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Legal Services Corporation v. Velazquez: The Court's Missed Opportunity to Clarify the Legal Framework for Examining the Constitutionality of Government Program Restrictions

Carrie S. Bernstein

LEGAL SERVICES CORPORATION V. VELAZQUEZ: THE COURT'S MISSED OPPORTUNITY TO CLARIFY THE LEGAL FRAMEWORK FOR EXAMINING THE CONSTITUTIONALITY OF GOVERNMENT PROGRAM RESTRICTIONS

I. INTRODUCTION

The First Amendment's free speech clause is one of the most widely cherished and debated constitutional rights in America. Today, discussions involving the First Amendment take center stage in our newspapers, on our televisions and over the Internet. Racists and white supremacists join hands with journalists and politicians alike to proclaim the virtues of the right to free speech. One topic of this debate receiving little publicity is the relationship between the legal profession and the First Amendment. Our society rarely rallies around lawyers. Yet, the recent Supreme Court decision of *Legal Services Corporation v. Velazquez*[1] provides a rare opportunity for free speech supporters to rally around litigators. Legal Services Corporation ("LSC") supporters achieved a rare victory against staunch conservatives in Congress who continue chipping away at their program. This comment examines the circumstances surrounding the case and it's legal issues.

This comment first outlines a factual context of the Legal Services Corporation, and the details that laid the foundation for the instant lawsuit. Second, this comment explores the relevant legal background, and articulates the pertinent legal issues surrounding this case. Third, this comment examines the Supreme Court's majority and dissenting opinions. Next, this comment analyzes the case from a public policy perspective and attempts to predict the effect the Court's decision may have on the Legal Services Corporation. Lastly, this comment expresses discontent for the current state of the law in this area, proposes a clearer legal framework for determining the constitutionality of government program restrictions, and challenges the Supreme Court to clarify the befuddled state of the law so lawyers, Congress and judges can more accurately predict the outcome of such constitutional legal disputes.

II. BACKGROUND OF LEGAL SERVICES CORPORATION

The Legal Services Corporation's roots can be traced back to President Lyndon B. Johnson's War on Poverty.[2] As part of this program,

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1. 531 U.S. 533 (2001).

2. *See* William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 245 (1998); *see also* J. Dwight Yoder, *Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 WM. & MARY BILL RTS. J. 827, 833 (1998) (discussing the establishment of the Legal Services Program in 1966).

Congress created the Office of Economic Opportunity (OEO) to operate programs to assist with poverty in the United States, including legal services to the poor.[3] Immediately, conservative political opposition strove to eliminate this legal services program.[4] Because of the controversy surrounding the OEO's program, Congress and the Nixon administration "focused on establishing a congressionally funded, but politically independent, legal services program."[5]

In 1974, Congress created the Legal Services Corporation (LSC) as a program that would provide legal services to those who would be "otherwise unable to afford adequate legal counsel."[6] Congress declared that the LSC "must be kept free from the influence of or use by it of political pressures."[7] In accomplishing this goal, LSC attorneys were provided with "full freedom to protect the best interests of their clients."[8]

Since its inception, LSC funds, in the form of grants, have been distributed to recipients who provide legal services to low-income individuals.[9] These grantees generally rely on LSC funding as well as monies from a variety of other private and public sources.[10] LSC funds have been described as "the primary vehicle for insuring that the poor are included in this nation's legal system."[11]

Even with this public interest background, controversy has shrouded the workings of LSC because of the increasing number of restrictions placed on the "permissible uses of federal funds by recipient organizations."[12] In 1996, Congress restricted the allocation of LSC funds to prohibit legal assistance for: lobbying activities, class action suits, aliens, activism, attorney profits, abortion, criminals, and welfare reform.[13] Additionally, LSC legislation prohibited grantees from providing legal assistance for a restricted purpose even when the funds were generated from other sources.[14]

The most controversial restriction (and at issue in the instant case) involved welfare reform litigation. This restriction prohibited "LSC recipients from participating in 'litigation challenging laws or regulations

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3. *See generally* Quigley, *supra* note 2. The program was called the Legal Services Program.
4. Yoder, *supra* note 2, at 833.
5. *Id.*
6. 42 USCS § 2996(2).
7. *Id.* § 2996(5).
8. *Id.* § 2996(6).
9. *See* Velazquez v. Legal Servs. Corp., 985 F. Supp. 323, 327 (E.D.N.Y. 1997), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).
10. *Velazquez*, 985 F. Supp. at 327.
11. *Id.*
12. *Id.*
13. *See* Omnibus Consolidated Rescission and Appropriations Act of 1996, § 504, 110 Stat. 1321-53.
14. *See id.* § 504(d)(2)(B).

enacted as part of an effort to reform a Federal or State welfare system.'"[15] Recipients could provide legal assistance to individuals seeking relief from a welfare agency; however, the restriction barred suits involving "an effort to amend or otherwise challenge existing" welfare laws.[16] Understandably, LSC funded lawyers found this restriction particularly prohibitive.

In response to these heightened restrictions, numerous individuals and organizations filed suit in the United States District Court for the Eastern District of New York against LSC, challenging the constitutionality of certain provisions of the Act by asserting that the restrictions violate the First Amendment.[17] A separate group of plaintiffs filed a similar suit in the federal District Court for the District of Hawaii in response to the same 1996 restrictions.[18]

III. CONSTITUTIONAL FRAMEWORK

A. Government Restriction vis-à-vis First Amendment Rights

To fully understand the recent decision of *Legal Services Corporation v. Velazquez*,[19] one must understand the paradox between First Amendment rights granted by the Constitution and government subsidies that the Constitution does not require Congress to allocate. The question ultimately becomes: if the government is not obligated by the Constitution to provide certain funding or programs, why should First Amendment rights apply to the restrictions the government chooses to place on the funding program?[20] The government understandably wants to control how budget dollars are spent; yet, in effectively constraining its budget, First Amendment rights may be limited.[21] Therefore, the Supreme Court

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15. Megan Elizabeth Lewis, *Subsidized Speech and the Legal Services Corporation: The Constitutionality of Defunding Constitutional Challenges to the Welfare System*, 74 N.Y.U. L. REV. 1178, 1179-80 (1999) (quoting 42 C.F.R. § 1639.3(a) (1997)).

16. 45 C.F.R. § 1639.4 (2001). *See also* Lewis, *supra* note 15, at 1180 (explaining the limitations on LSC recipients).

17. Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (E.D.N.Y. 1997). Original plaintiffs included: Carmen Velazquez, WEP Workers Together!, Community Service Society of New York, Inc., New York City Coalition to End Lead Poisoning, Contro Independiente De Trabajadores Agricolas, Inc., Greater New York Labor-Religion Coalition, Farmworkers Legal Services of New York, Inc., Lucy Billings, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, Lauren Shapiro, Andrew Connick, Councilmember C. Virginia Fields, Councilmember Guillermo Linares, Councilmember Stanley Michels, Councilmember Adam Clayton Powell, IV, Senator Lawrence Seabrook, and Assemblyman Scott M. Stringer.

18. Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997).

19. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

20. *See* Lewis, *supra* note 15, at 1181; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989)(explaining the debate in terms of the "government may not do indirectly what it may not do directly" versus "the greater power to deny a benefit includes the lesser power to impose a condition on its receipt").

21. *See* Lewis, *supra* note 15 at 1181.

has been charged with determining when those government restrictions have gone so far as to violate the First Amendment.

B. Government Funding Restrictions Constitutional Analysis

In recent Supreme Court opinions, the Court has alluded to numerous legal inquiries courts can use in examining constitutional challenges to government restrictions.[22] Two legal issues often discussed in these types of cases include: first, the relationship between the government and the grantee of the government's subsidy must be characterized, and second, the disputed restriction must be classified as viewpoint neutral or viewpoint discriminatory.

1. Characterizing the relationship between the government and the grantee.

The Supreme Court often discusses the relationship between "the government and the recipient of federal funds upon whom the restrictions are placed."[23] Understanding this relationship can assist in determining the constitutionality of a particular restriction on the government funded program.[24] Grantees can either fall under a limited public forum or nonpublic forum characterization.[25]

The Supreme Court has explained that a limited public forum consists of a place or organization that the State "has opened for use" for "expressive activity."[26] In essence, in programs that are intended to give a limited public forum, the government "provides funding to independent actors."[27] Thus, the government retains control over the forum it created through a specific program, yet the government "does not control the independent actors participating in the forum."[28]

On the other hand, the Court has explained that a nonpublic forum consists of a place or organization that the government reserved for an "intended purpose."[29] In this forum, the government funds individuals or grantees to serve as government agents.[30] In a nonpublic forum, the government may regulate the "time, place, and manner regulations" and may impose other restrictions reasonably necessary to maintain its intended

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22. Often called the unconstitutional conditions doctrine. *See* Sullivan, *supra* note 20, at 1415.

23. Yoder, *supra* note 2, at 849.

24. *See id.*

25. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see also* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 521-22 (2000) (discussing viewpoint discrimination in the limited public forum and nonpublic forum contexts).

26. *Perry*, 460 U.S. at 45.

27. Yoder, *supra* note 2, at 849.

28. *Id.* at 851.

29. *Perry*, 460 U.S. at 46.

30. *See* Yoder, *supra* note 2, at 849.

purposes.[31] Because these grantees are viewed as government agents, the government is able to organize these programs in order to restrict or promote certain policies and goals.[32]

2. Viewpoint discrimination in regards to nonpublic forum and limited public forum classification.

After determining whether the government program is classified as a nonpublic forum or limited public forum program, only then does the concept of viewpoint discrimination become important. Government program restrictions falling under the nonpublic forum classification can be both viewpoint discriminatory and constitutional, while those falling under the limited public forum classification can be deemed unconstitutional if viewpoint discriminatory.

a. Explanation of viewpoint discrimination

While the Supreme Courts' opinions as a whole have resulted in "uncertainty about the meaning of viewpoint discrimination,"[33] some conclusions have been made to assist in articulating the meaning of viewpoint discrimination, and its relationship to claims asserting First Amendment violations. First, it is important to distinguish between viewpoint discrimination and content discrimination.[34] The distinction between viewpoint and content discrimination proves important because, historically, the Court has concluded that viewpoint discrimination may violate the First Amendment, while content discrimination often will not.[35]

Several cases provide examples of this distinction.[36] Both *Perry*[37] and *Rosenberger*[38] observe that content discrimination involves discrimination against speech because of its subject matter, while viewpoint discrimination involves discrimination because of the speaker's specific motivating "ideology, opinion, or perspective."[39]

Several cases examined the distinction in the context of educational facilities.[40] For example, in *Lamb's Chapel*, the Court held that permit-

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31. *Id. See also* Casarez, *supra* note 25, at 533.

32. *See* Yoder, *supra* note 2, at 849.

33. Casarez, *supra* note 25, at 505.

34. Content discrimination is sometimes referred to as subject matter discrimination. *See id.* at 508.

35. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

36. *See Rosenberger*, 515 U.S. at 830; *Lamb's Chapel*, 508 U.S. at 393; *Perry*, 460 U.S. at 46.

37. *Perry*, 460 U.S. at 46.

38. *Rosenberger*, 515 U.S. at 830.

39. *See id. See also Perry*, 460 U.S. at 46 (explaining that content based discrimination must be considered in light of a compelling state interest).

40. *See Rosenberger*, 515 U.S. at 830; *Lamb's Chapel*, 508 U.S. at 393.

ting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the topic from a religious standpoint discriminates on the basis of viewpoint.[41] Again, in *Rosenberger*, the Court concluded that the University did "not exclude religion as a subject matter" but discriminated against journalistic endeavors with "religious editorial viewpoints."[42] Both opinions found viewpoint discrimination.

b. Speech within a limited public forum is unconstitutional if viewpoint discriminatory

In most limited public forum cases,[43] the Court consistently has held any restriction deemed viewpoint discriminatory unconstitutional.[44] For example, in *Widmar*, a case involving meeting facilities for student groups in a university, the Court held that the First Amendment forbids the government from enforcing exclusions from a limited public forum, like those of a university, even if it was not required "to create the forum in the first place."[45]

Further cases articulate the importance of viewpoint neutrality in limited public forums.[46] In *Lamb's Chapel*, the Court held that a school district authorizing public, after-hours use of school facilities for civic, social, and entertainment, but not religious purposes constituted unconstitutional viewpoint discrimination.[47]

The *Rosenberger* opinion further expanded the limits of this legal issue, concluding that the university's student activity fee fund constituted a "forum more in a metaphysical than in a spatial or geographic sense, but the same principles" regarding limited public forum applied to this program.[48] This line of cases clarifies that viewpoint discrimination in limited public forums usually violates the First Amendment's free speech clause.

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41. *See Lamb's Chapel*, 508 U.S. at 393.

42. *Rosenberger*, 515 U.S. at 831.

43. Especially those involving public schools and universities. *See Lamb's Chapel*, 508 U.S. at 393-94; *Rosenberger*, 515 U.S. at 830; *Perry*, 460 U.S. at 45; Widmar v. Vincent, 454 U.S. 263, 269 (1981).

44. *See* Casarez, *supra* note 25, at 522.

45. *Widmar*, 454 U.S. at 269. *See also Perry*, 460 U.S. at 45 (discussing public property which the State has determined should be used for expressive activity); Casarez, *supra* note 25, at 524 (discussing the *Widmar* holding).

46. *See Lamb's Chapel*, 508 U.S. at 393-94; *Rosenberger*, 515 U.S. at 830; *Perry*, 460 U.S. at 45.

47. *Lamb's Chapel*, 508 U.S. at 386.

48. *Rosenberger*, 515 U.S. at 830. *See* Casarez, *supra* note 25, at 526.

c. Speech within a nonpublic forum is constitutional even if viewpoint discriminatory

Speech, however, confined to a nonpublic forum likely will not be held to the same strict standard as speech in a public forum. In one recent case, [49] viewpoint discrimination was allowed because the Court found the government had created a nonpublic forum.[50] The Court, in *Rust*, upheld the government's Title X prohibition on abortion-related advice, concluding that the government created a program to convey a particular policy, not to encourage private speech.[51] The *Rosenberger* decision further clarified *Rust*, explaining, "when a government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[52] Thus, appropriate forum classification becomes important in discussing viewpoint discrimination.

C. Litigation is an activity protected by the First Amendment.

In analyzing viewpoint discrimination cases that violate the First Amendment, the court grants certain trades special consideration. In particular, the press historically has been given broad First Amendment protection.[53]

The Supreme Court consistently has held that the government cannot distribute subsidies to the press in a viewpoint discriminatory manner, regardless of the government's intended purpose of the funding program.[54] For instance, the Court asserted that broadcasters under the First Amendment are entitled to exercise the "widest journalistic freedom consistent with their public duties."[55] The Court explained that broadcasters are engaged in a "vital and independent form of communicative activity,"[56] and neither the FCC nor Congress can impose restrictions discriminatory in viewpoint.

In subsequent cases, the Court further articulated the press' special status in First Amendment claims.[57] The Court explained that the "First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."[58] Allowing such access

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49. *See* Rust v. Sullivan, 500 U.S. 173 (1991).
50. *See Rust*, 500 U.S. at 194.
51. *See id.*
52. *Rosenberger*, 515 U.S. at 833.
53. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (upholding the free speech right of newspapers).
54. *See* Casarez, *supra* note 25, at 545.
55. FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984).
56. *FCC*, 468 U.S. at 378.
57. Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998).
58. *Forbes*, 523 U.S. at 675.

would result in a "further erosion of the journalistic discretion of broadcasters."[59]

The Supreme Court has also classified litigation as a specially protected First Amendment activity.[60] In fact, the Court has concluded that litigation is entitled to the highest level of protection under the First Amendment.[61] The Court made special note that litigation was one of the few avenues available to minorities seeking redress for their grievances, and full access to the judicial system may be the most effective method of communicating minority groups' "ideas and beliefs of our society."[62]

Numerous decisions since *Button* have reaffirmed and expanded the notion that the First Amendment specially protects litigation.[63] Most recently, in *Polk County v. Dodson*,[64] the Court held that counsel should be "free of state control," and the client should receive "the services of an effective and independent advocate."[65] Thus, like the press, litigation has been deemed a specially protected activity under the First Amendment.

IV. *LEGAL SERVICES CORPORATION V. VELAZQUEZ*

A. *Procedural History*

The instant case was filed in the District Court, alleging the restrictions on the use of LSC funds violated the First and Fifth Amendments. The court held that the four contentious restrictions[66] were a "permissible construction" of the Act, as well as appropriately "tailored to the government's legitimate interests."[67] Thus, the court denied Plaintiff's request for a preliminary injunction.[68]

On appeal to the Second Circuit,[69] the court upheld three restrictions as constitutional because they all prohibited the LSC grantees' involvement, regardless of the viewpoint.[70] However, the court reversed the de-

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59. *Id.*

60. *See* Jessica A. Roth, *It is Lawyers We are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 111 (1998).

61. *See* NAACP v. Button, 371 U.S. 415, 433 (1963).

62. *Button*, 371 U.S. at 433.

63. *See, e.g.*, *In re* Primus, 436 U.S. 412 (1978); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217 (1967); Bhd. of R.R. Trainmen v. Va., 377 U.S. 1 (1964).

64. *See* Polk County v. Dodson, 454 U.S. 312 (1981).

65. *Polk County*, 454 U.S. at 312.

66. *See* Velazquez v. Legal Servs. Corp., 985 F. Supp. 323, 323. *See also supra* notes 13-16, 71-73 and accompanying text.

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

68. *See id.* at 327.

69. *See* Velazquez v. Legal Servs. Corp., 164 F.3d at 757, 757 (2nd Cir. 1999) *aff'd*, 531 U.S. 533 (2001).

70. *See Velazquez*, 164 F.3d at 768-73.

nial of a preliminary injunction with respect to § 504(a)(16),[71] the restriction preventing LSC grantees from challenging existing welfare rules.[72] The majority opinion held the qualification in the welfare restriction constituted impermissible viewpoint discrimination and, thus, violated the First Amendment.[73] Thereafter, LSC filed a petition for certiorari challenging the Second Circuit's opinion, and the Supreme Court granted its request.

B. Supreme Court Oinion

The Supreme Court upheld the Second Circuit's decision, basing their conclusion on several lines of reasoning.[74]

1. Viewpoint based restrictions are improper when the government program was designed to facilitate private speech.

The Court determined that the LSC program was intended to "facilitate private speech, not promote a government message."[75] The Court contrasted the LSC program with the Title X program in *Rust*, explaining that Title X was intended as an outlet for the government to promote its own policies or advance a particular idea, thereby giving the government a wider latitude to impose restrictions when the "government's own message is being delivered."[76]

Instead, the Court concluded that the LSC program is more similar to the *Rosenberger* program and falls into the limited public forum classification where viewpoint discrimination is unconstitutional.[77] Notwithstanding, the Court was unable to conclude that the purpose of the LSC was to "encourage a diversity of views," as the Court determined in *Rosenberger*.[78]

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71. The relevant part of § 504(a)(16) states:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity ... that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, *except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law.*

(emphasis added).

72. *See supra* notes 13-16, 66, 71-73 and accompanying text.

73. *See Velazquez*, 164 F.3d. at 769. *See also* Omnibus Consolidated Rescission and Appropriations Act of 1996, § 504(a)(16) (the qualification states that the representation could not "involve an effort to amend or otherwise challenge existing law.").

74. *See* Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (2001).

75. *Legal Servs. Corp.* 121 S. Ct. at 1049 (comparing the LSC program with the student activity fee fund in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)). *Cf.* Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000) (explaining that viewpoint based funding decisions are allowed when the government itself is the speaker).

76. *Legal Servs. Corp.*, 121 S. Ct. at 1048-49.

77. *See id.* at 1049.

78. *Id.*

Further, the Court looked at the role of the LSC funded lawyer.[79] The Court explained that Congress funded LSC recipients to enable lawyers to "represent the interests of indigent clients."[80] The Court found that the LSC funded "lawyer is not the government's speaker," but is instead one who "speaks on the behalf of his or her private, indigent client."[81] Therefore, the Court held that LSC funded a limited public forum and that restrictions viewpoint discriminatory in nature should be held unconstitutional.

Next, the Court briefly addressed why this particular restriction was viewpoint discriminatory.[82] The Court explained that the "restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns."[83] Furthermore, the Court asserted that the "Constitution does not permit the Government to confine litigants and their attorneys in this manner."[84] The Court warned that they "must be vigilant" when our legislature passes laws and restrictions that "insulate its own laws from legitimate judicial" challenges.[85]

2. Mission of judiciary function

The important role lawyers play in society provided a second reason for the Court to conclude that the restriction violated the First Amendment.[86] The Court proclaimed that under the "canons of professional responsibility," a lawyer is mandated to exercise "independent judgment on behalf of the client," and the lawyer will be "free of state control".[87]

The Court also explained that interpretation of the law and of the Constitution is the "primary mission of the judiciary."[88] Therefore, if the restriction were deemed constitutional, the Court reasoned, cases presented by LSC funded lawyers would be unable to argue before the court "serious questions of statutory validity."[89]

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79. *See id.*
80. *Id.*
81. *Id.*
82. *See id.* at 1052.
83. *Id.*
84. *Id.*
85. *Id.*
86. *See id.*
87. *Id.* (quoting Polk County v. Dodson, 454 U.S. 312, 321-22 (1981)).
88. *Id.* at 1050 (citing the holding in Marbury v. Madison, 1 Cranch, 137, 177 (1803)).
89. *Id.* at 1051.

3. Government must first determine the purpose of a particular medium before attempting to impose restrictions.

Here, the Court found that the legal profession might be analogous to the press, as trades given broad First Amendment protection.[90] The Court paralleled this case with its decisions in two recent broadcasting cases, which held that prohibitions on broadcasts were impermissible viewpoint restrictions.[91] The Court concluded that the First Amendment "forbade" the government from suppressing "speech inherent in the nature" of the broadcast medium.[92]

Similarly, the Court also compared LSC with limited public forum cases addressing student publications, concluding that while certain restrictions may be necessary, those restrictions cannot be viewpoint discriminatory.[93] The Court analogized the broadcast and student publication cases to LSC by reasoning that this LSC restriction "distorts the legal system by altering the traditional role of lawyers in much the same way broadcast systems or student publication networks were changed" when restrictions were imposed.[94]

4. No alternative representation is available to client if counsel is forced to withdraw due to LSC restrictions.

Here, the Court made a public policy argument, claiming that if an attorney is forced to withdraw from a representation due to this LSC restriction, "the client is unlikely to find other counsel."[95] The Court explained that Congress' intended purpose for the LSC was to make available legal assistance "to persons financially 'unable to afford'" the services.[96] Unfortunately, the Court concluded that there exists no "alternative channel for expression of the advocacy Congress seeks to restrict."[97] The Court distinguished this situation from *Rust*, arguing that a patient

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90. *See id.* at 1050.

91. *See id.* at 1049 (discussing FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984), *appeal dismissed by* 468 U.S. 1205 (1984) and Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998)).

92. *Id.* at 1051 (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 396-97 (1984)).

93. See *id.* at 1050. *See also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

94. *Legal Servs. Corp.*, 121 S. Ct. at 1051. *Cf. Ark. Ed. Television Comm'n*, 523 U.S. at 666; *Rosenberger*, 515 U.S. at 819 (discussing First Amendment violations of program restrictions in broadcasting and student newspapers).

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

96. *Id.* (quoting 42 U.S.C. § 2996 (2) (2001)).

97. *Id.*

could receive abortion counseling through a different organization not funded by Title X.[98]

5. The argument that restrictions are necessary to define the scope of the LSC program is unconvincing.

Finally, the Court concluded that the restriction was not necessary to define the scope of the LSC program.[99] It reasoned, "Congress cannot recast a condition on funding as a mere definition of its program in every case," otherwise, the First Amendment would be reduced to a "simple semantic exercise."[100]

C. Dissenting opinion

Justice Scalia, in his dissenting opinion, [101] claimed that *Rust* is indistinguishable from the instant case, and thus "compels the conclusion that § 504(a)(16) is constitutional."[102] First, Scalia contended that like the *Rust* program, the LSC Act does not create a limited public forum encouraging a "diversity of views."[103] Additionally, he argued that the LSC restriction does not discriminate on the basis of viewpoint because it funds "neither challenges to nor defenses of existing welfare law."[104] Instead, the prohibition acts to restrict subsidizing one kind of litigation.[105]

Second, Justice Scalia disagreed with the majority's assertion that the welfare funding restriction seeks to control a medium of expression traditionally found to be a public forum for free speech.[106] He found the analogies to the broadcasting and student newspaper cases unconvincing and misplaced.[107]

Finally, the majority's assertion that a welfare recipient will be unlikely to find other counsel troubled the dissenters.[108] Justice Scalia concluded that the restriction leaves the welfare recipient in "no *worse* condition than he would have been in had the LSC program never been en-

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98. *See id. See also* Rust v. Sullivan, 500 U.S. 173, 203 (1991) (discussing that patients can seek out other options for abortion counseling).

99. *See Legal Servs. Corp.*, 121 S. Ct. at 1051.

100. *Id.* at 1052.

101. *See id.* at 1053-60 (Scalia, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., & Thomas, J.).

102. *Id.* at 1055.

103. *Id. Cf. Rust*, 500 U.S. at 200 (discussing the similarities between Title X and LSC programs).

104. *Legal Servs. Corp.*, 121 S. Ct. at 1055.

105. *See id.*

106. *See id.* at 1055–56.

107. *See id.* at 1056 (distinguishing the instant case from Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); and FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984)).

108. *See Legal Servs. Corp.* at 1057.

acted."[109] He concluded that "the LSC subsidy neither prevents anyone from speaking nor coerces anyone to change speech," and is indistinguishable from *Rust*.[110] Thus, Justice Scalia concluded, the LSC restriction should be declared constitutional.[111]

V. ANALYSIS

While the outcome of this case should be applauded, the Court's reasoning should have been more forthright. Unfortunately, the Supreme Court once again failed to clarify the framework for courts to use in examining constitutional challenges to restrictions placed on government programs, thereby leaving the door open for lower courts to construe such challenges in a myriad of ways. Instead of skirting around the legal issues, as the majority did in coming to their decision, the Court should have boldly and clearly explained the appropriate classifications and factors to be considered in properly ruling on the constitutionality of each restriction. Given the confusing state in which the law concerning the constitutionality of restrictions on government programs exists today, there are several conclusions that can be drawn from this most recent decision, as well as other Supreme Court cases addressing the issue.

A. Public policy dictates whether a certain restriction is unconstitutional based on viewpoint discrimination.

Over the past few decades, the Justices on both the conservative and liberal sides of the Court, depending on the subject matter, have successfully argued that a particular restriction is unconstitutional when viewpoint discriminatory. Furthermore, these recent opinions have directly created the current confusing state of the law in this area.

For example, in *Rust* the restriction centered on abortion, a highly controversial topic in our courts today.[112] Since *Roe v. Wade*,[113] the conservative members of the Court steadily have attempted to limit access to abortion and public information regarding abortion.[114] *Rust* provided another opportunity to restrict access to information regarding abortions.[115] The majority opinion, written by Chief Justice Rehnquist, a conservative member of the Court, based its conclusion on a viewpoint discrimination

109. *Id.*

110. *Id.* at 1058 (concluding that the holding in Rust v. Sullivan, 500 U.S. 173 (1991) is indistinguishable from the present case).

111. *See id.*

112. *See Rust*, 500 U.S. at 177-78.

113. 410 U.S. 113 (1973).

114. *See* C. Elaine Howard, Note, *The Roe'd To Confusion: Planned Parenthood v. Casey*, 30 HOU. L. REV. 1457, 1467-75 (1993) (detailed discussion of the last twenty years of abortion jurisprudence).

115. *See* Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724, 1725 (1995) (arguing that the *Rust* decision more clearly articulated the Court's emerging view that abortion is "no longer a fundamental right.").

First Amendment analysis.[116] However, because of the ambiguities present in this line of cases,[117] the Court successfully argued that the program's purpose was to convey government messages,[118] and thus classified the Title X program as a nonpublic forum. In conclusion, the Court held the program's viewpoint discriminatory abortion restriction constitutional.[119]

Conversely, the Court's conservative members aligned to reach the opposite conclusion of that in *Rust* in three more recent cases.[120] In *Lamb's Chapel* and *Milford*, religious groups' access to school facilities was the central issue, another highly controversial topic in the courts today.[121] In contrast to *Rust*, the Court concluded that a school district opening its facilities creates a limited public forum, rather than a nonpublic forum.[122] By framing the issue in this manner, the Court had predetermined its conclusion. Thus, the Court determined that the restriction excluding religious groups from meeting on school facilities constituted unconstitutional viewpoint discrimination.[123]

In *Legal Servs. Corp. v. Velazquez*,[124] public policy considerations once again dictated the Court's decision. This time, however, the liberal side of the Court successfully argued unconstitutional viewpoint discrimination.[125] The legal profession and litigation were the disputed topic.[126] The Court again concluded that the LSC's intended purpose placed the program into the limited public forum classification.[127] Thus, because the qualification on the welfare restriction discriminated based on viewpoint, the restriction violated the First Amendment's free speech clause.[128]

Another interesting distinction that the *Legal Servs. Corp.* opinion pointed out was the supposedly apparent differences between the ethical obligations of the medical and legal professionals.[129] In *Rust*, the dissenting opinion sensibly argued that the "physician has an ethical obliga-

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

117. *See supra* note 25 and accompanying text.

118. *See Rust*, 500 U.S. at 194.

119. *See id.*

120. *See* Good News Club v. Milford Cent. Sch., No. 99-2036, 2001 WL 636202, (U.S. June 11, 2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

121. *See Milford*, 2001 WL 636202, at *1; *Lamb's Chapel*, 508 U.S. at 386.

122. *See Milford*, 2001 WL 636202, at *5 (contrasting with the reasoning in *Rust v. Sullivan*, 500 U.S. 173 (1991)).

123. *See id* at *6.

124. 121 S. Ct. 1043 (2001).

125. *See Legal Servs. Corp.*, 121 S. Ct. at 1043.

126. *See id.* at 1046.

127. *See id.* at 1052.

128. *See id.* at 1050.

129. *See id.* at 1049-50.

tion to help the patient make choices from among the therapeutic alternatives consistent with good medical practice," yet the majority opinion failed to be swayed by this argument.[130]

In *Legal Servs. Corp.*, the Court discussed the legal profession's ethical obligations in support of its holding, thereby distinguishing it from *Rust*.[131] The Court stressed the legal profession's "canons of professional responsibility," which mandates the lawyer exercise "independent judgment on behalf of the client," implying a differentiation between legal and medical professions.[132]

But, in fact, both physicians and lawyers are professionals with similar ethical obligations, including the requirement of making independent judgments. For physicians, courts have held that government restrictions conflict with the obligation to make independent medical judgments because a physician's professional ethics require that he have free and complete exercise of his medical judgment and skill.[133] Similarly, courts have held that a lawyer's "professional judgment in rendering" legal services cannot be directed or regulated by the person who recommends, employs, or pays the lawyer.[134]

It appears that the majority in both cases passed over the ethical responsibilities of the medical profession in order to support their position. The *Rust* majority was so compelled to further restrict access to abortion counseling, and in *Legal Servs. Corp.*, the majority was so intent on proclaiming the welfare restriction unconstitutional by way of the virtues of litigation, that each time the Court failed to perceive the obvious similarities between the medical and legal professional obligations.

Public policy considerations take center stage in determining whether a restriction violates the First Amendment. The viewpoint discrimination analysis is so wrought with ambiguities that at this juncture, it is foreseeable that nearly every issue presented before the Court could be argued viewpoint discriminatory in nature and therefore unconstitutional.

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130. Rust v. Sullivan, 500 U.S. 173, 214 (1991) (Blackmun, J., dissenting) (quoting AM. MED. ASS'N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CURRENT OPINIONS OF COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF AMERICAN MEDICAL ASSOCIATION P8.08 (1989)).

131. *See Legal Servs. Corp.*, 121 S. Ct. at 1049-51.

132. *Id.* (quoting Polk County v. Dodson, 454 U.S. 312, 321-22 (1981)).

133. *See* Quilico v. Kaplan, 749 F.2d 480, 484-85 (7th Cir. 1984); Lurch v. United States, 719 F.2d 333, 337 (10th Cir. 1983). *See also* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 172-73 (1996) (analyzing physician cases discussing this issue).

134. Polk County v. Dodson, 454 U.S. 312, 321 (1981). *See also* Post, *supra* note 133, at 172-73 (further discussing the ethical and professional responsibilities of a lawyer); *supra* notes 60-65, 87-89, 131-32 and accompanying text.

B. *The Court's holding in* Legal Servs. Corp. *likely will have minimal effect on the LSC program.*

Originally, the plaintiffs in *Legal Servs. Corp. v. Velazquez* sought a preliminary injunction against four of the 1996 restrictions.[135] While the Supreme Court holding may appear as a victory at first glance, those plaintiffs brave enough to initially challenge the LSC restrictions likely did not feel properly remedied.[136]

From its inception, LSC proponents have battled with Republican Congressmen and women to keep LSC a viable program.[137] To continue receiving funding, LSC supporters have been forced to compromise with more conservative factions, allowing the implementation of program restrictions.[138] Only a few renegade LSC lawyers have resisted the whittling away of the LSC program's core.[139] Thus, the LSC's recent success in the Supreme Court does little to return the LSC program back to its 1974 stature.

However, even with this minimal victory, supporters who have hesitated to openly oppose new restrictions may find the courage to challenge the constitutionality of further LSC restrictions. With a Supreme Court opinion serving as precedent backing LSC supporters, conservative Congressmen and women bent on "de-funding" the program may hesitate to impose additional restrictions or may gravitate towards attacking other liberal legislative programs.[140] Once again the Court could have clarified to supporters and opponents of the LSC the possibility that other restrictions violated the Constitution if they had been more forthright in their opinion. However, both sides are now more befuddled than ever about the question of the constitutionality of a certain restriction.

C. *A New Analytical Model for Subsidized Speech & Viewpoint discrimination cases*

Based on the recent trend of the Supreme Court to grant certiorari to cases involving viewpoint discrimination and subsidized speech, a similar case likely will be presented before the Court in the near future, providing another opportunity for the Court to clarify the legal framework for constitutional challenges to restrictions on government programs. Such a case would provide an opportunity for the Court to redeem itself

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135. *See* Velazquez v. Legal Servs. Corp., 985 F. Supp. 323, 326 (E.D.N.Y. 1997), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001). *See supra* notes 66-68 and accompanying text.

136. *See Legal Servs. Corp.*, 121 S. Ct. 1046 (holding that a clause of one of the 1996 restrictions violated the First Amendment).

137. *See* Roth, *supra* note 60, at 108-09.

138. *See id.* at 108.

139. *See id.* at 109.

140. *See id.*

from the criticism discussed earlier, and boldly assert a working model for these types of constitutional challenges. Below outlines a potential framework that the Court should consider asserting in future cases.

Three legal determinations should be made to ascertain the constitutionality of a particular government restriction. First, the Court must characterize the relationship between the government and the grantee of the government's subsidy. Second, the disputed restriction must be classified as viewpoint neutral or viewpoint discriminatory. Third, additional factors need to be taken into consideration to determine if a certain government program should be specially protected.

1. Classifying the relationship between the government and the grantee of the government's subsidy.

The relationship between the government and the grantee should be classified as either in the nonpublic forum or limited public forum realm. In the past, the Court has deemed this classification important and has affirmatively used these categories, but it ultimately failed to provide clear guidelines to determine what category a specific subsidy falls under. To assist in determining the appropriate classification, courts should look at the following factors: legislative history, the area being subsidized, and other Constitutional protections for the area being subsidized.[141]

First, a court should examine the subsidy's legislative history to accurately determine the classification, looking specifically for several items. If Congress "conceptualized persons as means to an end rather than as autonomous agents," or if the "attainment of institutional ends" was deemed an "unquestioned priority," the subsidy may fall within the nonpublic forum classification.[142]

In addition, a court should characterize the area being subsidized to determine the proper classification of the subsidy. For example, subsidies addressing freedom of expression seriously limit the government's ability to regulate through restrictions.[143] The original Constitution and its Amendments decree the utmost deference by Congress. Any subsidy regarding the Constitution, therefore, most likely will fall under the limited public forum classification.

2. Classifying the restriction as viewpoint neutral or viewpoint discriminatory

After determining the proper classification of the government subsidy as either in a nonpublic forum or limited public forum, only then

141. This list should not be seen as exhaustive.
142. *See* Post, *supra* note 133, at 171.
143. *See id.*

does the concept of viewpoint discrimination become important. Government program restrictions falling under the nonpublic forum classification can be both viewpoint discriminatory and constitutional while those falling under the limited public forum classification can be deemed unconstitutional if viewpoint discriminatory. While the Court has occasionally alluded to this differentiation, it also has befuddled the area by forbidding viewpoint discrimination whenever it occurs within subsidies relating to speech, regardless of its classification as either a nonpublic or limited public forum.[144] In the next case the Court decides, the majority must clearly assert that viewpoint discrimination is allowed in nonpublic forum subsidies.

To accurately classify a restriction as viewpoint neutral or viewpoint discriminatory, several factors can be looked at to simplify this characterization. First, a court should determine if the speaker's "ideology, opinion, or perspective," rather than the subject matter of the speech, is being limited by the restriction.[145] If the subsidy restriction involves the discrimination of a particular speaker's perspective, then it constitutes viewpoint discrimination; if the restriction discriminates against the entire spectrum of a particular subject matter, then the discrimination is viewpoint neutral and therefore content discriminatory. Overall, only viewpoint discriminatory restrictions can be held unconstitutional.

3. Addressing additional factors to determine if a certain subsidy should receive special protection.

When a court has completed the first two legal determinations of this framework, it should further explore the subsidy and restriction to decide whether it deserves special protection. Certain industries, trades and professions should be given special consideration in this analysis. The Court has already determined that government subsidies relating to the press deserve special protection.[146] Additionally, the Court, in *Legal Servs. Corp.*, followed a long line of cases that granted lawyers a special degree of protection.[147]

Other industries and professions also deserve this special protection, and case law and the Constitution provide a guide to appropriately determine which industries and professions should receive this protected status. Physicians are the most obvious profession deserving this recog-

144. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147-48 (1993). *See also* Post, *supra* note 133, at 164-65 (explaining that the general principle forbidding viewpoint discrimination with respect to subsidized speech is false).

145. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995). *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). *See also supra* note 39 and accompanying text.

146. *See supra* notes 53-59 and accompanying text.

147. *See supra* notes 60-65, 87-89 and accompanying text.

nition.[148] Other areas, however, likely deserve special consideration. Therefore, addressing these additional factors to determine a possible protected status must be included in such a legal analysis.

By and large, following this legal framework for constitutional challenges to restrictions on government programs should clarify the current confusing state of First Amendment jurisprudence. While this framework can by no means completely ease the tensions that exist in this area of the law, it should assist the courts in more fairly determining the constitutionality of a particular subsidy restriction.

VI. CONCLUSION

While it is exciting that the Court's liberal justices and LSC supporters can claim a small victory with their holding in *Legal Servs. Corp. v. Velazquez*,[149] in reality, mixed results will likely flow from the Court's decision. With this opinion, the Court has thoroughly complicated the law regarding the constitutionality of viewpoint discriminatory restrictions, and lower courts are now faced with an even more confusing legal framework to work from. This decision demonstrates an even more compelling need for the Court to lay out a comprehensive legal framework for constitutional challenges to restrictions on government programs.

Only after the Court establishes a more comprehensible framework can free speech advocates effectively challenge the constitutionality of other subsidy restrictions. Until that time, no party who brings a constitutional challenge to such restrictions can predict the ultimate ruling. Liberal free speech advocates must contain their excitement with the current decision and join with other First Amendment supporters, whether a racist, a journalist or a politician, and show their dissatisfaction with the majority opinion, thereby encouraging the Supreme Court to hear another case in order to clarify the current state of law. Only then will all First Amendment proponents feel secure that First Amendment rights are protected impartially.

Carrie S. Bernstein

148. *See supra* notes 129-36 and accompanying text. Although the Court failed to extend this protected status to physicians in *Rust*, the Court should look for an upcoming case involving the medical profession to remedy this lapse in judgment.

149. 121 S. Ct. 1043 (2001).