionably violate the First Amendment's cardinal prohibition against prior restraints because they require 'assurances' in advance that the speakers conform their speech to this government-composed script.").

189. See *Lyng v. International Union of UAW*, 485 U.S. 360 (1988) (holding that statute denying eligibility for, or increase in, food stamps for striking workers not unconstitutional prior restraint).

190. See *Meese v. Keene*, 481 U.S. 465 (1987) (holding that governmental labeling of certain films as "political propaganada" is constitutional and does not violate disseminators' First Amendment rights).

191. See *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (holding that zoning ordinance restricting licensing of adult theaters not invalid as prior restraint as ordinance only regulates who receives licenses, not content of speech).

192. See *Hannegan v. Esquire*, 327 U.S. 146 (1946) (holding that postmaster may not place restrictions on content of second-class mailings, provided material is not obscene).

193. For a discussion of the premises underlying the doctrine against prior restraint, see *supra* notes 45-154 and accompanying text. Thus, it was a red herring for Chief Justice Rehnquist to compare the restraint to the establishment by Congress of a National Endowment for Democracy with no obligation to fund programs encouraging communism or fascism. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). The employees who work for the National Endowment for Democracy certainly know what is expected of them and that they might lose their positions if they deviate from the intent of the program, but there is no prior restraint as in *Rust* in the sense of an explicit ban on certain content in advance of speaking. If there were, it would likewise be unconstitutional. The government may speak, but it may not abridge the individual autonomy of its citizens in doing so, and crucial to that interest is a right to differ with one's government.

restraint.¹⁹⁴ Instead of allowing the near boundless spending power of government to supersede the doctrine against prior restraint, the Court should have begun with an analysis of the injury done by the regulation to the system of limited government. That analysis would have been aided by express consideration of the regulation's harmony with the premises of distrust of government,¹⁹⁵ acceptance of risk inherent in speech¹⁹⁶ and regard for individual autonomy.¹⁹⁷

B. *(Dis)Trusting the Government*

The premise of trusting the individual rather than government was sacrificed even as its praises were being sung. Toward the end of the *Rust* Court's consideration of the First Amendment aspects of the case, the majority sought to clarify that government funding is not "invariably sufficient to justify Government control over the content of expression."¹⁹⁸ The Court referred to traditional public forums subsidized by government and traditional spheres of free expression such as universities and possibly doctor-patient relationships, the regulation of which would apparently merit stricter review than the control in *Rust*.¹⁹⁹ This has prompted at least one

194. For a discussion of the *Near* Court's analysis of the operation and effect of the statute there at issue, see *supra* notes 79-89 and accompanying text. See also *Alexander v. United States*, 113 S. Ct. 2766, 2783 (1993) (Kennedy, J., dissenting) ("[I]n some instances the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may be to raise the same concerns which inform all of our prior restraint cases: the evils of state censorship and the unacceptable chilling of protected speech.").

195. For a general discussion of the doctrine against prior restraint in relation to distrust of government, see *supra* notes 47-50, 74-112 and accompanying text. For an analysis of distrust of government in the *Rust* decision, see *infra* notes 198-208 and accompanying text.

196. For a general discussion of the doctrine against prior restraint in relation to acceptance of the risk inherent in speech, see *supra* notes 51-52, 114-33 and accompanying text. For an analysis of this concept in the context of the *Rust* decision, see *infra* notes 209-12 and accompanying text.

197. For a general discussion of prior restraint in relation to respect for individual autonomy, see *supra* notes 53-64, 134-54 and accompanying text. For an analysis of this concept in the context of the *Rust* decision, see *infra* notes 213-38 and accompanying text.

198. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991).

199. *Id.* at 200.

court²⁰⁰ and several commentators²⁰¹ to suggest that the course of free expression after *Rust* involves looking to see whether a “sphere” of free expression is involved, thus invoking the traditional skepticism toward government regulation. Putting aside whether this approach would require a fundamental shift in the focus of protection from the speech²⁰² to the speaker, however, it is not at all clear that the Court was serious in its derogation of government influence in such spheres.

The doctor-patient relationship was at the heart of *Rust*, yet the Court found that “Title X program regulations do not significantly impinge upon the doctor-patient relationship.”²⁰³ The Court further stated that a doctor’s silence regarding abortion could not “reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option,”²⁰⁴ an assertion for which no authority is offered, perhaps for good reason.²⁰⁵ If the Court did not think it needed to decide whether this potential “sphere” deserved protection from government regulation in this case, it is not hard to imagine how the Court could express its deference to government in future cases even while mak-

200. See *Board of Trustees v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991). In this case, Stanford researchers funded by the National Institute of Health were required by terms of a grant to submit proposed publications on an artificial heart device to the government for prior approval. The district court, while acknowledging that the ruling in *Rust* controlled the case, invalidated the condition because the *Rust* condition applied specifically to the project and not to grantees (whereas this condition bound researchers personally). *Id.* at 476. Additionally, the *Rust* opinion exempted the university as a sphere of free expression to which different rules would apply. *Id.* at 476-78.

201. See *Cole*, *supra* note 163, at 717 (discussing spheres of neutrality and independence); *Fitzpatrick*, *supra* note 163, at 218-20 (indicating there is exception to *Rust* rationale for “traditional spheres of free expression”).

202. See *First Nat’l Bank v. Belotti*, 435 U.S. 765, 777 (1978) (stating that constitutional protection of speech does not depend on “identity of its source”).

203. *Rust*, 500 U.S. at 200. Justice Blackmun considered this a “curious contention.” *Id.* at 211 n.3 (Blackmun, J., dissenting). The imposition of a substantial burden on the doctor-patient relationship, he thought, was “beyond serious dispute.” *Id.* (Blackmun, J., dissenting).

204. *Id.* at 200.

205. The American Medical Association is of the opposing view. See *Hearing*, *supra* note 151, at 34-6 (statement of Raymond Scalettar, M.D., on behalf of AMA) (stating that *Rust* gag-rule is unethical, abhorrent, unprofessional, unsound, and it subjects physicians to legal liability). Justice Blackmun termed it “uninformed fantasy” to think that a woman at a Title X clinic might expect that her doctor would “withhold relevant information regarding the very purpose of her visit.” *Rust*, 500 U.S. at 211 n.3 (Blackmun, J., dissenting). If speaking of abortion as one of several options was considered approval of that option, not speaking of abortion as one of the options cannot be considered approval and at least leaves open the possibility of implied disapprobation.

ing the obligatory nod toward individuals, spheres or whatever.²⁰⁶ To substitute the opinion of those in government for that of a doctor illustrates a trust in government rather than the individual doctor regarding the welfare of patients;²⁰⁷ it is government paternalism in the extreme.²⁰⁸

C. "A Dangerous Idea"

An irony implicit in the regulation at issue in *Rust* was that silence was considered inconsequential, but speech regarding abortion must have been presumed to be compelling, necessitating its complete abstinence. The mere mention of abortion might predispose patients against all other alternatives or introduce them to an option to which they would otherwise be oblivious. Such a risk was apparently unacceptable.

The Court insisted that *Rust* was "not a case of Government 'suppressing a dangerous idea.'"²⁰⁹ However, suppression of a dangerous idea is almost a given in prior restraint cases, in that government would not bother to suppress an idea it did not consider dangerous to some degree. Especially in light of the express intent behind the regulation to send a message "that the federal government does not sanction abortion,"²¹⁰ it seems disingenuous to claim the government considered the idea to be innocuous. The majority

206. At least two justices have recognized the need for protection of the doctor-patient relationship. See *Cruzan v. Director*, 497 U.S. 261, 340 n.12 (1990) (Stevens, J., dissenting) (arguing that "special relationship between patient and physician" protected by due process clause); *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (recognizing that right of doctor to advise patients fully is obviously protected by First Amendment).

207. See *Hearing*, *supra* note 151, at 26 (statement of Floyd Abrams) ("[W]hile the Court in *Rust* offers enormous deference to the executive branch . . . it offers no deference at all to First Amendment principles.").

208. The timeless observation of Justice Blackmun in *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* exemplifies the opposite perspective: [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

425 U.S. 748, 769-70 (1976).

209. *Rust*, 500 U.S. at 194.

210. 53 Fed. Reg. 2944 (1988).

seemed unwilling to recognize the wrenching controversy in this country regarding abortion, with each side to the controversy considering the viewpoint of the other to be dangerous.²¹¹ As First Amendment attorney Floyd Abrams observed in testifying before Congress, “to say that a doctor cannot even answer a question about abortion is to indicate the degree to which the writers of the regulations considered that a dangerous idea.”²¹²

D. *Compromising Individual Autonomy*

Government can provide for speech in ways that preserve individual autonomy.²¹³ *Rust v. Sullivan*, however, illustrates the contrary proposition.

1. *Government Speech*

The aspect of the case that causes the most serious constitutional concern is the government’s deliberate effort to compromise individual autonomy by placing conditions on Title X funds, as surely as if it had licensed speech at family planning clinics. Both the counseling that was authorized and the silence that was mandated took on the characteristic of government expression rather than individual expression. As Deputy Assistant Attorney General Leslie Southwick testified in a Senate hearing following *Rust*, when “government funds a certain view, the government itself is speaking.”²¹⁴ It follows, according to Southwick, that government could

211. Justice Blackmun was not hesitant to remind the majority, however. *See Rust*, 500 U.S. at 215 (Blackmun, J., dissenting) (stating that “the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years”).

212. *Hearing, supra* note 151, at 31 (testimony of Floyd Abrams); *see also id.* at 26 (statement of Floyd Abrams) (discussing government action in *Rust* as suppression of dangerous idea); Cole, *supra* note 163, at 688 n.47 (addressing issue as clear example of law aimed at suppressing dangerous ideas).

213. Government already does so through maintenance of public forums and subsidies. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (providing and maintaining forum, Central Park bandshell, for expression); *Hannegan v. Esquire*, 327 U.S. 146 (1946) (providing subsidies for second-class mailing privilege); *see also Hearing, supra* note 151, at 17 (statement of Lee C. Bollinger) (stating that well-established public forum doctrine, which requires government to allocate speech opportunities without regard to ideas or messages, is primary example of constitutional choice to limit state’s power to distort speech through use of public property).

214. *Hearing, supra* note 151, at 11 (statement of Leslie H. Southwick); *see also* Brief for the Respondent at 22-23, *Rust v. Sullivan*, 500 U.S. 173 (1991) (No. 89-1391) (arguing that government entitled to participate in public discourse and may “contract out” production of its messages); Cole, *supra* note 163, at 676-77 (discussing content-based strings attached to federal funding); Hirt, *supra* note 163, at 1904-12 (advocating entitlement of government to restrict speech if associ-

regulate the content of any message it sponsors.²¹⁵ The implications of such a premise are staggering. As Professor Rosenthal observed, “[i]f the power to tie conditions to federal funds were really unlimited, Congress could use the spending power to destroy balances achieved at the Constitutional Convention and in almost two centuries of Supreme Court decisions”²¹⁶

When government speaks through individuals at the family planning clinics, the fallacy, at least for First Amendment purposes, is laid bare in the *Rust* Court’s attempt to distinguish overt coercion from selective subsidy: “There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”²¹⁷ Yet, any “legislative policy” that substitutes the views of the state for those of individuals is a mockery of the concept of individual autonomy, whether the policy is couched in terms of interference or encouragement. Diversity of expression suffers if some of the ostensibly private speakers actually are representing state ideology, especially when they would express themselves differently but for

ated with government funding). Professor Sullivan concluded that the *Rust* Court was treating government “as just another speaker who may decide what is to be said on its nickel.” Sullivan, *supra* note 169, at 46.

215. *Hearing, supra* note 151, at 13 (statement of Leslie H. Southwick).

216. Rosenthal, *supra* note 158, at 1105-06. A commentator offered some of the possibilities for future government control of speech it subsidizes, including restricting the National Endowment for the Arts to funding only art that promotes “family values,” appropriating money to public libraries only for works that do not discuss abortion and revoking the second-class mailing privilege for magazines critical of the administration. Fitzpatrick, *supra* note 163, at 201; *see also* Cole, *supra* note 163, at 687 (theorizing that government could create National Endowment for Democratic Party Values to fund speakers, authors and artists). The logic of *Rust* would seem to bring into question the holdings in a number of cases. *See, e.g.*, *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) (holding that second-class mailing privilege criterion of “public character” does not convey discretion to Postmaster to censor works with sexual theme); *Bullfrog Films v. Wick*, 847 F.2d 502 (9th Cir. 1988) (holding that it was unconstitutional for United States Information Agency to issue educational certificates as prerequisites for customs duty exemption only to films that advocated specific point of view, which USIA thought included those promoting safety of nuclear power, but not those describing dangers); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (finding it unconstitutional for Internal Revenue Service to deny tax exemption because of magazine’s support for homosexual rights); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986) (finding it unconstitutional for Congress to direct Library of Congress not to produce and distribute braille edition of *Playboy* because of its sexual content).

Justice Blackmun, dissenting in *Rust*, wrote, “Under the majority’s reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee’s speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.” *Rust v. Sullivan*, 500 U.S. 173, 213 (1991) (Blackmun, J., dissenting).

217. *Rust*, 500 U.S. at 193 (quoting *Maier v. Roe*, 432 U.S. 464, 475 (1977)).

the intercession of the state.²¹⁸

Private doctors whose salaries were not at all dependent on Title X funds would enjoy complete freedom from any prior restraint in discussing family planning options with their patients. The restraint that was imposed on would-be speakers skewed their relationship with government and to other speakers²¹⁹ who were privileged enough to avoid the censorship their government would otherwise impose on them.²²⁰ In seventeenth century England, the

218. See Kreimer, *supra* note 61, at 1352-78. As part of an analysis of the constitutionality of allocations affecting liberties, Professor Kreimer would have the courts consider whether a government condition presents an offer or a threat (does the individual end up with more or fewer choices?) and he suggests three factors in reaching that conclusion: (1) history (has the benefit always been conferred?); (2) equality (is the condition, withdrawal of benefit, etc. imposed selectively?); and (3) prediction (what would happen if government could not impose the condition in question or could not take the exercise of constitutional rights into account?). *Id.* The factors are an improvement over traditional result-oriented doctrines, and they may bear on whether the fundamental premises of free speech, consistent with limited government, are subordinated. While grants earmarked for certain purposes will always influence what speakers will say compared to what they would have said, if the grant conditions specifically prohibit certain content that the speakers otherwise would have expressed, the "predictive" factor seems to indicate the government is deliberately targeting individual autonomy. *Id.*

219. See Sullivan, *supra* note 169, at 1490-99. Professor Sullivan argued that "[p]reserving autonomous private decision-making not only promotes self-determination by rightholders; it also checks the power of the state. Ensuring that decisions about rights remain to the greatest extent possible a matter of private ordering preserves an equilibrium between public and private spheres." *Id.* at 1493 (footnotes omitted). Not only is democratic self-government undermined if the state violates the rule of neutrality and some rightholders are subject to conditions and others are not, but a constitutional caste system is created. *Id.* at 1496-98; see also *id.* at 1490 ("[A]n unconstitutional condition can skew the distribution of constitutional rights among rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition.").

220. In its brief, the government attempted to draw an analogy between the regulations prohibiting abortion counseling by Title X recipients and a government grant to produce a television documentary discussing family-planning techniques, but not abortion. Brief for the Respondent at 22-23, *Rust* (No. 89-1391). Professor Roberts contended, however, that the government's analogy grossly undervalued the impact of the regulations at issue on the access of poor women to abortion information. "The hypothetical that more accurately illustrates the injustice of the regulations is a society where the dispossessed only have access to a government television channel that broadcasts limited, misleading — even harmful — information, while the privileged have their pick of channels that provide a wealth of information." Roberts, *supra* note 158, at 608.

Professor Sullivan noted that a governmental obligation of neutrality or evenhandedness regarding private speech may leave intact very real inequities among speakers. Sullivan, *supra* note 169, at 1497. However, the skewing caused by government "can be recognized and restrained even if inequality among rightholders remains." *Id.* She analogized to antitrust law where perfect competitive equilibrium need not result. Likewise, "a right against government distortion need not entail a right to government equalization. . . . [S]ome equity conditions restrain

government doled out licenses as means of controlling publication; now it doles out largesse.

2. *The Systemic Consequences of "Choice"*

Arguably, accepting largesse and the conditions attached to it is different from applying for a license. At least in the former scenario, the speakers are free to speak if they do *not* receive government's grant, and they are only bound if they accede to the conditions by accepting the money. Putting aside the dynamic that it is in government's interest to bind as many people as possible by distributing its largesse liberally, the issue in *Rust* seemed to center on choice. The clinic could forgo the funds and retain all freedom, at least in terms of negative liberty, or voluntarily accept the funds and abide by the conditions. Chief Justice Rehnquist observed that government did not violate the First Amendment "simply by offering that choice."²²¹

As with the "legislative policy" of encouraging a particular viewpoint at the expense of another, however, the "choice" is itself invalid, no matter if government is characterized as beneficent, or the prospective recipient as willing. The government cannot impose prior restraint, in any guise, without overstepping its role in a representative democracy. The Court focused on the individual prerogative in making a choice,²²² when the essential problem is with

government even in a constitutional order founded on negative rather than positive liberty." *Id.*

Professor Baker made the same point in noting that constitutional rights are protected against government deterrence, but the state assumes no obligation to address economic impediments in a market economy. Constitutional and statutory entitlements, however, by their nature are positive rights and impose affirmative obligations on government to address market barriers to facilitate the realization of the rights. Baker, *supra* note 158, at 1219-20. Professor Baker also acknowledged the argument that "background economic impediments, although distinguishable, are as much a product of the State as its discrete laws, regulations, and constitutional provisions." *Id.* at 1219 n.123. See generally BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 27 (1975) (stating that Framers did not contemplate right to survival in marketplace for all potential purveyors of ideas); Randall Bezanson, *Herbert v. Lando, Editorial Judgment, and Freedom of the Press: An Essay*, 1978 U. ILL. L.F. 605, 613, 615 (stating that ideas less likely to gain popular acceptance relegated to forums of lesser circulation).

221. *Rust*, 500 U.S. at 199 n.5.

222. *Id.* Chief Justice Rehnquist stressed that the individuals were "voluntarily employed" on a Title X project, and their freedom of expression only is limited when they work for that project; "but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Id.* at 199. Furthermore, a recipient of Title X funds "voluntarily consents to any restrictions placed on any matching funds or grant-related income." *Id.* at 199 n.5.

government offering such a choice.²²³ For government to bargain for a waiver of the individual's freedom from prior restraint, which protects the individual against government and which government may not abridge outright, is to upset the constitutional scheme. The right serves as a key counterweight to the power of government in a system where power in the people is more than platitude. Otherwise, government becomes a monopolist, fixing prices in the marketplace of ideas.²²⁴

Thus, credible arguments have been made that rightholders cannot make the choice to waive their First Amendment right, even if the choice was offered.²²⁵ While on the face of it, a waiver would

Professor Baker provided a deft overview of the Court's labeling efforts in this area:

The Court, in its search, has taken the perspective of the potential beneficiary and has focused on the extent and type of burden presented by the condition. Not surprisingly, given this perspective, the rhetoric of individual 'choice' versus 'coercion' permeates its discussions. In determining which conditions are coercive and therefore impermissible, the Court has explicitly looked to such characteristics as the 'directness' or 'substantiality' of the condition's impact, the likelihood that the condition will deter the exercise of a constitutional right, the 'germaneness' of the condition to the purpose of the benefit program, and the 'importance' of the individual right or interest burdened. These concepts, however, are scarcely less determinate than the notions of coercion and choice they are intended to delineate and define. Thus, one might conclude, at least at first glance, that the Court has simply relocated rather than resolved the original problem.

Baker, *supra* note 158, at 1194-95 (footnotes omitted).

223. See *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) ("[T]o accept the waiver argument is to say that the government may do what it may not do.").

224. Full credit is due Professor Kreimer for the wonderful analogy. See Kreimer, *supra* note 61, at 1391 (analogizing government to monopolist).

225. See *id.* at 1378-92 (discussing inalienability of First Amendment rights); Ronald Dworkin, *Is the Press Losing the First Amendment?*, *NEW YORK REVIEW*, Dec. 4, 1980, at 49, 56-57 (addressing issue of unwaivable First Amendment rights); see also *THE DECLARATION OF INDEPENDENCE* (U.S. 1776) (stating that all men are endowed with certain unalienable rights); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (holding that state may not impose conditions that require relinquishing constitutional rights); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (holding that person cannot make agreement in advance to forfeit their rights at some future time); *Townsend v. Townsend*, 7 Tenn. (Peck) 1, 12 (1821) (holding that constitutional rights may not be bartered or transferred away and any such transfer is void); Kreimer, *supra* note 61, at 1383 n.323 (listing sources which have analyzed issue of waiver of constitutional rights); Rosenthal, *supra* note 158, at 1159-60 (asserting that *Snepp* case, where CIA agent required to pay damages for violating secrecy agreement, was wrongly decided if decided as employment contract case); Smolla, *supra* note 180, at 116 (arguing that recipients of public largess who lack bargaining power cannot contract away their right to procedural protection for same reason that contracts of adhesion are invalid).

However, the argument that First Amendment rights may not be waived is not without its critics. Professor Baker suggested the fallacy is that there is no way of telling which rights were inalienable or when they would be inalienable. Baker,

seem consistent with individual autonomy, Professor Kreimer disagreed: "To the extent that a right is the result of a definition of the structure and power of government, an individual decision to waive it is irrelevant."²²⁶ The government is prohibited from condoning slavery, even should an individual want to waive his or her Thirteenth Amendment right, because it denigrates the individual

supra note 158, at 1215. While that may be true generally of constitutional rights (and Professor Baker dwells on cases involving public assistance benefits), it would not seem to be so much of a problem with First Amendment speech and press rights fundamental to effective representative democracy and integral to the constitutional scheme.

Professor Sullivan observed that inalienability undercuts the autonomy it is intended to promote. See Sullivan, *supra* note 169, at 1486 (arguing that declaring constitutional right non-relinquishable may, in some circumstances, contradict personal autonomy of rightholder to have control over right). Proponents of inalienability may use social values as a rationale, overlooking the autonomous and individual values at stake. *Id.* at 1487-88. Either wholesale alienability or inalienability is advocated, when the issue should be inalienability *vis-a-vis* government without regard to waivers in the private sector. *Id.* One might respond, though, that it is autonomy from government that the First Amendment contemplates and it would not promote autonomy to waive it to become a vessel for government speech. Secondly, both social and individual values support inalienability of First Amendment rights, and thirdly, the First Amendment right is framed in opposition to government, which further supports its inalienability. However, Sullivan does embrace a form of inalienability, based upon the "systemic effects that conditions on benefits have on the exercise of constitutional rights." *Id.* at 1490. Rights would only be inalienable up to the point where the conditions on benefits survive strict review. *Id.* at 1490, 1499-1500.

Professor Cole thought inalienability was too blunt a tool because government must commonly engage in content differentiation. Cole, *supra* note 163, at 700. The example he gave involved hiring a spokesperson for the administration who, he claimed, would be required to waive his or her right to criticize the administration. *Id.* One might suggest, though, that an administration spokesperson would and should retain a right to criticize the administration and that any explicit provision to the contrary in an employment contract would indeed be unconstitutional. Such criticism might well have consequences for the spokesperson, just as defamation can have consequences, but administration spokespersons presumably hold their tongues because of professional and political reasons and not because of any prior restraint.

Professor Easterbrook employed an economic analysis in criticizing inalienability, concluding: "A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action." Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347 (footnote omitted). Even an advocate of economic analysis, though, might see the circularity in identifying the "worth" or "value" of constitutional rights with the price they would bring upon sale. Easterbrook's only discussion of systemic consequences of alienability involved a refutation of the public's right to know, describing it as a "by-product" of the right to speak and a creature of "invention rather than interpretation" of the First Amendment. *Id.* at 350-51. This much might be granted, but it does not constitute an exhaustive critique of the systemic effects of First Amendment inalienability.

226. Kreimer, *supra* note 61, at 1387.

worth integral to our system of government.²²⁷ Likewise, a caste system of First Amendment rightholders and an underclass of the dispossessed is antithetical to the democratic foundations of society.²²⁸

Just as Blasi referred disparagingly to the “collective effect” that consensual prior restraint could have for the allocation of authority between the state and individual,²²⁹ Professor Sullivan emphasized the “systemic effects” of state conditions on constitutional rights: “[P]referred constitutional liberties . . . do not simply protect individual rightholders piecemeal. Instead, they also help determine the overall distribution of power between government and rightholders generally, and among classes of rightholders.”²³⁰ In this sense, individual autonomy is preserved because it is essential

227. See *Pollack v. Williams*, 322 U.S. 4, 24 (1944) (holding that state may not command involuntary servitude even if through voluntary contract); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (finding compulsory service to work off debt, or peonage, is involuntary servitude and unconstitutional under Thirteenth Amendment, even if contract entered into voluntarily); see also *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding that Fifth Amendment freedom from self-incrimination may not be waived as condition of employment as policeman).

228. See Kreimer, *supra* note 61, at 1387-88 (arguing that caste system is contrary to societal belief in free society); Sullivan, *supra* note 169, at 1490 (arguing that unconstitutional conditions can create “undesirable caste hierarchy” between those who do and do not depend on government benefits).

229. For a discussion of the “collective effect” of consensual prior restraint on the allocation of authority between state and individual, see *supra* note 64 and accompanying text.

230. Sullivan, *supra* note 169, at 1490; see Edward J. Fuhr, *supra* note 180, at 107, 117, 137-40, 152-53 & n.248 (stating that problem with interpreting conditions as offers or threats is that at some point alienation of certain rights should be limited because of structural effects, which is especially important in First Amendment context).

Thus, the Pareto superiority test of welfare economics would be inapplicable in the First Amendment context. Individuals may bargain for benefits and the outcome is said to be Pareto superior if those who accept the conditions are better off and nobody is worse off. A problem, however, is that the prerequisite that no one else would be affected can rarely be fulfilled, and nowhere is that more true than when the issue is waiver of First Amendment freedom from prior restraint. The agreement to prior restraint alters the relationship not only between the speaker and government, but between the speaker and all other speakers who have not waived their right. Moreover, it begs the question of the initial distribution of resources. Do you ask whether the family clinic is better off compared to a world in which the State does not provide the benefit at all or one in which the State provides the benefit without the attached condition? See Baker, *supra* note 158, at 1192-93 & n.14 (1990) (quoting RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 54-55 (1981)) (discussing problems associated with Pareto superiority test in context of choice of unconstitutional conditions); Sunstein, *supra* note 158, at 606 n.48 (asserting that Paretian criteria hardly dispose of constitutional questions, and waiver of rights may be individually rational but have significant adverse systemic consequences—such as governmental purchase of right to vote or free speech—undermining not only individual autonomy but certain forms of government).

to our constitutional commitment to limited government. Individuals do not have the power to sacrifice their autonomy to government because government does not have the power either to coerce or induce that result.²³¹

3. *The Chimera of "Choice"*

Beyond the constitutional implications, Chief Justice Rehnquist's resort to "choice" as justification for the prior restraint in *Rust* raises a question of logic. The label "choice" provides no reason why First Amendment rights may be given up in the first place. To say there is a choice is to assume the right may be waived. This is the non sequitur that Professor Van Alstyne exposed in his classic article on the demise of the right-privilege distinction.²³² He analyzed Justice Holmes' oft-quoted²³³ epigram from an 1892 case of a policeman who was fired for political canvassing in violation of his employment contract: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a po-

231. Kreimer, *supra* note 61, at 1391 ("Most importantly, the government may be barred from attempting to obtain waivers of constitutional rights . . ."). Government should even be expected to resist the pressures exerted by individuals who pursue their own advantage in waiving their individual rights. Individual liberties such as speech, voting and even freedom of religion or freedom from search may seem of little intrinsic worth to some individuals, especially compared to what they may be able to gain in exchange for resources necessary for livelihood or some other sense of security. In the case of voting rights, Professor Kreimer put it eloquently:

It is advantageous for any given member of the least well-off group, if votes are alienable, to sell her vote rather than use it to attempt to obtain a public good for her group. If others sell their votes, she is no worse off for having sold her vote, and if other members of her group retain their votes and vote for the public good, she will obtain the good in any event. On the other hand, if she retains her vote and her compatriots do not, she will have gained nothing, and she knows that her compatriots, faced with the same choices, will probably "rationally" choose to sell.

Id. at 1390 n.54; *see also* Fuhr, *supra* note 180, at 153 n.248 ("It is unlikely that individual employees would value very highly their First Amendment rights, though in the aggregate, the effect of such waivers could be immense."); Sullivan, *supra* note 169, at 1482-83 (stating that due to political pressures, individuals may feel compelled to bargain away rights that they would have collectively voted to preserve under different factual situation).

232. Van Alstyne, *supra* note 158, at 1439.

233. A long list of commentators have cited Justice Holmes' quote. *See, e.g.*, Baker, *supra* note 158, at 1190; Cole, *supra* note 163, at 676; Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 670; Epstein, *supra* note 180, at 10 n.14; Fuhr, *supra* note 180, at 100-01; Rosenthal, *supra* note 158, at 1120; Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1051 n.38 (1984); Smolla, *supra* note 180, at 83; Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1010 (1986); Gary A. Winters, Note, *Unconstitutional Conditions as "Nonsubsidies": When Is Deference Inappropriate?*, 80 GEO. L.J. 131, 141 n.46 (1991).

liceman.”²³⁴ The sentence might just as easily have read, “The clinic doctor may have a constitutional right to counsel regarding abortions, but she may choose government funding in lieu of that right.”

Van Alstyne highlighted the lack of a rationale in the sentence, and further demonstrated that it was “perfectly circular” when Holmes’ own elastic conception of a “right” was taken into account.²³⁵ To Holmes, a right was not apparent on its face but only represented “the fact that the public force will be brought to bear upon those who do things said to contravene it.”²³⁶ If one can be stopped from violating it, then it is a right. Because those who fired the policeman would not be stopped from firing him, he had no right to be a policeman and talk politics; and because he had no right to be a policeman and talk politics, those who fired him would not be stopped, according to Van Alstyne.²³⁷ Or, in the present case, because government would not be stopped from prohibiting certain speech if it funded other speech, the clinic doctor has no right to avoid the choice between funding and freedom from prior restraint; and because she has no right to avoid the choice, the government would not be stopped from prohibiting certain speech if it funded other speech. There is nothing per se constitutional about choice, unless choice is predetermined to be constitutional—unless it is predetermined that the public force will not be brought to bear on those who impose the choice. In *Rust*, the proposition that one could choose prior restraint was assumed, and the outcome was therefore foreordained.²³⁸

234. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892).

235. See Van Alstyne, *supra* note 158, at 1459-60. According to Professor Westen, the right-privilege distinction is “untenable” because if constitutional rights are to possess the significance society accords them, they must be assumed to apply to the whole of human activity. That is to say, once a government regulation arguably exerts an adverse effect on an interest that underlies a constitutional entitlement, we expect the state to account for, or justify, such adverse effects, and the state cannot escape the obligation simply by announcing that the regulation falls within some arbitrarily defined sphere of nonaccountability.

Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 747-48 (1981) (footnotes omitted).

236. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 42 (1918), quoted in Van Alstyne, *supra* note 158, at 1459.

237. See Van Alstyne, *supra* note 158, at 1460 (revealing circularity of Holmes’ argument by substituting in Holmes’ definition of “right”).

238. Individual choice as a justification for imposition of onerous conditions by the state has a long history in the Supreme Court, dating to the dissents in the Civil War loyalty oath cases, and the Court’s initial consideration of state authority to condition market access on corporate waiver of the federal guaranteed right of access to federal courts. See *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 542 (1876)

VI. THE DAY THE MUSIC DIED

Floyd Abrams, in his congressional testimony, perceptively characterized the essential problem with *Rust*:

There is another theme I would briefly offer It is deliberately impressionistic. Or, to mix my metaphor a bit, it relates to the music as well as the words of the Court's opinion. It is this: *Rust* is a singularly insensitive ruling, insensitive to the spirit as well as the letter of the First Amendment. It is written as if the First Amendment were little but a bother—a minor bother, perhaps, but surely nothing more than an irritant that must mechanistically be dealt with *en route* to a long since predetermined result. . . . The Court, in short, simply does not take seriously the First Amendment issues raised by its decision. That in itself makes the dangers of its ruling all the more serious.²³⁹

It is the music of the First Amendment and of the doctrine against prior restraint that is missing in *Rust* and that this Article concerns. Chief Justice Rehnquist simply, as he saw fit, defined the issue, chose doctrine deferential to government, and laid the groundwork for future deference in cases involving conditions on the right to speak without prior restraint. At the same time, he glossed over the concept of limited government in a paragraph tacked on to the end of his First Amendment discussion.

Yet, he cannot totally be faulted for overlooking prior restraint as the central issue in the case. The petitioner's brief and reply brief mentioned prior restraint only once in their texts.²⁴⁰ Interestingly, in *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁴¹

(holding statute constitutional which requires out of state business to contract away its right to use federal courts for dispute resolution in order to obtain license to do business in state); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 389-90 (1867) (Miller, J., dissenting) (arguing it is not constitutional violation to require loyalty oaths of those who would accept office or practice law); see also Kreimer, *supra* note 61, at 1304 n.31 (providing list and classifications of cases where courts have defended allocational sanctions on ground that victim retains choice of non-compliance). The argument lost favor in corporate regulation in the early part of this century, but continued to be effective in personal liberties cases through the mid-part of the century and occasionally even in the present. Kreimer, *supra* note 61, at 1304 n.31.

239. *Hearing*, *supra* note 151, at 27 (testimony of Floyd Abrams).

240. Brief for Petitioners at 14, *Rust v. Sullivan*, 550 U.S. 173 (1991) (No. 89-1391). The petitioners argued that the regulations at issue "proscribed" or "censored" speech of physicians. *Id.* at 14-15.

241. 18 F.3d 269 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994).

a later case quite similar to *Rust*, the Fourth Circuit Court of Appeals accepted the plaintiff-appellants' argument that "content and viewpoint discrimination imposes a prior restraint upon the ability . . . to enjoy government largesse."²⁴² The university offered funding for student activities, but exempted religious activities, including the magazine dedicated to "Christian expression" that plaintiff-appellants published.²⁴³ The court concluded that "the restriction has operated to erect a prior restraint on university subsidization of all forms of religious expression [W]hen funds are made available . . . generally, they must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity."²⁴⁴

Abortion and the free exercise of religion both enjoy constitutional protection, and speech regarding each is protected. When the government maintains a program of funding speech generally, but specifically exempts otherwise protected speech on the basis of its content, then the state action would contravene the premises underlying the doctrine of prior restraint and, as such, be unconstitutional. The regulation in *Rust* should have been identified as a prior restraint, just as the restriction in *Rosenberger* was.²⁴⁵ It is easy

242. *Id.* at 279.

243. *Id.* at 273-74.

244. *Id.* at 280-81.

245. Actually, the defendant-appellees in *Rosenberger* placed "great emphasis" on the Supreme Court's decision in *Rust*. *Id.* at 282 n.28. The Fourth Circuit, however, found *Rust* inapposite because the petitioners in *Rust* had already received funding, while the appellants in *Rosenberger* were denied access to funding at the outset. *Id.* A clearer focus on the viewpoint-restrictive nature of the government funding ban in both cases would have established the similarity, though.

The dissimilarity in the cases involves the complicating factor of the Establishment Clause in *Rosenberger*, requiring separation of church and state. *See id.* at 281-82 (noting defendant-appellees' concern that they could not fund religious activities without violating the Establishment Clause). The Fourth Circuit assumed that it had to consider whether a compelling state interest, narrowly drawn to achieve that end, justified the regulation of content. *Id.* at 281 (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (using strict scrutiny to find sales tax exemption for periodicals based on content to be unconstitutional); *see also supra* note 180 (suggesting this analysis for conditions imposed by state subsidies on speech generally, although not if condition constituted prior restraint). Not all agree that such balancing is appropriate in cases of content regulation. *See Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991) (Kennedy J., concurring) (contending that the compelling state interest test is derived from equal protection analysis and regulation of protected speech content should not be subject to balancing, but considered unconstitutional). A per se finding of unconstitutionality would be consistent with the historical treatment of prior restraint. *See supra* note 90 (noting that before *Near*, doctrine against prior restraint considered unqualified and without exception). For a discussion of Blackstone's definition of a realm of speech protected from previous restraint and another realm of speech unprotected from subsequent punishment, see text accompanying *supra* note 19.

The Fourth Circuit found that subsidizing the plaintiff-appellants' magazine

to criticize with the advantage of hindsight, and Chief Justice Rehnquist could have defined the issue in *Rust* as not involving prior restraint just as easily as he did in a more recent case.²⁴⁶ However, a more forthright assertion of prior restraint as the central issue in the *Rust* case and an appeal to the time-honored premises underlying the doctrine against prior restraint would have been truer to the “music” of the First Amendment. No composition on the First Amendment generally, and the doctrine against prior restraint specifically, is complete without consideration of the three premises of limited government integral to the doctrine—trust in the individual rather than government, acceptance of the risk inherent in democracy, and regard for individual autonomy from the state.

The premises apply equally well to conditional prior restraint cases other than *Rust*. Some allowances might be made for conditional prior restraints on speech by CIA agents²⁴⁷ or politicians who are offered campaign funding,²⁴⁸ but I sincerely doubt it. The only difference may be that different premises—acceptance of risk in the case of the CIA agents²⁴⁹ and distrust of government meddling

would “excessively entangle” the university with religion, thus creating a compelling interest justifying the prior restraint. *Rosenberger*, 19 F.3d at 286.

Curiously, the petitioners distinguished their case from *Rust v. Sullivan* in arguing to the Supreme Court; their brief made no mention of the doctrine against prior restraint. See Brief for Petitioners, *Rosenberger v. Rector & Visitors of Univ. of Va.* (No. 94-329) (positing that status of family planning clinics in *Rust* as “conduits for government messages” made to grantees’ speech subject to reasonable government restrictions).

246. See *Alexander v. United States*, 113 S. Ct. 2766 (1993) (finding forfeiture of entire inventory of non-obscene magazines and videotapes after conviction under RICO for seven obscene items is subsequent punishment and poses no obstacle to future speech).

247. See *Snepp v. United States*, 444 U.S. 507 (1980) (upholding agreement not to divulge classified information without authorization).

248. See *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (per curiam) (characterizing Federal Election Campaign Act of 1971 as “a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process”).

249. *Snepp*, 444 U.S. at 514-15. *Snepp* was a case of risk aversion, with the majority highly sensitive to probing into confidential matters. *Id.* The risk of prior restraint was never addressed. At least one author has suggested that the reason for pre-publication clearance programs and the risk to which the government was most clearly averse was embarrassment caused by whistleblowers. See Fuhr, *supra* note 180, at 146-47 (expressing point that government has desire to avoid situation where employees may sabotage programs by releasing information for public debate); see also Smith, *supra* note 1, at 468-69 (recognizing that much of what Americans know concerning perilous or provocative acts by their government has come from reporting of classified or otherwise concealed information). Fuhr pointed out that pre-publication review is most ineffective in the cases in which it would be most needed, and that unauthorized disclosure of classified information is already covered by criminal penalties. Fuhr, *supra* note 180, at 145. The need for a solution is dubious because there has not been shown to be a significant problem. See

regarding political speech²⁵⁰—merit the type of prominent consideration denied individual autonomy in *Rust*. When the Court strikes a discordant note, as it did in *Rust*, one can only hope that it was a postmodernistic foray in a developing area of law and that the classical approach will ultimately prevail. The venerable age of the doctrine against prior restraint, dating well before the First Amendment, does not guarantee its survival, however, and new, more sophisticated incursions will always be attempted. Allowing government to buy what it may not coerce represents just such an incursion and the reasoning and holding in *Rust* indicate that the threat is real. Creative use of the government's power of the purse could marginalize the doctrine against prior restraints if the Court chooses to ignore the threat to speech posed by unlimited government. Debates over whether the Framers intended subsequent punishment or just prior restraint to be proscribed by the First Amendment will then truly be only academic.

The regulation at issue in *Rust* was not a subsequent punishment or any esoteric speech restriction. It was a prior restraint. It struck at the core understanding of what the First Amendment meant when it was written, and it depreciated the individual rationality central to our form of government. If a Supreme Court majority does not develop an appreciation for the richly nuanced harmonics of the First Amendment in our constitutional scheme and of the doctrine against prior restraint in cases of conditioned speech rights, then the doctrine, like Mozart's grave, may be lost.

id. at 145 & n.221 (stating that GAO study to Congress showed few unauthorized disclosures, most made by officials who would not be covered by proposed review program). Reliance on subsequent punishment would decrease the likelihood of government harassment of employees who voice critical views. *Id.* at 150-51.

250. See L. A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 252-54, 283-84 (discussing distrust of government in arena of campaign financing and mass speech).

