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# Government Subsidies and Free Expression

Martin H. Redish

Daryl I. Kessler

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* Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law. The authors would like to thank Howard Wasserman of the class of 1997 at Northwestern University School of Law for his valuable research assistance.

** J.D. 1995, Northwestern University School of Law; B.A. 1991, Dartmouth College. Associate, Proskauer Rose Gotz & Mendelsohn, New York City.

## INTRODUCTION

Determining the constitutionality of government subsidization of expression is one of the most frustrating tasks facing scholars of the First Amendment. Initially, one may legitimately ask whether courts should *ever* deem government subsidization to violate the right of free expression. One might reasonably argue that as long as government in no way affirmatively restricts or punishes expression, it does not violate the First Amendment guarantee. While this position, originally well accepted, wisely has been rejected by more modern decisions, the conclusion that selective governmental subsidization of expression implicates the First Amendment ultimately raises more questions than it resolves.

The primary difficulty is that a reasonable observer quite probably will have very different intuitive reactions concerning the constitutionality of various examples of government subsidy. Furthermore, a reasonable observer will have no self-evident method of articulating a coherent, principled rationale to explain those different reactions. For example, one reasonably could accept the government's "subsidization" of the Vice President's trip to speak in favor of a proposed political program, even though the government refuses to subsidize the speech of the

program's leading opponent.[1] Yet, most constitutional observers would find very troubling the government's decision to fund only those scholars who agree with its positions. Similarly, many constitutional observers have vehemently criticized the Supreme Court's decision in *Rust v. Sullivan*[2] upholding governmental refusal to subsidize clinics that inform their patients about the availability of abortion.[3] Presumably none of those critics, however, would deem unconstitutional the cancellation of a contract with the Congressional Record's printer because the printer insisted on including its own pro-choice material in the Record.

The task at hand is to develop an analytical structure that simultaneously provides coherent, generalized criteria by which to measure the constitutionality of government-funding decisions, while it fosters the values underlying the free speech guarantee. To date, none of the judicial or scholarly attempts to provide such an approach has been successful. The Supreme Court's hopelessly incoherent analysis in *Rust*[4] sadly underscores the confusion and futility of its approach. And while the efforts of commentators perhaps do not deserve the criticism more appropriately leveled at the Court's insufficient analytical attempts, they, too, ultimately fail, either because they focus on what are largely tangential or irrelevant factors, or because they lump issues of free expression with other constitutionally protected interests.[5]

In this Article, we propose an analytical structure that substantially advances the inquiry. Our structure is designed to categorize and conceptualize different forms of government subsidy based on their respective impacts on the normative theoretical values underlying the constitutional guarantee of free speech. We incorporate into the analysis—developed by means of *ex ante* categorical balancing—common sense practical limitations on constitutional restriction of government subsidi-

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1. *See infra* text accompanying note 85 (discussing the funding of the Vice President's travels as an example of a permitted limited employee subsidy).

2. 500 U.S. 173 (1991).

3. *See infra* text accompanying notes 105-111 (explaining regulations that prohibited clinics receiving funding from the Department of Health and Human Services from providing information about abortion).

4. *See infra* text accompanying notes 112-121 (describing and critiquing the Court's reasoning in *Rust*).

5. *See* discussion *infra* at Part IV (outlining and critiquing alternative models for analyzing governmental subsidization of speech).

zation that is designed to prevent the free speech guarantee from counterproductively undermining the values it protects.[6] Put most simply, our approach allows, to the extent feasible, government subsidization when it promotes the values underlying free expression and prohibits it when it undermines those values.[7]

Our structure initially draws a distinction between what we call "negative" subsidies and "positive" subsidies.[8] We deem negative subsidies—the subsidies given to a private individual or entity to induce that individual or entity to remain silent—presumptively unconstitutional. Only when the government can both establish that it has a compelling interest and show that it has tailored its negative subsidization to meet this interest may the government provide a negative subsidy. In short, our structure permits negative subsidies only when current First Amendment jurisprudence would allow direct infringement of free speech.

Our approach divides positive government-speech subsidies—subsidies expended to encourage entities or individuals to speak—into two groups that we term "policy" subsidies and "auxiliary" subsidies.[9] Policy subsidies include situations in which the government either funds the speech of "core" policy-making government employees or makes a political appointment based at least in part on that appointee's prior expression. We deem this government activity constitutional. Analysis of auxiliary subsidies is more complicated. We divide these subsidies into three subcategories: "categorical" subsidies, "viewpoint-based" subsidies, and subsidies of "judgmental necessity."[10] The government grants a categorical subsidy of

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6. *See infra* text accompanying notes 46-51 (articulating prevailing theories on the value of free speech); discussion *infra* Part II.C.1. (explaining the effects of positive subsidies on free speech values).

7. It is not always possible to draw a strict dichotomy between the two situations. *See* discussion *infra* Part II.C. (discussing when government funding might either promote or undermine free speech values). When this is so, we seek to draw an *ex ante* categorical balance. *See infra* text accompanying notes 100-103 (arguing that the benefits of allowing governmental subsidies as a judgmental necessity outweigh the risks).

8. *See infra* text accompanying notes 54-56 (describing the difference between positive and negative subsidies and their constitutional implications).

9. *See infra* Part II.C.2. and accompanying text (explaining the distinction between "policy" and "auxiliary" subsidies).

10. Subsidies of judgmental necessity are at times inevitably viewpoint based. *See infra* notes 100-103 and accompanying text (describing the

speech when it makes a viewpoint-neutral choice to fund a particular category, subject or class of expression, such as when it chooses to fund art. We deem such subsidization of expression constitutional. The government grants a viewpoint-based subsidy of speech when it funds a speaker because of the viewpoint espoused by that speaker, such as when the government chooses to fund the work of a particular artist because she produces art glorifying the Republican Party. Our approach generally deems this type of subsidy unconstitutional.[11] Finally, the government provides a subsidy of "judgmental necessity" when it selects among applicants for funding within a categorical subsidy of speech, such as when the government chooses between two artists applying for government funding, or between two researchers in similar areas seeking governmental support of their research. Our approach considers these types of subsidies to be conditionally constitutional. The choice of one speaker over another is constitutional if the government bases its decision on criteria "substantially related" to the predescribed viewpoint-neutral purpose of the subsidy.[12] In essence, judgmental necessity allows the government to subsidize a narrow group of necessarily content-based expression and an even narrower group of inevitably viewpoint-based expression. As such, our approach does not view subsidies made of judgmental necessity as alternatives to categorical and viewpoint-based subsidies. Rather, in certain instances, they constitute narrow *exceptions* to the general unconstitutionality of viewpoint-based subsidies.

This structure will allow courts to calibrate the constitutionality of government subsidies simply by locating the challenged subsidy within the model's established structural framework.[13] Whereas legitimate disputes may arise over exactly where a

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characteristics and analysis of subsidies of judgmental necessity).

11. The model's exception to the ban on viewpoint-based subsidies will include some of those subsidies that fall within the terms of the "judgmental necessity" category. *See infra* text accompanying notes 100-101 (arguing that the benefits of allowing governmental subsidies made as a judgmental necessity outweigh the risks).

12. *See infra* text accompanying notes 100-101 (explaining the requirement that a decision to subsidize be "substantially related" to the pre-described goals and purposes of the program to fit under the judgmental-necessity provision).

13. *See infra* note 102 and accompanying text (explaining the structure of the inquiry to be used by the Court in analyzing a challenged subsidy).

particular type of subsidy should be placed,[14] whatever doctrinal and conceptual difficulties to which our structure might give rise pale in comparison to the overwhelming confusion that plagues previously suggested approaches.[15] More importantly, our structure possesses the distinct advantage of tailoring constitutional regulation to foster universally accepted free speech values.[16]

Before we more fully articulate the rationale for and implications of our structure, we examine the logically prior question of why government-subsidy decisions ever violate the First Amendment. Unless one concludes that a refusal to subsidize constitutes a *prima facie* abridgement of constitutionally protected expression, no need arises to calibrate the constitutionality of different types of subsidization. In addition, an exploration of exactly how governmental refusals to subsidize might undermine the values underlying free speech protection assists in devising a structure that most effectively fosters those values. Hence, Part I of the Article focuses on this preliminary inquiry. Part II explains the structure and rationale of our approach. In Part III, we apply our proposed structure to several of the most troubling and frustrating examples of government subsidy. In Part IV, we critique alternative attempts to frame analytical models for the determination of the constitutionality of governmental-subsidy decisions.

No analytical structure is free from doubt or question; any time one applies generalized standards to specific, concrete facts, the possibility of uncertainty and ambiguity exists. But when properly crafted, such models can help assure that judicial decision-making fulfills the underlying normative values that the law is designed to serve. No area of law requires greater assurance of this than the convoluted area of governmental subsidization of expression.

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14. *See infra* text accompanying notes 97-103 (discussing the possible ambiguities arising from the government's efforts to award viewpoint-neutral subsidies).

15. *See* discussion *infra* Part IV (exploring the comparative merits of alternative models previously suggested for measuring the constitutionality of government subsidization of expression).

16. *See* discussion *infra* Part II.C.1.a. (describing the positive effects of positive subsidies on free speech values).

## I. DENIAL OF SUBSIDIZATION AS ABRIDGEMENT: GOVERNMENT FUNDING AND THE VALUE OF FREE EXPRESSION

### A. THE RIGHT-PRIVILEGE DISTINCTION AND THE CONCEPT OF "UNCONSTITUTIONAL CONDITIONS"

Writing for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford*,[17] then Judge Holmes succinctly described the traditional view concerning the constitutionality of the government's denial of a subsidy because of expression. He stated that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[18] The logical basis in support of this position derives from two premises. First, by definition, a governmental subsidy is a matter of governmental largesse, and the greater governmental power to deny the subsidy logically includes the lesser power to grant the subsidy conditionally on the waiver of a constitutional right. Second, if the individual chooses to exercise her right of speech rather than receive the subsidy, she is in no worse a position than if the government had offered her no subsidy in the first place.

Modern scholarship and doctrine have, for the most part,[19] rejected this deceptively simple logic under the terms of the so-called "unconstitutional conditions" doctrine,[20] although the constitutional grounding for this rejection has not always been

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17. 29 N.E. 517 (1892).

18. *Id.* at 517.

19. Not all scholars find the logic of the unconstitutional conditions doctrine to be persuasive. *See generally* 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 (1990) (arguing that the unconstitutional conditions doctrine should be abandoned). Moreover, in certain areas the Supreme Court has, without explanation, completely ignored the doctrine's logic. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 (1982) (holding that under the "public rights" doctrine, the federal government may condition, where it creates a substantive statutory right, acceptance of that right on adjudication of the right in a non-Article III forum); Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450 (1977) (applying the "public rights" doctrine to the Seventh Amendment right to civil jury trial).

20. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (contending that the erosion of "privilege" in the public-sector context has required the creation of substantive due process provisions to protect against the state).

entirely clear. The fallacy of the traditional analysis, however, is evident in the context of equal protection.[21] The government may deny welfare to all citizens. It does not logically follow, however, that this "greater" power to deny welfare includes the "lesser" power to grant welfare to whites only. The right of equal protection constitutes its own free-standing right to equal treatment. No comparable independent constitutional right to receive welfare exists.[22] Thus, the Constitution does not render the power to deny welfare "greater" than the power to deny welfare to non-whites only. Outside of areas subjected to strict scrutiny under the Equal Protection Clause, however, the logic behind the modern rejection of the traditional right-privilege distinction is uncertain.

According to Professor Kathleen Sullivan,[23] commentators and jurists traditionally have justified the unconstitutional conditions doctrine on three grounds. The first rationale "locates the harm of rights-pressuring conditions on government benefits in their coercion of the beneficiary."[24] Sullivan recognizes, however, that "[n]either the Court nor the commentary . . . has developed a satisfying theory of what is coercive about unconstitutional conditions. Conclusory labels often take the place of analysis."[25] The second rationale focuses on the legislative impropriety of engaging in such activities.[26] This explanation begs the initial question: Unless the practice is defective in the first place, how can there be legislative impropriety? Finally, Sullivan notes that one can justify the doctrine on the basis of the "essential inalienability" of constitutional rights.[27] Unfortunately this answer appears to suffer from the fatal problem of circularity, asserting only that constitutional rights are inalienable because they are constitutional. Such reasoning also runs

21. U.S. CONST. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

22. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989) ("The [Equal Protection] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.").

23. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

24. *Id.* at 1419.

25. *Id.* at 1420.

26. *Id.*

27. *Id.* at 1421. Professor Sullivan notes that this approach "has never been prominent in the cases at all, but is suggested by contemporary debate among commentators about limits on permissible exchange." *Id.*

contrary to a considerable body of established constitutional doctrine that recognizes a citizen's ability to waive constitutional rights.[28]

Various commentators have suggested alternate theoretical rationales to explain the unconstitutional conditions doctrine. Sullivan, for example, has proposed her own approach that "focuses not on the individual beneficiary, the legislative process, or the alienability of a right, but rather on the systemic effect of conditions on the distribution of rights in the polity as a whole."[29] She argues that unconstitutional conditions "implicate three distributive concerns."[30] First, "they permit circumvention of existing constitutional restraints on direct regulation";[31] second, they undermine "the maintenance of government neutrality or evenhandedness among rightholders";[32] and third, they foster "discrimination among rightholders who would otherwise make the same constitutional choice, on the basis of their relative dependency on a government benefit."[33]

The validity of Sullivan's suggested rationale for the unconstitutional conditions doctrine, as well as those suggested by other commentators,[34] may well be appropriate subject of debate.[35] One also could examine the Supreme Court's puzzling and seemingly unexplained selective use of the doctrine.[36]

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28. *See, e.g.*, National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) (holding that a due-process objection to personal jurisdiction is subject to waiver through contract). Similarly, the Seventh Amendment right to jury trial may be waived with relative ease. *See* FED. R. CIV. P. 38.

29. Sullivan, *supra* note 23, at 1421.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See, e.g.*, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295 (1984) (suggesting that affirmative governmental intrusion in the form of benefits has exceeded negative government action as a form of coercion); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1125-33 (1987) (measuring the extent to which conditions attached to congressional spending may exceed, in effect, direct regulations Congress would be barred from enacting). *See generally* Richard A. Epstein, *The Supreme Court, 1987 Term, Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1987) (explaining the various opinions about the unconstitutional conditions doctrine in judicial and academic circles).

35. *See generally* Sunstein, *supra* note 19 (stating that the validity of the unconstitutional conditions doctrine is subject to question).

36. *See supra* note 19 (citing cases in which the Supreme Court, inexplicably, opted not to employ the unconstitutional conditions doctrine).

Present purposes, however, do not require exploration of these issues. Regardless of the validity of the unconstitutional conditions doctrine as a general matter, the doctrine's constitutional basis becomes easy to comprehend when viewed from the limited perspective of free expression. We therefore turn to a discussion of that limited perspective.

## B. GOVERNMENT SUBSIDIES AND THE VALUE OF FREE EXPRESION

### 1. Constitutional Text: Subsidy Denials as "Abridgements"

By its terms, the First Amendment prohibits the "abridgement" of free speech.[37] Thus, the inquiry, at least as an initial matter,[38] must focus on whether a challenged governmental action "abridges" the free speech right. Courts have not construed the concept of "abridgement" to require that government physically prevent a private individual or entity from speaking.[39] Issuance of an injunction, for example, does not physically halt expression; it merely means that if the subject of the injunction engages in the prohibited expression she will be subject to a contempt citation.[40] In such a situation, a court gives the individual the option of not speaking and avoiding contempt, or speaking subject to imposition of the contempt penalty. Yet courts have established that such injunctions constitute classic examples of presumptively unconstitutional abridgements.[41] Similarly, one sentenced to prison because of

37. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . ."

38. The mere fact that a *prima facie* abridgement is shown does not necessarily mean that the regulation is unconstitutional.

39. Such physical prevention, however, may constitute at least a *prima facie* abridgement.

40. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 315 (1967) (holding that punishment for violating an otherwise unconstitutional injunction is not a violation of a person's free speech rights). However, unlike defendants accused of criminal violations, a defendant prosecuted for contempt generally is not, under the "collateral bar" rule, permitted to raise as a defense the unconstitutionality of the injunction. *Compare id.* (holding that a defendant accused of violating an injunction cannot challenge the constitutionality of the injunction) *with* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (holding a criminal ordinance that imposed a limitation identical to the injunction upheld in *Walker* to be a violation of the First Amendment).

41. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 713 (1931) (holding that prior restraints on expression have a strong presumption of unconstitutionality).

his expression is not physically prevented from speaking.[42] The government instead has offered him the "option" of not speaking and staying out of jail, or speaking, burdened with the penalty of a prison sentence. Most people presumably would agree that imposition of a prison sentence constitutes a *prima facie* "abridgement" of protected expression.

When government ties subsidies to expression, then, the mere fact that the government's actions do not physically *prevent* expression does not mean that such actions fail to "abridge" the free speech right. The textual question ought to be whether the government's actions *penalize* protected expression. Contempt citations, prison sentences and civil and criminal fines constitute *prima facie* abridgements because they *penalize* speech.

At first glance one might think that government subsidies directly tied to expression present a different situation, since, unlike the above-mentioned examples, with such subsidies the government does not affirmatively impose a new burden on the speaker because of his expression. At worst, the government merely is denying the citizen a benefit to which he had no overriding right in the first place. In a sense, then, the speaker finds himself in arguably the same position as before he spoke. The same could not be said, of course, of the speaker sent to prison or subjected to a fine. The proper question, however, is not whether, because of his expression,[43] the government placed the speaker in a worse position *than if it had granted no benefit at all*, but whether the government placed the speaker in an unambiguously worse position *than if he had not spoken at all.* If so, the government has "penalized" him for his expression, in much the same sense as when he has been fined or imprisoned because of his expression. From a purely linguistic perspective, then, his right of expression is "abridged," much as it is when he is fined or imprisoned.

One can argue that the severity of the penalty is considerably greater when the government fines or imprisons a speaker as compared to when the government merely denies the speaker a subsidy. Although this point may be accurate in the

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42. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding prison sentences imposed on individuals because of expressive activity).

43. Whether the speaker has been placed in a worse position because of his expression or rather because of an unrelated reason, of course, presents a factual issue that will have to be resolved in the individual case.

majority of cases, it is not always true. One easily could conceive a government subsidy so central to an individual's well being[44] that the denial of it will, as a practical matter, have at least as much adverse impact as would a fine or prison sentence. In any event, the point is irrelevant to answering whether a subsidy denial potentially constitutes a *prima facie* violation of the First Amendment. To be sure, the extent or severity of the abridgement can influence the outcome of a pragmatic judicial calculus in an individual case,[45] but, at least as a *prima facie* matter, any abridgement—no matter how small—can trigger a First Amendment inquiry. A $50 fine could "abridge" an individual's free speech right the same as would a $50,000 fine or a 20-year prison sentence.

2. Government Subsidies and Free Speech Theory

When one adds a normative theoretical perspective to the analysis, it becomes apparent that a denial of a subsidy can undermine the value or values we seek to foster by the protection of free expression. The important point to note is that this is true regardless of how one comes down in the debate over the proper course of First Amendment theory.

The theories underlying the First Amendment's protection of freedom of expression can, roughly, be placed into two broad categories: communitarian and autonomy.[46] Supporters of the former argue that free speech is necessary to the processes of community and self-government; that free speech protects "the common needs of all the members of the body politic."[47]

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44. Examples are food stamps or Medicaid.

45. Of course, one could adopt a so-called "absolutist" position on free speech. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970) (explaining the absolutist view of free speech). Under this approach, the mere finding of "abridgement" automatically will lead to a finding of unconstitutionality. Neither the Supreme Court nor the majority of commentators, however, has accepted this view. For purposes of this Article, we take no position on the question. For a detailed discussion of the issue, see MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 52-55, 191-206 (1984).

46. It must be conceded that issues of free speech theory do not always fall into the terms of so simplistic a dichotomy. For present purposes, however, recognition of these two broad categories is sufficient.

47. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 8-9 (1960); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527-28 (explaining the ability of a free press to expose actions of the government); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555-58 (1988)

Alternatively, the latter theories contend that people should view protection of free speech "not as a means to a collective good but because of the value of speech conduct to the individual."[48] Our objective here does not require a proclamation of one of the two theories as superior, because, for our purposes, it matters little which normative approach one prefers. Regardless of one's theoretical outlook, the government's decision to fund the expression of some individuals or entities but not others can amount to an abridgement of speech, because that decision may undermine the principles underlying either theory. This occurs because the grant or denial of a subsidy can deter individual expression, artificially skew the nature of public debate, or both.

Selective award of governmental subsidies undermines the autonomy values served by free speech protection because the government's action influences a private individual either not to say anything or not to say what she would have said absent the government's influence. Thus, the threat of a subsidy denial wipes out, or at a minimum stunts, whatever self-developmental or actualization benefits the individual would have gained as a result of genuine (non-subsidization influenced) expressive activity.

One might argue that governmental-subsidy denials do not violate the First Amendment autonomy/self-development value because the ultimate choice not to speak is the individual's. As explained above, however, one could say the same of any governmental penalty for expression short of placing tape over a speaker's mouth prior to her speaking. In almost every instance, the individual can choose to speak, as long as she will accept the consequences. Of course, one can also persuasively contend that when imprisonment or a heavy fine is the alternative to remaining silent, the individual's choice not to speak is not "free." The same can be said when the government links a valuable subsidy to the individual's choice not to speak or to the individual's message. In neither case does the individual make

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(articulating a republican belief grounded in a guaranteed right to participate in public deliberation).

48. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) (asserting that free expression is essential to realizing the individual's character and potentialities as a human being); *see generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that the true goal of free speech is to promote "individual self-realization").

a "free" decision in any meaningful sense.

Similarly, a communitarian theorist, at least a democratic communitarian theorist,[49] who presumably cares little about negative effects on individual development, should find troubling the potential impact of government-subsidy decisions on the political and societal values fostered by free expression. A democratic communitarian theorist values free expression because it facilitates performance of the community's self-governing function by providing the electorate with information and opinion about the issues that require community decisions.[50] To the extent that government-subsidy decisions chill expression, that chilling deprives the electorate of whatever information or opinion speakers would have contributed but for the government's decision. To the extent that subsidy decisions cause individuals to assert viewpoints that they would not have asserted of their own free will, they artificially skew the tenor and direction of public debate. As a result, the possibility exists that the government precluded information important to the electorate from reaching that audience. The decision, therefore, harms the public's decision-making process.[51] Thus, whatever one's broad perspective on the value of free expression, one can perceive that linkage between government subsidies and either the existence or content of expression presents, at least potentially, a substantial threat to those values.

### C. THE "JEKYLL-HYDE" NATURE OF GOVERNMENT SUBSIDIES: ACKNOWLEDGING THE FIRST AMENDMENT DILEMMA

On the basis of the analysis of the preceding sections, one might face the temptation to conclude that *any* linkage of government subsidies to protected expression[52] violates the

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49. By "democratic communitarian," we mean one who believes in the value of communitarian self-determination. *See* Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 290-94 (1991) (defining the "communitarian-determinative" model of civic republican theory).

50. *See generally* MEIKLEJOHN, *supra* note 47.

51. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 20, 101 (1975) (explaining that content-based restrictions distort the marketplace of ideas, leaving the public with an incomplete and possibly inaccurate vision of society's opinions).

52. To the extent the expression in question does not fall within First Amendment protection and thus could be regulated directly, this analysis of course becomes irrelevant.

First Amendment, much as the imposition of a fine or a prison sentence does. The issue, however, is considerably more complex. In certain cases, not only do government subsidies of expression not present the aforementioned dangers to First Amendment interests, they affirmatively foster the values served by free expression. For example, government's funding of the arts or scientific research likely promotes both autonomy and communitarian values. Although courts generally do not construe the Constitution to impose on the government an affirmative obligation to support individuals,[53] surely it would appear Orwellian to prohibit the government totally from facilitating expression in the name of the First Amendment. Both scholars and jurists, then, face the dilemma of fashioning an analytical structure that will guide us in deciding when government subsidy decisions overstep constitutional boundaries.

## II. CALIBRATING THE CONSTITUTIONALITY OF GOVERNMENT SUBSIDIZATION: AN ANALYTICAL STRUCTURE

### A. AN OVERVIEW OF THE STRUCTURE

In shaping our approach, we initially draw a distinction between "negative" subsidies and "positive" subsidies. A negative subsidy conditions receipt on a potential speaker's decision either to refuse to speak or to cease speaking. A positive subsidy, on the other hand, requires the recipient to engage in expression. Under our structure, negative subsidies are presumptively unconstitutional. The structure finds them constitutional only in those cases in which current First Amendment jurisprudence would uphold an affirmative imposition of a burden, such as when the government imposes a fine or prison sentence for expression falling outside the scope of the First Amendment,[54] or when competing social interests outweigh the need for free expression.[55] Analysis of positive

53. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989) (holding that the Constitution confers no right to affirmative aid).

54. An example is expression categorized as legally obscene. *See* Miller v. California, 413 U.S. 15, 34-37 (1973) (holding, in part, that obscene material is not protected by the First Amendment).

55. An example would be advocacy of unlawful conduct that is found to present a clear and imminent danger of harm. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (explaining the level of imminent harm necessary to justify an infringement of free speech protection).

subsidies, on the other hand, requires a more detailed inquiry.[56]

B. NEGATIVE SUBSIDIES

With the philosophical foundations of the First Amendment's protection of free expression in mind,[57] one can see that negative subsidization of speech, such as the government's provision of a subsidy to an individual on the condition that she remain silent, constitutes a significant abridgement of free speech. Negative subsidization of speech undermines the underpinnings of both communitarian and autonomy theories of the First Amendment. Under a communitarian view, negative subsidization reduces the sum total of speech available to contribute to wise collective self-government and therefore impedes the community's ability to govern itself. Similarly, under an autonomy view, any government inducement not to speak reduces not only the development of the speaker, but also that of her would-be listeners, readers, or viewers.

Since negative subsidizations of speech undermine the values served by the First Amendment, they are presumptively unconstitutional. Indeed, negative subsidization of speech closely resembles direct, content-based government restrictions on speech, which are almost never constitutionally permissible.[58] For all the reasons that courts strictly scrutinize content-based government restrictions on speech, so, too, should

56. *See infra* Part II.C. (discussing positive government subsidies of speech).

57. *See supra* text accompanying notes 46-52. (discussing the effects of government subsidies on free speech).

58. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 211-12 (1975) (holding invalid a statute prohibiting drive-in theaters from showing movies containing nudity if screen is visible from a public street); Police Dep't v. Mosley, 408 U.S. 92, 99-102 (1972) (declaring as overbroad a statute prohibiting all picketing, other than peaceful picketing during a labor dispute, within 150 feet of a school). In both of these cases, the Court closely scrutinized content-based regulations. For an overview of the treatment of content-based restrictions, see generally John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Stone, *supra* note 51. Indeed, even if restrictions on speech are content-neutral, First Amendment principles might be undermined. *See, e.g.*, Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 131 (1981) ("[S]uch restrictions may undermine the functioning of the marketplace by keeping the public equally ignorant of *all* positions on issues, rather than merely of one viewpoint.").

they subject negative subsidies to a presumption of unconstitutionality.[59]

### C. POSITIVE SUBSIDIES

It is tempting to argue that the government does not abridge freedom of speech when it funds expression in a positive, rather than a negative, manner. After all, as long as it does not impose a penalty or otherwise discourage the exercise of free expression, the government appears not to violate the First Amendment. Unlike negative subsidies, positive subsidies do not reduce the sum total of expression, and no one is placed in a better position by not speaking. The speaker who is denied a positive subsidy because her views differ from those of the government is placed in no better position by saying nothing than by saying what she had intended to say in the first place. Moreover, the government is wholly neutral as to this speaker's initial choice whether to speak or to remain silent. The government cares only what the speaker will say if she does choose to speak.

The government's decision to subsidize an entity can nevertheless amount to an abridgement of speech because such a decision may artificially skew a public debate by inducing some who otherwise would have taken a contrary position (or would have chosen not to speak at all) to support the government's views. Such a result undermines both the communitarian and the autonomy values conceivably underlying the First Amendment. The goal, therefore, is to construct an analytical structure that allows the government to subsidize speech positively when such subsidization promotes First Amendment values but precludes the government from subsidizing speech positively when such subsidization undermines these values.

#### 1. The Costs and Benefits of Positive Government Subsidization of Speech

To establish a structure for gauging the constitutionality of positive government subsidization of speech, one must first examine both the conceivable benefits and costs of such subsidi-

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59. *See* Edward G. Reitler, *The Title X Family Planning Subsidies: The Government's Role in Moral Issues*, 27 HARV. J. ON LEGIS. 453, 459 (1990) (refuting the argument that negative subsidies are far less insidious than direct restrictions because an entity can simply reject a subsidy and therefore eschew the silencing effect of that subsidy).

zation.[60] This examination confirms our contention that positive subsidization of speech can both foster and undermine First Amendment values.

a. *The Benefits of Government Subsidization*

A democratic society must permit the government on occasion to communicate with the populace, both with its own voice and through the voices of others.[61] Commentators have recognized that the government is uniquely situated to inform directly and teach the populace.[62] In addition, indirect government subsidization of private speech can provide a voice to an entity that, without the aid of government funding, would not be heard.[63]

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60. Professor Yudof has noted that the benefits and costs of government subsidization of speech, addressed briefly above and more fully below, apply specifically to government subsidization of speech because "[g]overnments have an almost unique capacity to acquire and disseminate information in the modern state. This stems in part simply from superior resources . . . [b]ut . . . also stems from the broad reach of the modern welfare state." MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 9-10 (1983). Yudof believes that the potential harmful effects of this capacity are exacerbated by technological advances that have improved the government's ability to communicate. *Id.*

61. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways."); JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 13-14 (1977) ("Even in democratic societies, the community may legitimately act, through government, on the mind."); YUDOF, *supra* note 60, at 41 ("It is absurd, then, in the modern contexts, to adopt the position that government speech, in its many manifestations and irrespective of its advantages, is an illegitimate enterprise in a liberal and democratic state."); Donald L. Beschle, *Conditional Spending and the First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117 (1992) (affirming the importance of the government's voice while exploring the current approach to conditional-spending issues); Reitler, *supra* note 59, at 458 ("[T]he question is no longer whether the government has any role in the inculcation of values. Instead it is a matter of how much governmental influence in individual choice is desirable.").

62. *See infra* notes 63-72 and accompanying text.

63. *See generally* Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (per curiam) (recognizing that public expenditures may "facilitate and enlarge public discussion"); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 868 (1979) ("The government is sometimes uniquely situated to acquire and disseminate particular information, and in some cases government may be the only actor with the willingness and the resources to present a particular side of a public issue.").

Professor Emerson noted that

> [p]articipation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources. In short, government expression is a necessary and healthy part of the system.[64]

Perhaps the most zealous advocate in support of the government's subsidization of speech in order to teach and inform was Joseph Tussman, who argued "not only that government has authority in the realm of the mind, but also that its responsibilities there are among the most important that it has."[65] Tussman recognized that the government serves a crucial function in supporting "knowledge-creating and transmitting institutions,"[66] and that "[t]he teaching power is the inherent constitutional authority of the state to establish and direct the teaching activity and institutions needed to ensure its continuity and further its legitimate general and special purposes."[67] Tussman argued that because the government functions in part by teaching, persuading, and informing the populace, it therefore must be able to subsidize speech.[68] Similarly, Zachariah Chafee argued that the government must be able to communicate with the public in order to explain statutes and regulations promulgated by it,[69] and must be able to inform those governed of potential dangers to their well-being.[70]

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64. EMERSON, *supra* note 45, at 698.

65. TUSSMAN, *supra* note 61, at 3.

66. *Id.* at 11.

67. *Id.* at 54.

68. *See id.* at 13-14; *see also* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 702 (1992) ("[A] government functions in large measure through communication and persuasion, and would be disabled by a mandate that it maintain only neutral positions."); Yudof, *supra* note 63, at 866 ("Although they do not serve individual values of self-expression and dignity, the communications emanating from [the government, as well as municipal and private corporations] do provide information necessary to the exercise of the citizenry's judgment about political issues and candidates.").

69. ZECHARIAH CHAFEE, GOVERNMENT & MASS COMMUNICATIONS 755 (1947).

70. *Id.* As an example of this principle in action, Chafee explained that "[i]f the government makes [a serious public danger] plain to the people, they may be able to ward it off by private action. . . ." *Id.*

In addition to directly teaching and informing the public, government subsidization of speech can indirectly enable a private individual or entity that would have difficulty being heard without the government's assistance to speak, thereby allowing that individual or entity to reach its intended audience. Indeed, commentators have argued that "government speech often offsets the vast communications resources controlled by corporate or wealthy interests"[71] insofar as it "can amplify the voices of the local populace that seek to participate in debates dominated by mass institutions."[72]

b. *The Dangers of Government Subsidization*

Countless commentators have expressed the fear that, by positively subsidizing speech, the government might artificially skew the debate on a particular issue and thereby artificially shape public attitudes.[73] Professor Yudof, for example, expressed concern over the government's ability to "shape public attitudes" through communication.[74] "The obvious danger," Yudof asserted, "[was] that government persuaders [would] come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what [made] them accede to government's plans, policies, and goals."[75] Yudof

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71. Reitler, *supra* note 59, at 483.

72. YUDOF, *supra* note 60, at 43; *see also* Yudof, *supra* note 63, at 866 (stating that government speech, which "can amplify the voices of individuals" is one consideration for the support of "First Amendment rights for the government").

73. *See* YUDOF, *supra* note 60, at 42 ("The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime."); *see also* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 611 (1980) (recognizing the danger of the tyranny of prevailing opinion).

74. YUDOF, *supra* note 60, at 6; *see also* Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1107 (1979) ("Government promulgation of political views presents dangers to the interests which the Framers intended the first amendment to protect."); Shiffrin, *supra* note 73, at 611 (arguing that government "departures from neutrality are indefensible when they undermine respect for the democratic process."); Yudof, *supra* note 63, at 898 (noting that, by "indoctrination and the withholding of vital information," government speech can undermine "the power of the citizenry to judge intelligently and to communicate those judgments"). *But see generally* Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983) (reviewing MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983)) (questioning the distorting effect of government speech).

75. YUDOF, *supra* note 60, at 6; *see also* Kamenshine, *supra* note 74, at 1105 ("If a government can manipulate [the marketplace of ideas], it can ultimately

expressed the fear that government communications might be used to "falsify consent," that is, that the government would "attempt to fashion a majority will through uncontrolled indoctrination activities."[76] Yudof believed that this eventuality has become more likely as the "expansion of government at all levels had increased its opportunity to communicate with the populace."[77]

Professors Emerson and Haber concurred with Yudof:

> The penetration of government into more and more aspects of modern life, including the field of mass communication; the increasing dependence of higher education and scientific research upon government support; the many forms of pressure toward political, intellectual and social conformity—these and other factors raise grave issues as to the proper role of government in controlling communication and molding thought and expression in a democratic society.[78]

Perhaps the concerns of the aforementioned scholars were most effectively summarized by Professor Robert Kamenshine, who contended that "[t]he government has the potential to use its unmatched arsenal of media resources and legislative prerogatives to obtain political ends, to nullify the effectiveness of criticism, and, thus, to undermine the principle of self-government."[79]

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subvert the processes by which the people hold it accountable.").

76. YUDOF, *supra* note 60, at 15; *see also* Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 580 (1980).

77. YUDOF, *supra* note 60, at 6. More specifically, Yudof feared that the government might manipulate the private mass media "by leaking selected information, creating pseudo-events, and lying about matters not easily verified by those outside government." *Id.* at 8. He also expressed concern about the "tendency of executive-branch agencies to seek to influence legislative processes." *Id.* Additionally, Yudof feared the government's ability to speak, without limitation, in "public institutions whose mission, in whole or in part, [was] to indoctrinate, educate, or care for a particular group." *Id.* at 9.

78. Thomas I. Emerson & David Haber, *The "Scopes" Case in Modern Dress*, 27 U. CHI. L. REV. 522, 522 (1960).

79. Kamenshine, *supra* note 74, at 1104; *see also* Shiffrin, *supra* note 73, at 607 ("If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace."); Ziegler, *supra* note 76, at 618 (arguing that "official partisanship in connection with structured political questions violates the first amendment since it infringes the political rights of citizens by diminishing the effect and probability of success of its opponents' protected expression"). The Supreme Court has heeded these warnings in a number of cases. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 597-610 (1967) (holding that statute and regulations preventing the appointment or retention of subversive persons in state employment was unconstitutional).

Zechariah Chafee identified a particular concern with the government's

2. Subdividing Positive Subsidies

When it positively subsidizes speech such that the hazards of the government-sponsored communication outweigh its benefits, the government improperly undermines First Amendment values, and courts must deem the subsidization unconstitutional. The obvious task, then, is to conceptualize and categorize positive subsidies in a manner that enables a reviewing court to distinguish the beneficial positive subsidies from the detrimental ones with reasonable accuracy and efficiency. Recognizing the need for such a dichotomy, of course, is considerably easier than fashioning one.

With this admonition in mind, we divide the category of positive subsidies into two broad subcategories: "policy" subsidies, and "auxiliary" subsidies. Policy subsidies include funding the speech of "core" government employees, for example, those who are responsible for directing governmental policy,[80] when they engage in expression about and in support of government activities and initiatives. We term this funding "limited government employee subsidies." Policy subsidies also include the selection of political appointees when decision-makers base their selection at least in part on the viewpoints expressed by the appointed individuals. We term these subsidies "appointment subsidies." Our approach presumptively deems both types of policy subsidies constitutional. Auxiliary subsidies, to which we will return below,[81] consist of all positive government subsidization of the expression of private individuals or entities, except appointment subsidies, and subsidization of the speech of non-core government employees.

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ability to shape public attitudes. Chafee's apprehension was that those in power would communicate with the public simply as a means for staying in power. CHAFEE, *supra* note 69, at 763. He believed that "an energetic information service [was] an excellent way [for officeholders] to intrench themselves in office." *Id.*; *see also* Anderson v. City of Boston, 380 N.E.2d 628, 637 n.14 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979) ("Surely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials (to the exclusion of their opponents), even though the open discussion of political candidates and elections is basic First Amendment material."); Reitler, *supra* note 59, at 456 ("elected officials should not perpetuate themselves or their party through the spending of public monies").

80. Whether a particular employee falls within the category of "core" employees presents an issue of fact, for individualized resolution.

81. *See infra* discussion at Part II.C.2.b.

a. *Policy Subsidies*

i. Limited Government Employee Subsidies

The first type of policy subsidy is the limited government employee subsidy, which our approach deems constitutional. Society must permit government employees who participate in directing governmental policy to speak, supported by government funding, about and in favor of government policies and initiatives.[82] From the perspective of democratic theory, it is essential that these government employees inform the populace of the government's policies and initiatives. Because the government informs the populace about its functioning through these subsidies, it facilitates self-government by providing members of the community with information and data on which to judge the performance of its political leaders. As a result, the electorate is better able to check elected officials and hold them accountable.[83]

It is true that permitting core government employees to speak on matters regarding the functioning of the government creates a risk that the government is also able to skew artificially a debate and undercut First Amendment principles by overwhelming the opposition due to the sheer volume of government speech. The fact that listeners may readily identify the government speaker as such, however, mitigates the likelihood of this potentiality. As a result, the speech of a core government employee is unlikely to skew substantially the marketplace of ideas, since the populace can evaluate the message with an eye toward the messenger.[84] Any remaining possibility that the government might undermine First Amendment principles by skewing a debate with limited government employee subsidies is substantially outweighed by the practical and theoretical benefits that derive from allowing core government employees to speak on issues of importance to the government.

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82. TUSSMAN, *supra* note 61, at 115.

83. *See generally* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 154-58 (1995); Blasi, *supra* note 47, at 521.

84. *See* Beschle, *supra* note 61, at 1144 ("The government's disproportionate power to communicate its opinions is at least partially curbed by the natural skepticism, perhaps even cynicism, which greets government messages clearly labeled as such."); Reitler, *supra* note 59, at 460 ("Today's Watergate-wise public is notoriously skeptical of what its government says.").

A classic example of a limited government employee subsidy is government funding of the travels of the Vice President of the United States in order to allow him to speak in favor of a policy supported by the administration. Certainly the Constitution permits Vice President Gore to travel the country, at government expense, to speak in favor of the North American Free Trade Agreement, even though the administration quite naturally declines to fund the treaty's opponents. This type of subsidization is constitutional because it ultimately fosters First Amendment values.[85]

ii. Appointment Subsidies

Our approach also permits the government to make hiring decisions of policy making, non-civil–service employees based on the previously expressed viewpoints of the candidates it is considering. Few would argue that the Constitution does not permit the government to consider the writings, speeches, and other public statements of a scholar in considering whether to appoint that scholar to the cabinet. Precluding the government from engaging in such a positive subsidization of speech could result in the appointment of an individual whose ideas are incompatible with those of the government. As a result, prohibiting this positive subsidy would hinder elected government officials in their efforts to implement the policy choices they were presumably elected to bring to fruition. This would undermine fundamental notions of representative democratic theory.

We acknowledge that by permitting the government to provide appointment subsidies, we potentially allow the government artificially to skew debate. It is conceivable, we suppose, that an individual might alter her expression in order to be appointed to some position by the government. Despite this possibility, considerations of governmental efficiency and democratic theory[86] lead us to conclude that appointment subsidies, like limited government employee subsidies, are constitutional.

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85. *See supra* text accompanying notes 61-72 (arguing that certain governmental subsidies support First Amendment values).

86. *See supra* text accompanying notes 61-72 (describing the benefits of government subsidization).

b. *Auxiliary Subsidies*

Auxiliary subsidies are positive subsidies that the government grants to entities or individuals other than core government employees and government appointees to encourage and facilitate their expression. They include such subsidies as a government grant to an organization to allow it to produce a study examining the effects of smoking on human beings, government funds given to a private library to purchase books, and a government grant to support completion of a particular artistic or literary work.

Under our approach, the government may constitutionally provide auxiliary subsidies only in certain instances. Auxiliary subsidies allow the government to teach, inform, or provide a voice to a relatively silent entity, and therefore may promote First Amendment values. Once again, however, allowing the government to act as a benefactor to third parties creates the danger that the government may skew artificially public debate or impede an individual's exercise of free will in fashioning her expression. What's more, auxiliary subsidies, unlike policy subsidies, do not always assist the government in performing essential functions. Therefore, our approach significantly circumscribes, but does not entirely curtail, the government's ability to disburse auxiliary subsidies.

We divide auxiliary subsidies into three, not entirely segregated subcategories: "categorical" subsidies, "viewpoint-based" subsidies, and subsidies of "judgmental necessity." The government provides categorical subsidies of speech when it makes viewpoint-neutral choices to fund particular categories, subjects, or classes of speech. The government generally makes categorical subsidies both because of the public's need for information and because such subsidization is unlikely to come from other sources.[87] For example, the government makes a categorical subsidy when it funds a study on the physical effects of smoking, or the purchase of history books or new American fiction for a public library. Our approach deems such subsidies presumptively constitutional.

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87. Owing to its substantial resources, the government is uniquely capable of funding the promulgation of information on many matters of public concern. *See* YUDOF, *supra* note 60 (describing the government's unique position to provide subsidies).

The government makes a viewpoint-based subsidy of speech when it chooses to fund speakers based on their viewpoints. Our approach deems these subsidies presumptively unconstitutional.[88] If we permit the government to make viewpoint-based subsidies, the government could choose to fund only those viewpoints with which it agreed, thereby dramatically skewing public debate and undermining First Amendment principles. The greatest fears attendant to government subsidization of speech, therefore, derive from this kind of subsidy.

Before one can accept our model's proposed bar against viewpoint-based positive auxiliary subsidies, we must answer three questions: First, why are viewpoint-based auxiliary subsidies more harmful to First Amendment values than categorical auxiliary subsidies? Second, why does our proposed structure deny government the power to do indirectly through auxiliary subsidies, what it permits government to do directly through policy subsidization of the expression of core government employees and appointees?[89] Finally, even if one were to accept as a theoretical matter the validity of a viewpoint/categorical dichotomy for purposes of positive auxiliary subsidies, how, as a practical matter, is a court to decide whether a subsidy, labelled superficially as a categorical subsidy, is in reality a disguised viewpoint subsidy?

Initially, the distinction our structure draws between viewpoint-based and categorical subsidies represents a well established precept of First Amendment doctrine in other areas of speech regulation.[90] While this dichotomy is by no means free of risk in areas of direct governmental regulation,[91] in the context of government subsidies the justification for the distinction is compelling. In a case of direct governmental regulation, it is difficult to understand why the fact that a prohibition is categorically-based, rather than viewpoint-based,

88. It may not be presumptively constitutional, however, if the subsidy is a policy subsidy or a subsidy of judgmental necessity that is inevitably viewpoint based.

89. *See supra* text accompanying notes 82-86 (discussing subsidization of government employees and appointees).

90. *See generally* Stone, *supra* note 51 (explaining that content-based restrictions distort the marketplace of ideas, leaving the public with an incomplete and possibly inaccurate vision of society).

91. Indeed, one of us has in the past been a severe critic of this dichotomy. *See generally* Redish, *supra* note 58 (explaining that content-neutral restrictions may negatively affect the marketplace of ideas).

somehow implies that the prohibition need not be subjected to a compelling interest standard; the sum total of expression is reduced as a result of the regulation in either case, and whatever values free speech protection serves are thereby harmed.[92] In the case of government subsidies, however, complete denial of government power to subsidize speech has the effect not of *preserving* expression, but of actually *reducing* the sum total of expression. Thus, one interested in fostering First Amendment values should be quite hesitant to deny such power to the government.

It is also true that, although categorical regulations can be harmful to First Amendment values, they surely are not *as* harmful as viewpoint-based regulations.[93] Categorical distinctions do not skew public debate in the same manner, nor do they present as great a danger of stark governmental suppression of political opinion, as do viewpoint-based regulations. Thus, given the potentially beneficial impact of positive subsidies, it is appropriate to draw a line that allows government to subsidize speech in a categorical manner but simultaneously denies it the power to subsidize on the basis of viewpoint.

It is true that under our approach, government is permitted to subsidize the speech of core policy employees on a viewpoint basis.[94] The justification for such subsidies, however, is considerably stronger than the asserted justification for viewpoint-based auxiliary subsidies, and the risk of harm is simultaneously considerably less than the potential harm caused by viewpoint-based auxiliary subsidies. Initially, it is difficult to imagine how government could operate effectively without having the opportunity to communicate its positions and programs to the public, or without the opportunity to select its policy-making employees on the basis of their previously expressed viewpoints. It is equally difficult to understand why efficient representative government somehow requires the opportunity to control the flow of debate among private parties through the selective use of viewpoint-based subsidies. At least as a general matter,[95]

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92. *See id.* (explaining that content-neutral regulations also may undermine First Amendment principles).

93. *See generally* Stone, *supra* note 51 (discussing the dangers of viewpoint-based discrimination).

94. *See supra* text accompanying notes 82-86 (describing the benefits of subsidizing speech of policy-making employees).

95. It is conceivable that under narrowly defined circumstances, government may find it necessary to "farm out" one of its traditional policy expressions

government should be able to operate effectively without the need to "deputize" private parties to foster government views and positions.

Moreover, auxiliary viewpoint-based subsidies to private parties present a danger of defrauding the public in a manner not present in the case of policy subsidies. When a government officer speaks, much as when a political candidate or a commercial advertiser speaks, the listener is able to "discount" the expression on the basis of the speaker's apparent self-interest.[96] However, when government fosters dissemination of its positions by means of funding private party expression, the danger arises that the public will fail to "discount" the views expressed. Even if it were somehow feasible to require the private parties to identify the existence of their government funding, the risk of "consumer confusion" of partially attentive members of the public is very real. Thus, drawing a distinction between auxiliary viewpoint-based subsidies and policy subsidies makes perfect sense from the perspective of both free speech theory and the practical needs of governmental operations.

One must concede that government may on occasion seek to disguise what are in reality viewpoint-based subsidies behind the mask of permissible categorical subsidies. This problem has long plagued the doctrinal distinction between viewpoint-based and content-neutral regulations of expression. Although this danger is impossible to avoid completely, at least two tactics can mitigate the likelihood of its arising. Initially, courts must prohibit the government from defining categorical subsidies in a viewpoint laden manner, such that the very contours of the category effectively exclude viewpoints with which government disagrees. For example, government cannot define the category as "the evils of abortion," thereby effectively excluding any expression that advocates freedom of choice. A reviewing court generally should be in a position to resolve this issue on the four corners of the governmentally established category, without the

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to a private contractor, as when government retains a private public relations firm to fashion a campaign in support of a government program. Arguably, the hypothetical of the private printer of the Congressional Record, *supra* text following note 3, would fit within this category. Such activity may properly be deemed a "policy" subsidy only in those instances in which a reviewing court concludes that the expressive activity in question is one that, absent use of the private contractor, the government definitely would have performed itself.

96. *See supra* text accompanying note 76 (discussing dangers of governmental falsification of consent).

need to resort to a separate factual inquiry.

In certain situations, however, courts must still undertake a separate factual inquiry. Such a case would arise when, although on its face the categorical description unambiguously excludes viewpoint distinctions, an unsuccessful applicant for the subsidy asserts that in reality the government based its denial on the applicant's underlying viewpoint. For example, assume that the government chooses to fund studies on the presumably viewpoint-neutral category of the social effects of abortion. An unsuccessful applicant, however, claims that the government based its denial of his application entirely or predominantly on the fact that he intended to describe those social effects as positive.

Under our approach, in order to challenge a facially "neutral" funding decision as viewpoint-based, a plaintiff must follow the procedure set out by the Supreme Court in *Mt. Healthy Board of Education v. Doyle*.[97] This procedure dictates that the entity challenging the funding decision must show by a preponderance of the evidence that the government impermissibly based its decision on the recipient's viewpoint.[98] The burden then shifts to the government to show by a preponderance of the evidence that it would have reached the same funding decision absent the viewpoint-based consideration.[99] If the government fails to meet this burden, the challenged decision fails. One cannot doubt that this procedure is costly. It is likely that some number of viewpoint-based subsidies will go unchallenged because of the transaction costs that inevitably accompany litigation. Even with these costs in mind, however, the *Mt. Healthy* procedure adequately protects against the hazards of surreptitious viewpoint-based government subsidization.

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97. 429 U.S. 274 (1977). In that case, a fired, untenured teacher challenged dismissal on First Amendment grounds. The Supreme Court initially required the plaintiff to establish that his constitutionally protected conduct had been a "substantial factor" in the school board's decision. *Id.* at 287. The burden then shifted to the school board to demonstrate "by a preponderance of the evidence that it would have reached the same decision as to [the teacher's] reemployment even in the absence of the protected conduct." *Id.* Although the Court did not elaborate on exactly how this was to be accomplished, the only conceivable method available to the board appears to have been to demonstrate the inadequacy of the teacher's record and performance. The Court elaborated upon this procedure in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

98. *Mt. Healthy*, 429 U.S. at 287.

99. *Id.*

c. *Subsidies of Judgmental Necessity*

Once the government makes the decision to award a categorical subsidy, it naturally must choose among different candidates for funding within that category. For example, once the government decides to fund a study on breast cancer, it must choose either Firm X or Firm Y to undertake the study. In making this funding choice, we cannot require the government arbitrarily to pick names out of a hat. Rationality requires that the government examine and judge the content of the various competing applications or proposals. Thus, while we can require the government to eschew virtually all viewpoint-based factors in the initial establishment of its subsidized categories,[100] we cannot entirely preclude the influence of normative value judgments in the actual selection among competing applicants for the subsidy.

It would be unwise to conclude that, as a result of these dangers, we should constitutionally deny government the opportunity to provide positive auxiliary subsidies. The general societal and First Amendment values served by such subsidies are simply too great.[101] The task, then, is to engage in a form of constitutional damage control. We probably cannot avoid all dangers of abuse. We can, however, fashion certain flexible and comprehensible *ex ante* guidelines that enable a reviewing court to determine whether the substantive normative criteria employed by government officials in selecting among competing applicants are unconstitutional.

Under our structure, the government's selection is constitutional as long as it is based on criteria "substantially related" to the predescribed goals and purposes of the program pursuant to which the category of speech is funded. For example, if the government chooses to award a categorical subsidy to fund a study on breast cancer, the government may make the choice among competing applicants, provided that it bases its decision on criteria "substantially related" to the prescribed purposes of the funded program. Assuming that the government's program is designed to fund the study that will produce the most thorough, accurate, and reliable results, it may choose to fund

100. *See supra* text accompanying notes 90-99 (discussing prohibitions on viewpoint-based subsidies).

101. *See supra* text accompanying note 61-72 (describing the public's need for information).

one firm's research to the exclusion of another's if it finds that the former firm's study is more likely to meet these predetermined criteria. Thus, the government may fund Firm X's study to the exclusion of Firm Y's because it concludes that the former will employ superior or more advanced technology or because its primary researchers are better qualified. The government may not fund Firm X's study to the exclusion of Firm Y's because Firm Y is comprised of a higher percentage of Democrats than Firm X. The political leanings of the members of the firm are unrelated to the stated scope of the program for which the subsidy is provided.

This requirement of "substantial relationship," coupled with the requirement that the category of subsidized expression itself be defined in a viewpoint-neutral manner,[102] ensures, to the highest degree possible, that the government does not in reality engage in viewpoint-based subsidization when it makes subsidies of judgmental necessity. This, in turn, precludes the government from undermining First Amendment values by means of viewpoint-based subsidies.[103]

## III. APPLYING THE ANALYTICAL STRUCTURE

The preceding discussion described the elements of our structure in abstract terms. Because difficulties naturally will arise in application of the structure to specific fact situations, we find it helpful to consider how the structure operates in real circumstances. This section, therefore, examines the use of the approach in three highly controversial cases of government subsidization: federal funding of family planning programs, governmental subsidization of the arts, and government selection of public school textbooks.

### A. FEDERAL FUNDING OF FAMILY-PLANNING PROGRAMS: *RUST V. SULLIVAN* REVISITED

In *Rust v. Sullivan*,[104] the Supreme Court upheld Health and Human Services Department (HHS) regulations regarding federal funding of family-planning services promulgated

102. *See supra* text following note 96 (requiring that categories be fashioned in a viewpoint neutral manner).

103. *See supra* notes 61-72 and accompanying text (discussing the benefits and need for government subsidies).

104. 500 U.S. 173 (1991).

pursuant to Title X of the Public Health Services Act.[105] According to the Act, the Secretary of HHS was directed to promulgate regulations, pursuant to which she would make grants and contracts.[106] In 1988, the Secretary promulgated the regulations in question. As the Supreme Court indicated, these regulations "attach[ed] three principal conditions on the grant of federal funds for Title X projects."[107] First, the regulations prohibited a Title X clinic from providing "counseling concerning the use of abortion as a method of family planning or [from] provid[ing] referral for abortion as a method of family planning."[108] Second, the regulations prohibited a Title X project from "encourag[ing], promot[ing], or advocat[ing] abortion as a method of family planning."[109] Finally, the regulations required that a Title X project be organized in such a way that "it [was] physically and financially separate" from activities prohibited in the regulations.[110] By means of the new regulations, the Secretary attempted to erect "a wall of separation between Title X programs and abortion as a method of family planning."[111]

In concluding that the regulations were constitutional, the Court relied heavily on its interpretation of the unconstitutional conditions doctrine. The petitioners had argued that "the restrictions on the subsidization of abortion-related speech contained in the regulations [were] impermissible because they condition[ed] the receipt of a benefit . . . on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counselling."[112] The argument did not persuade the majority. Rather, the majority concluded that the government was not "denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which

105. 42 U.S.C. § 300-300a-7 (1988). Under Title X, the Secretary of Health and Human Services was "authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a) (1988).

106. 42 U.S.C. § 300a-4(a) (1988).

107. *Rust*, 500 U.S. at 179.

108. 42 C.F.R. § 59.8(a)(1) (1994).

109. 42 C.F.R. § 59.10 (1994).

110. 42 C.F.R. § 59.9 (1994).

111. 53 Fed. Reg. 2922 (1988).

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

they were authorized."[113] The Court found that

> the regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.[114]

The Court concluded that since the regulations placed a condition on the *program* pursuant to which funds were received, and not on the *grantee* receiving the funding, the condition was not an unconstitutional condition. In other words, because the regulations did not dictate what a Title X grantee could do outside the boundaries of the Title X program, the regulations were constitutional.

Viewed from the perspective of the unconstitutional conditions doctrine, the Court's analysis possesses a superficial appeal. But closer examination reveals the conceptual limitations of the unconstitutional conditions doctrine[115] more than it demonstrates the correctness of the Court's decision. The Court properly reasoned that in order to violate the unconstitutional conditions doctrine, the government must link the receipt of a subsidy either to the recipient's assumption or avoidance of a particular viewpoint. The Court, however, viewed the Secretary's regulations not as constituting subsidies forcing the recipient's assumption or rejection of a particular viewpoint, but rather as the very structural description of the scope and purpose of the subsidy. The government established the subsidy for the very purpose of fostering family planning methods *other than abortion*. It therefore would be absurd to hold unconstitutional the government's choice not to fund pro-abortion counseling. Thus, in the Court's view, the regulations constituted not an improper government "carrot" designed to silence expression of a particular viewpoint, but rather a self-defined governmental program the purpose of which was to deter abortions, or at least promote alternatives to abortion.

The problem with the unconstitutional conditions analysis is that it allows the government to define its subsidization

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113. *Id.* Indeed, elsewhere in the opinion, the Court asserted that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.

114. *Id.* at 196 (citing 42 C.F.R. § 59.9 (1989)) (emphasis in original).

115. *See supra* text accompanying notes 20-36 (discussing the theoretical limitations of the unconstitutional conditions doctrine).

programs in a wholly unchecked, self-referential[116] manner.[117] Although such an analysis can enable the government to escape the conceptual strictures imposed by the unconstitutional conditions doctrine, its failure to view *the government's initial funding choice itself* from the perspective of First Amendment restraints enables the government to employ subsidies in a manner that threatens core values of free expression.

Viewed from the perspective of our proposed analytical structure, the Secretary's regulations are clearly unconstitutional. It is true that, from its inception, the funding program had as its primary purpose the dissemination of information about alternatives to abortion. Although the contours of the unconstitutional conditions doctrine allow the Court to satisfy the constitutional inquiry without questioning the legitimacy of the goals of the government's program, our structure, premised exclusively on considerations unique to First Amendment policy and theory, does not. For reasons we have discussed,[118] the First Amendment cannot allow government to employ subsidies as a means of skewing the expression of private parties. The regulations at issue in *Rust* established a positive auxiliary viewpoint-based subsidy, which is unconstitutional under our

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116. "Self-referentiality" in this context refers to the evaluation of a governmental subsidy with reference to the subsidy's express purpose rather than to the effects the subsidy has on the wider sphere of available public choices in regard to expression. *See supra* discussion at text between notes 96-97.

117. The Court relied upon a logical fallacy when reasoning that

> [t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. *In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.*

*Rust*, 500 U.S. at 193 (emphasis added). The Court erroneously believed that "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" *Id.* at 192-93 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). When, as here, the government's "value judgment" is a pretext for stifling expression of an ideological position, the government discriminates on the basis of viewpoint. As Justice Blackmun indicated, the Court "for the first time" in *Rust* upheld "viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds." 500 U.S. at 207 (Blackmun, J., dissenting).

118. *See supra* text accompanying notes 93-97 (analyzing the dangers of the government's subsidization of speech). *See also supra* Part II.C.2.b. (discussing the constitutional legitimacy of "auxiliary" subsidies).

structure.[119] The very description of the subsidy program as a means of disseminating information concerning family planning methods *other than abortion* inescapably reveals the viewpoint-based, selective nature of the subsidy,[120] and makes the program unconstitutional under our approach.[121]

The fallacy of the *Rust* Court's self-referential approach to government subsidization programs becomes clear if one visualizes the subsidization of private expression exclusively in favor of such ideas as a free-market economic philosophy, or the political theories of Mao Zedong or Rush Limbaugh. In such situations, the Court could reason under its unconstitutional conditions approach, as it did in *Rust*, that exclusion of funding for those opposed to the political viewpoints sought to be disseminated makes perfect sense in light of the program's own purposive description. It does not follow, however, that such initial decisions as to scope are themselves constitutional. Our structure demonstrates that they are not.

Government may appropriately choose neutrally to fund works on family planning, on the viability of free-market economic philosophy, or on the wisdom of Mao Zedong's or Rush Limbaugh's political thought. Each of these subsidies would foster First Amendment values by adding to the public's knowledge and facilitating the self-realization of those engaged in the particular expressive activities and those listening or watching them also. For reasons already discussed, however, government may not foster public acceptance of its own viewpoints on these issues by manipulating private expression.

### B. GOVERNMENT SUBSIDIZATION OF THE ARTS

Professor Robert O'Neil has posed the crucial dilemma created by governmental subsidization of the arts:

> [I]f government cannot fund all artists or all works, how must it choose? If it makes choices, it must adopt and apply standards. And if those standards are not simply broad and bland categories—for example, fund only oil paintings but not water colors . . . —then there

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119. *See supra* discussion at text accompanying note 88 (discussing the constitutional legitimacy of viewpoint-based subsidies).

120. To underscore the viewpoint-based nature of the regulations, it is helpful to transform them hypothetically into a proper categorical subsidy. This would have been the case had the regulations directed the subsidized clinics to counsel on the general issue of family planning.

121. *See supra* text accompanying notes 96-97 (arguing that government may not establish viewpoint-based categories).

> is inevitable potential for content differentiation. The difficulty is deciding when that differentiation abridges or inhibits freedom of expression in ways the first amendment will not allow.[122]

Indeed, while few would argue that the government is not constitutionally permitted to fund works of art,[123] much disagreement has arisen over the way in which the government may constitutionally make its funding decisions.[124]

In part to answer this question, Congress in 1965 established the National Endowment for the Arts (NEA),[125] which it designed as a mechanism for funding the "best" works of art from the many for which artists had requested grants. Congress intended that the choice be "insulated from partisan political

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122. Robert M. O'Neil, *Artistic Freedom and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 177, 191 (1990).

123. *But see generally* EDWARD C. BANFIELD, THE DEMOCRATIC MUSE: VISUAL ARTS AND THE PUBLIC INTEREST (1984) (arguing that the federal government should not engage in the aesthetic judgments required for art subsidies); WILLIAM D. GRAMPP, PRICING THE PRICELESS: ART, ARTISTS, AND ECONOMICS (1989) (arguing that public support of the arts is not economically justifiable).

124. *See generally* Elizabeth E. deGrazia, *In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 133 (1994) (advocating a return to NEA decision-making free from government-imposed content restrictions); Owen Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991) (equating viewpoint-based denial of funding with government censorship of the arts); John E. Frohnmayer, *Giving Offense*, 29 GONZ. L. REV. 1 (1993/1994) (arguing that, if the government supports the arts at all, such support should be viewpoint-neutral); Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 KAN. L. REV. 437 (1992) (arguing that NEA criteria are impermissible under the First Amendment); Jesse Helms, *Is it Art or Tax-Paid Obscenity? The NEA Controversy*, 2 J.L. & POL'Y 99 (1994) (explaining Senator Helms's position that the NEA has been a tool for advancing moral relativism more than a legitimate public subsidy); Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473 (1994) (arguing that the Court unjustifiably has diminished incentives for constitutionally contemplated public discourse); O'Neil, *supra* note 122 (discussing concepts of academic and artistic freedom); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209 (1993) (arguing for a more precise definition of artistic "content" in First Amendment jurisprudence); Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 79 (1994) (arguing that restrictions on art funding are unconstitutional because such restrictions deny some individuals a right to express a political identity); Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969 (1990) (arguing against attempting to regulate art through conditional grants).

125. *See* deGrazia, *supra* note 124, at 133 (describing the formation of the NEA).

considerations."[126] Only artwork of "substantial artistic and cultural significance" would receive funding.[127]

Legislators have, at times, attempted to narrow the definition of "best" by defining out of consideration specified types of art. For example, in 1990, the NEA's reauthorization bill contained what became known as the "decency clause."[128] Under that clause, the NEA chairperson was directed to ensure that all works funded by the NEA comported with "general standards of decency and respect for the diverse beliefs and values of the American public."[129] The question is whether attempts to make content-based distinctions among works of art, such as the "decency" clause, are constitutionally permissible.

Determining the constitutionality of the decency clause probably presents the most difficult test for our approach.[130] At least in the abstract, government is entitled to fund the arts. Such a subsidy constitutes a positive auxiliary categorical subsidy.[131] Within this categorical subsidy, pursuant to the principle of "judgmental necessity,"[132] the government may make content-based distinctions. In other words, the government cannot be expected either to fund every one of the applicants for funding or to make its selections arbitrarily. As discussed in the analysis of our structure, the choice of one applicant over another is properly deemed a constitutional subsidy of judgmental necessity if it is based on criteria "substantially related" to the program pursuant to which the category of speech is funded.[133] Thus, since by creating the NEA Congress intended to fund on the basis of artistic excel-

126. Note, *supra* note 124, at 1972.

127. 20 U.S.C. § 954(c)(1) (1990).

128. 20 U.S.C. § 954(d) (1990) (disallowing funding for any art the NEA chairperson deems to be obscene).

129. *Id.* A California district court struck down the "decency clause" in Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992). In *Finley*, the court labelled the decency clause unconstitutionally vague and overbroad. In holding the clause was overbroad, the court concluded that the government's criteria for evaluating art are limited to "professional evaluations of . . . merit." *Id.* at 1475.

130. *See supra* Part II.C.

131. *See supra* text accompanying notes 87-97 (defining and discussing the constitutionality of "auxiliary" subsidies).

132. *See supra* text accompanying notes 100-103 (discussing the application of the "judgmental necessity" principle).

133. *See supra* notes 101-103 and accompanying text (defining the "substantial relationship" concept in the context of the normative selection process).

lence, it may choose between applications only by means of criteria designed to determine excellence.

There appears to be no basis on which a reviewing court could objectively determine that considerations of "decency" are inherently unrelated to the quality of the art. To be sure, one could quite reasonably argue that such considerations should be deemed to have no connection to quality. This, however, seems to be a purely subjective judgment, one which a court has no more ability to make than it does the initial quality determination. As a result, if a particular applicant is denied on the grounds that his art is gross or offensive, it would be effectively impossible for a reviewing court to conclude, for constitutional purposes, that such a judgment was substantially unrelated to the work's artistic quality.

Arguably, a different situation is presented when, rather than influencing a determination of whether particular artwork meets standards of excellence, decency considerations are employed, *ex ante*, to exclude entire categories of work that deal with certain subjects or employ certain words or visual images. In such a case, those in authority could be making a good faith, broadly based judgment concerning artistic quality. A reviewing court, however, could reasonably be suspicious of any such mechanistic approach. We doubt that true artistic judgments could be so broadly and crudely made. It is considerably more likely in such a case that those in power are superimposing on to the selection process normative content-based judgments that are wholly unrelated to considerations of quality. This likelihood is even greater when this *a priori* decency limitation is imposed, not by those experts designated to make the individual funding selections, but by Congress itself. While it is of course difficult and dangerous for a reviewing court to question asserted congressional motivations,[134] in such a situation a court could properly conclude, as a matter of law, that Congress's concern is not with issues of artistic quality, but with wholly extraneous normative moral, social, and lifestyle judgments.[135] The

134. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 374-75 (1968) (accepting at face value Congress's highly suspect assertion that its prohibition on draft and desecration was motivated by viewpoint-neutral, non-speech related considerations). *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 819 (2d ed. 1988) (discussing the Court's avoidance of a congressional-motive inquiry in *O'Brien*).

135. Nor could Congress redefine its goal as the funding of "decent" art. *See supra* text accompanying notes 73-79 (discussing the dangers inherent in

decency clause, in that case, would not qualify under the "judgmental necessity" exception, because the criteria employed to make the choice are not "substantially related" to the legitimate viewpoint-neutral parameters of the subsidy program.

One might respond that Congress should not be forced to fund expression with which its members or those they represent disagree or find morally repugnant, and of course, Congress cannot be forced to do so. Congress could conceivably make the judgment that it will fund absolutely no art. It does not follow, however, for reasons already discussed,[136] that it may choose indirectly to manipulate both public opinion and private speech through the use of viewpoint-based auxiliary subsidies.

### C. SELECTING PUBLIC SCHOOL TEXTS

Public schools give rise to a unique First Amendment conundrum. On the one hand, public schools play an important, indeed vital, role in socializing and inculcating values in students.[137] On the other hand, government, in its efforts to

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governmentally sanctioned positive-speech subsidies).

136. *See supra* discussion at text accompanying notes 88-96 (arguing that viewpoint-based subsidies are unconstitutional).

137. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (arguing that "schools must teach by example the shared values of a civilized order"); Plyer v. Doe, 457 U.S. 202, 222 n.20 (1982) ("The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained."); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (discussing findings that public schools instill "fundamental values necessary to the maintenance of a democratic political system"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (finding that the government can teach "the guaranties of civil liberty which tend to inspire patriotism and love of country"); Joel S. Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPP. L. REV. 105, 134-36 (1978) (asserting that the state has a compelling interest in inculcating values to students); Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1274 (1991) ("The Supreme Court currently views the work of the schools to be the inculcation of values."); Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 527-28 (1984) ("Children, however, are rightfully perceived as . . . instruments of larger societal purposes. Those purposes include the assimilation of the child into the larger culture, for the intergenerational, exogenetic transmission of values, knowledge, language, and customs is essential to the preservation of community and to the definition of persons within the community."); William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 943-44 (1987) (stating that under the "cultural transmission ideology . . . the purpose of education is not to encourage individual growth, but to assure the internalization of established norms, with the child's need to learn societal

socialize and inculcate, "may cast a pall of orthodoxy over the classroom," thereby undermining the First Amendment rights of students.[138] Commentators often argue that the role of the school as indoctrinator and the First Amendment rights of the students are in direct conflict.[139] As a result of this conflict, the right of the school to indoctrinate often tramples the First Amendment rights of students.[140]

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disciplines receiving particular emphasis").

138. Keyishian v. Board of Educ., 385 U.S. 589, 603 (1967); *see* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (noting that students are not "closed-circuit recipients of only that which the state chooses to communicate"); *West Virginia State Bd. of Educ.*, 319 U.S. at 637 (stating that schools "are educating the young for citizenship is reason for scrupulous protection of [c]onstitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes"); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (noting that students are not "mere creatures of the state"); STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 206 (1983) ("If the government were able to use schooling to regulate the development of ideas and opinions by controlling the transmission of culture and the socialization of children, freedom of expression would become a meaningless right. . . ."); Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 498 (1987) (Indoctrination "may deny students an appreciation of the role that liberty, democracy and dissent have played in our achievements as a people." (citations omitted)); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 16 ("Any effort to indoctrinate 'official values' . . . is inconsistent with . . . personal autonomy.").

139. *See* Ingber, *supra* note 138, at 19 ("Paradoxically, education must promote autonomy while simultaneously denying it by shaping and constraining present and future choices."); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986) ("[T]he very nature of the process of inculcating values in those who are not yet adults apparently necessitates that the constitutional rights of . . . students be somewhat circumscribed."); Roe, *supra* note 137, at 1276 ("An inherent conflict between the authority of the state to instill knowledge and values it deems important and the speech interests of individual students characterizes Supreme Court jurisprudence in the area of school speech."); Yudof, *supra* note 137, at 528 ("Children need to be socialized to societal norms, but they also need to grow up to be relatively autonomous beings within the confines of culture.").

140. *See Tinker*, 393 U.S. at 506 (holding that although students do not "shed their constitutional rights . . . at the schoolhouse gate, . . . [the] special characteristics of the school environment" reduce students' First Amendment protection); Levin, *supra* note 139, at 1678 ("In most instances, the interest of the educational enterprise in socializing students to particular values or in order and control is given considerable weight while that of the individual schoolchild is given relatively little."); Tyll van Geel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197,

How is one to negotiate the conflict between the rights of government as indoctrinator in public schools and the rights of students as autonomous human beings? A number of scholars have addressed this question. Professors Yudof and Ingber argue that the Supreme Court's inability to resolve this conflict makes clear that the primary restraints on the government as indoctrinator in the public schools must be "political, social, and attitudinal."[141] Other scholars take a stronger position against governmental indoctrination in the public schools, arguing that society has no legitimate interest in inculcating students. Some of these scholars argue that attempting to inculcate "political values" is inappropriate because there are no "uniformly acceptable" political values.[142] Others argue that attempting to indoctrinate students is inappropriate generally because the government is so ineffective at inculcating that which it seeks (or ought to seek) to inculcate that it has no compelling interest to justify its attempts to indoctrinate students.[143] A number of these scholars have advocated adoption of a "fairness doctrine" in public schools.[144] Such a doctrine would require "that schools expose students to different viewpoints on controversial issues."[145]

Perhaps the clearest area of conflict in public schools exists in the selection of history textbooks. Commentators have noted that the purpose of history texts is "not to explore but to instruct—to tell children what their elders want them to know

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239-40 (1983) ("For many years, the Supreme Court has shown ambivalence toward whether pupils in the public schools enjoy a right of freedom of belief that serves as a check on governmental efforts to indoctrinate them.").

141. Ingber, *supra* note 138, at 95; Yudof, *supra* note 137, at 563; *see also* Shiffrin, *supra* note 73, at 647-53 (arguing for a similarly "process oriented" solution to the conflict that would divide the authority to make curriculum-related decisions among schoolboards, parents and teachers).

142. *See* Kamenshine, *supra* note 74, at 1134 ("Short of general concepts of social responsibility . . . no such [uniform] values exist.").

143. *See* Roe, *supra* note 137, at 1292-93 (advocating the use of a "conceptual development model"); van Geel, *supra* note 140, at 297 ("Empirical social science evidence shows that the government has no compelling interest in value inculcation. . . .").

144. *See, e.g.*, Emerson & Haber, *supra* note 78, at 526-28 (discussing the need for a "balanced presentation" of views in public education); Gottlieb, *supra* note 138, at 577 (detailing advantages to a fairness doctrinal approach in public education); Kamenshine, *supra* note 74, at 1130, 1137 (discussing application of a fairness doctrine); van Geel, *supra* note 140, at 297 (advocating the adoption of a "fairness principle").

145. Gottleib, *supra* note 138, at 577.

about their country."[146] Two studies of American textbooks have confirmed this view, concluding that textbooks generally "minimize the role of dissent in our history."[147] This likely stems from the "elders' " desires that their children not be made fully aware of the potential effectiveness of dissent. Is such a presentation of history constitutionally permissible? That is, may a school board select a textbook although in doing so, it inaccurately minimizes the role of dissent in our history?

Two points are particularly relevant to this question. First, it is unlikely that a "definitive historical account" exists. It is almost impossible, therefore, to choose the "best" textbook if to do so is to choose the textbook that objectively contains the "correct" account of history. Rather, selecting the "best" textbook more likely means selecting the textbook that best accords with the view of history espoused by those charged with selecting texts. Second, in selecting a textbook, a school board need not merely select the best transmitter of facts. Rather, as the Supreme Court and many commentators have recognized, the Constitution permits a school board, within certain boundaries, to attempt to inculcate values in its students.[148] Some of this inculcation appropriately occurs through textbooks selected by the school board.

With these points in mind, we now return to the question of what factors our structure indicates a school board may properly consider in selecting a history textbook. Consider the hypothetical case of a school board that determines it will select only a textbook that portrays history as accurately as possible. Moreover, the school board believes accuracy requires that Christopher Columbus be portrayed as a racist. Although the text might tell of Columbus's arrival in North America, it must also tell of his allegedly savage treatment of Native Americans.

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146. FRANCES FITZGERALD, AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY 47 (1979).

147. Gottleib, *supra* note 138, at 505; *see also* James C. O'Brien, Note, *The Promise of Pico: A New Definition of Orthodoxy*, 97 YALE L.J. 1805, 1820 (1988) (citing Jean Anyon, *Workers, Labor and Economic History, and Textbook Content*, *in* IDEOLOGY AND PRACTICE IN SCHOOLING 37, 44 (Michael W. Apple & Lois Weis eds., 1983)) ("Anyon found that radical unions, their leaders, and their policies were ignored, insulted, or dismissed as dishonest . . . [and] that [textbooks] discussed only strikes that ended in violence and ultimately did not get workers what they wanted; and that reformist leaders and moderate reform legislation were lauded." (citations omitted)).

148. *See supra* note 137.

Our structure indicates that the school board may employ such selection criteria.

In deciding to purchase accurate textbooks in the first instance, the government makes a viewpoint-neutral choice to fund a particular study or class of speech, a constitutionally valid categorical subsidy. Within this category of speech, a school board must of course select one textbook for use in its schools. Under our approach, the board's choice falls within the "judgmental necessity" exception, as long as it makes that choice on the basis of criteria "substantially related" to the predescribed purpose of the program pursuant to which textbooks are funded. The job of the school board, presumably, is to select the textbook that will provide students with the most complete and accurate description and understanding of history. If a school board believes that Christopher Columbus was a racist, then it is likely that, all other things being equal, this school board will choose a textbook that describes Columbus as a racist over one that ignores his treatment of Native Americans. Insofar as subjective viewpoint is inextricably linked to the board's judgment of textbook quality, it is difficult to argue that a school board cannot make the decision based on the textbooks' treatment of Columbus.[149]

The more troubling situation concerns a case in which the school board selects a textbook that it openly believes to be inferior in its picture of history but superior insofar as it inculcates values that the school board desires to inculcate. While inculcation of values is an inescapable function of the

149. Recall that the "judgmental necessity" concept allows the government to have some basis on which to select between competing applicants for funding. As long as the criteria used for selection are "substantially related" to the terms of the viewpoint-neutral category, the government can make a normative judgment between competitive candidates, even though this most likely will produce "viewpoint" contamination. *See supra* notes 100-103 and accompanying text (discussing "judgmental necessity"). Compare this with Rust v. Sullivan, 500 U.S. 173 (1991). In *Rust*, the government did not define the initial category in a viewpoint-neutral fashion. The decision to purchase textbooks, in contrast, is viewpoint neutral as a generic matter. Thus, like NEA grants, government decision-makers can proceed to the next step. The government may make some value judgments in selecting among the competing candidates. *Rust* never gets past the first step because the government defined the category in a viewpoint-laden manner. *See supra* notes 103-121 and accompanying text (examining *Rust*).

educational process,[150] surely the First Amendment imposes outer limits on this power.[151] A school board could not, for example, constitutionally require instructors to teach that the New Deal never took place, simply because the board wished to inculcate only free-market values in its students. Similarly, we cannot deem acceptable the government's conscious falsification or manipulation of historical fact and analysis for the avowed purpose of indoctrinating students.[152]

## IV. REJECTING ALTERNATIVE MODELS

Before the groundwork for acceptance of our structure is complete, we must explore the comparative merits of alternative models previously suggested for measuring the constitutionality of government subsidization of expression. The Supreme Court's opinion in *Rust* illustrates the inherent defects of the non-speech specific "unconstitutional conditions" approach.[153] Moreover, neither of two other models previously put forward by scholars adequately resolves the difficult constitutional issues surrounding subsidy decisions.

### A. THE "SPHERES-OF-NEUTRALITY" APPROACH

Professor David Cole has proposed a structure for gauging the constitutionality of government subsidization of speech.[154] Although Cole purports to consider the benefits and dangers of government subsidization of speech,[155] his approach fails sufficiently to accommodate these considerations. As a result, Cole's approach would allow the restriction of government

150. *See supra* text accompanying notes 137-146 (providing a discussion of the role of public schools in the inculcation of values).

151. *See* Board of Ed. v. Pico, 457 U.S. 853, 864 (1982) (finding that the "discretion of the states and local school[]boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment").

152. The obvious danger here is the evidentiary problem of establishing the fact of the government's improper motive. *See supra* discussion at text accompanying note 97 (stating that the burden of establishing the government motive as improper is on the plaintiff).

153. *See supra* discussion at text accompanying notes 115-121 (critiquing *Rust*).

154. *See* Cole, *supra* note 68, at 748 ("A better way of accommodating the opposing interest implicated when government funds speech is to identify and enforce spheres of neutrality and independence.").

155. *Id.* at 702-08 (discussing of the problems associated with government funding of speech).

subsidization of speech even when that subsidization would actually foster First Amendment values, while simultaneously permitting government subsidization of speech when those subsidies would threaten these values.

1. A Description of the Approach

In establishing his approach for gauging the constitutionality of governmental subsidization of speech, Cole initially recognizes that a great deal of similarity exists between the government's direct restriction of speech and the government's selective subsidization of speech.[156] He notes that, with regard to direct government restriction of speech,[157] courts generally enforce "a strict neutrality mandate."[158] That is, "government generally must remain neutral as to the content and viewpoint of speech, absent a compelling justification."[159] Cole then questions whether this neutrality mandate is "transferable to selective government funding of speech."[160] He contends that the mandate is not perfectly transferable because of the nature of government speech. He recognizes that "[w]e cannot mandate neutral funding across the board, because such a rule would disable government as we know it."[161] Cole, however, believes that the neutrality mandate should not be completely rejected. He argues that "[i]f government were allowed unfettered discretion to support speech that it favors, public debate would be subject to substantial co-optation."[162]

To accommodate these concerns, Cole proposes a "structural accommodation, attuned to the role that certain institutions play in maintaining a robust public debate and an autonomous citizenry."[163] This accommodation "draw[s] on the neutrality principle that governs selective government prohibitions on speech, but [applies] it only to certain spheres of government funding."[164] Therefore, Cole proposes that:

> [w]here neutrality is consistent with . . . an institution's function, strict

156. *Id.* at 712.
157. Courts recognize limited exceptions for obscenity, libel, and fighting words.
158. Cole, *supra* note 68, at 712.
159. *Id.*
160. *Id.* at 713.
161. *Id.* at 714.
162. *Id.* at 715.
163. *Id.*
164. *Id.*

> neutrality should be required; where some non-neutral content decisions must be made, the first amendment should guarantee a degree of independence for the decision-maker. Where, on the other hand, the institution does not play an important role in furthering public dialogue or individual autonomy, or where non-neutral government speech is necessary to further an important government function or first amendment values, government should be free to support speech non-neutrally.[165]

Under Cole's approach, when "government non-neutrality does not pose a substantial risk of skewing or indoctrinating, it should be permitted."[166] Cole believes that this risk is unacceptably high only in certain predetermined institutional settings or expressive contexts. He refers to his approach as a "spheres-of-neutrality" approach.[167] Indicating that the Supreme Court has recognized them as such, Cole initially identifies public fora,[168] public education,[169] and the press[170] as "spheres of neutrality."[171] He suggests a three-pronged approach for determining whether other settings qualify as "spheres of neutrality":

> First, the Court should ask whether government control of the content of speech in the institution would be threatening to a vigorous public debate or to the autonomy of listeners; second, the Court should ask whether the internal operation of the institution is consistent with a first amendment neutrality mandate; and third, where non-neutrality poses a threat to free speech values, but strict neutrality would impede the institution's internal functioning, the court should ask whether the independence of speakers can be structurally accommodated in some intermediate fashion.[172]

With this approach as his guide, Cole finds that the arts[173] and professional fiduciary counseling[174] also qualify as spheres of neutrality.

2. A Critique of the Approach

Many flaws exist in Cole's approach. Initially, it is unclear from his own analysis whether any forum exists in which non-neutral funding should be permitted. Indeed, Professor Cole

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165. *Id.* at 716.
166. *Id.* at 737.
167. *Id.* at 716.
168. *Id.* at 717.
169. *Id.* at 723.
170. *Id.* at 731.
171. *Id.* at 717.
172. *Id.* at 736.
173. *Id.* at 739.
174. *Id.* at 743.

never suggests one. In any event, if settings do exist that do not qualify as "spheres of neutrality," Cole's approach does not clearly explain why the government should be permitted to fund them in a non-neutral manner to any degree that it desires. Indeed, government non-neutrality in *any* setting may undermine First Amendment values.[175]

An examination of his classification of the arts as a sphere of neutrality underscores the problems with Cole's approach. While it is incontrovertible, as Cole notes, that art "is a forum for dissent and opposition"[176] and that government control over the arts would "be threatening to a vigorous public debate,"[177] it is far less clear that one could not say the same of every other forum or subject of expression. Although Cole correctly notes the historical importance of the arts as a forum for dissent and opposition,[178] such a history is not dispositive of whether an institution today serves as such a forum. The logical question one could pose to Cole, then, is whether a forum exists over which government control does *not* threaten vigorous public debate.

### B. THE "CONDITION-OF-PUBLIC-DISCOURSE" APPROACH

Professor Owen Fiss has objected to a "criterion-based" examination of government subsidization of the arts, such as the one we have proposed. Fiss argues that examinations that rely on an inquiry into the criteria on which the government bases its funding decisions are suspect for three reasons. First, he argues that "[w]hile in the discrimination context it might be possible to construct a finite and rather well-understood list of forbidden criteria . . . in the free speech context no such list readily suggests itself."[179] Second, Fiss argues that even if forbidden criteria could be located, "often the real reason for an allocative decision cannot be authoritatively ascertained."[180] Finally, Fiss argues that the criterion approach is particularly inappropriate under the First Amendment because such an approach focuses on individual fairness, while the "First Amendment is a

175. *See supra* text accompanying notes 73-79 (outlining the dangers of government subsidization of speech).
176. Cole, *supra* note 68, at 740.
177. *Id.* at 736.
178. *See id.* at 739-40 (discussing the arts as a "sphere of neutrality").
179. Fiss, *supra* note 124, at 2098.
180. *Id.* at 2099.

guarantee of collective self-determination."[181]

As an alternative to the criterion approach, Fiss proposes that "the focus [of a system gauging the constitutionality of NEA grants] should be on the condition of public discourse, not the process by which that condition was created."[182] Fiss argues that the judiciary

> should keep the focus on effects, specifically the effect the exercise of state power has on public debate. . . . Such a judgment requires a sense of the public agenda, a grasp of the issues that are now before the public and what might plausibly be brought before it, and then an appraisal of the state of public discourse . . . to see whether all the positions on the issue are being fully and fairly presented so that the people can make a meaningful choice.[183]

For example, Fiss concludes that Robert Mapplethorpe's art would require funding because the denial of a grant "would impoverish public debate" by preventing a voice that counters the prevailing orthodoxy regarding homosexuality from reaching the marketplace.[184]

Serious flaws exist in both Fiss's criticism of the criterion-based approach and his suggested alternative. Whatever one thinks of Fiss's criticisms of a criterion-based approach, one should find considerable difficulty in accepting his suggested "condition-of-public-discourse" alternative. Ironically, while Fiss criticizes a criterion-based approach because of its inability to fashion workable, principled criteria, his suggested alternative suffers from a complete lack of workable, predictable standards by which to determine its applicability. How, one must ask, can a reviewing court possibly decide whether, absent public funding, the ideas in question would not reach the public?

Even if one were to accept Fiss's first two criticisms of a criterion-based analysis, his conclusion following these criticisms remains suspect. Fiss assumes that it is more difficult under the

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181. *Id.* at 2100.

182. *Id.*

183. *Id.* at 2101. Professor Stanley Ingber argues, in a manner similar to Fiss, that

> [p]ublic subsidies of the arts . . . should be allocated so that more is said and more are exposed to that which is said than would exist without public subsidies. Public monies will advance public discourse by supporting the kind of art that would not have found a ready patron in the private market, not by simply allowing more people to say the same thing.

Ingber, *supra* note 124, at 1621-22 (footnotes omitted).

184. Fiss, *supra* note 124, at 2101.

First Amendment than it is under the Fourteenth Amendment to identify forbidden criteria, and even if one locates forbidden criteria, it will be difficult to know when the NEA has relied on these criteria in allocating scarce resources. Although these may be valid observations, the difficulties they present do not invalidate an inquiry into these factors. Certainly one can point to criteria on which the NEA may not constitutionally rely. Under our approach, for example, the NEA may not make subsidization decisions based on the unrelated viewpoints of those applying for funding. The government thus may not refuse to fund an artist simply because that artist produces art advocating liberal political principles. What's more, once one identifies forbidden criteria, the possible difficulty of determining whether the government has employed them in a particular case should not preclude a court from attempting to make this determination.

Fiss's third criticism is also misplaced. He argues that a criterion-based methodology is particularly inappropriate under the First Amendment because it focuses on individual fairness, while "the First Amendment is a guarantee of collective self-determination." The approach we propose does not rely exclusively on notions of individualism. Quite to the contrary, our approach considers notions of communitarian interest in addition to elements of individual self-development. Indeed, our approach deems certain criteria unconstitutional both because of the potential effect of reliance on those criteria on community self-government and because of the potential effect of reliance on those criteria on individual self-realization.[185] The decision not to fund a work of art because of the political viewpoint it espouses, therefore, remains suspect because such a decision might allow the government to skew artificially the marketplace of ideas and therefore undermine *both* autonomy *and* communitarian values that arguably underlie the First Amendment.[186]

Finally, Fiss's approach all but eliminates the power of those making an award to consider the inherent artistic merit or quality of a work, the criterion on which NEA funding was

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185. *See supra* notes 46-51 and accompanying text (enumerating communitarian and autonomy theories as two broad theories of freedom of expression).

186. *See supra* notes 46-51 and accompanying text (discussing the values that underlie the First Amendment).

intended to be based in the first place.[187] Under Fiss's structure, a monochromatic crayon drawing which voices a viewpoint that is "otherwise-insufficiently represented" in the marketplace of ideas should logically be chosen for funding over a painting universally deemed a superior work of art, if that painting espouses a viewpoint that "reinforces the prevailing orthodoxy." Fiss's approach thus places significant restraints on the ability of government to foster individual self-realization and human flourishing by promoting and encouraging literary or artistic excellence.[188] Our structure avoids these two problems by allowing government to fund art regardless of the political viewpoint it expresses and by simultaneously enabling government to adhere to the statutory objective of the NEA to fund the highest quality art.

## CONCLUSION

In proposing our suggested analytical structure to determine the constitutionality of government subsidization of expression, we have employed a methodology that has been described as *a priori* balancing.[189] We have attempted to fashion broadly-phrased, flexible guidelines because we believe that these categories best fulfill the purposes served by the protection of free expression. These selections are by no means free of doubt or controversy. Moreover, application of these abstract categories to specific fact situations may not always be obvious. As we have shown, however, none of the few alternatives that other commentators have suggested provides a viable method for sorting out the complex constitutional issues inherent in the

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187. Perhaps anticipating this particular criticism, Fiss argues later in his article that

> [t]he duty to attend to effects does not mean . . . an end to merit. What it does mean is either a reexamination of the notions of merit that underlie funding decisions or, alas, a sacrifice of some of the values that might be furthered by notions of merit that do not incorporate, or, in fact, are antagonistic to, the constitutional goal of producing a public debate that is worthy of our democratic aspirations.

Fiss, *supra* note 124, at 2103. However, Fiss merely proposes a redefinition of merit that devalues consideration of the inherent quality of a piece of art and substitutes a consideration of the ability of the art to contribute a voice to a debate on an issue.

188. An additional problem with an approach that turns on a determination of whether or not a work of art "reinforces the prevailing orthodoxy" is the obvious difficulty in making such a determination.

189. *See* Ely, *supra* note 58, at 1496 (advocating use of *a priori* balancing in free speech cases).

review of subsidy decisions.

We focus our proposed structure in an effort to tame the "Jekyll-Hyde" nature of speech subsidization by government. By selectively subsidizing speech, government may artificially skew public debate, thereby undermining the effective operation of the democratic process. Selective subsidization also may deter an individual's freely chosen expressive activity, thereby threatening autonomy and self-realization values. Yet a complete denial of governmental power to subsidize expression could also significantly undermine First Amendment values by precluding the government from facilitating communicative and expressive activities of private individuals and entities. Our structure seeks to reconcile these competing strains.

One may think the analytical structure proposed here is vulnerable to criticism from opposite perspectives. On the one hand, one might argue that the approach overly complicates and confuses the constitutional inquiry because it provides neither a single yes or no answer to the question of the constitutionality of expressive subsidies, nor a single, workable criterion by which to separate constitutional subsidies from unconstitutional ones. On the other hand, one might criticize the structure for seeking mechanistic, easily applied solutions to what are in reality difficult and subjective value choices. We reject both critiques. That difficult and subjective value choices are involved cannot alter the basic fact that somehow those choices must be made. Our structure attempts to balance the competing interests *ex ante*, by fashioning guiding principles designed to implement universally accepted principles of free speech theory. While they are far from mechanistic or automatic in their application, neither do they suffer from total malleability or turn substantially on the subjective judgment of the individual implementing them. As a result, we believe they represent a significant advance over previously suggested approaches.