Georgia State University Law Review

Volume 29
Issue 4 *Summer 2013*

Article 8

9-14-2013

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Recommended Citation
Ruffin, Chase (2013) "You Don't Have to, but It's in Your Best Interest: Requiring Express Ideological Statements as Conditions on Federal Funding ," *Georgia State University Law Review*: Vol. 29: Iss. 4, Article 8.
Available at: http://scholarworks.gsu.edu/gsulr/vol29/iss4/8

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YOU DON'T HAVE TO, BUT IT'S IN YOUR BEST INTEREST: REQUIRING EXPRESS IDEOLOGICAL STATEMENTS AS CONDITIONS ON FEDERAL FUNDING

Chase Ruffin*

INTRODUCTION

Congress enjoys broad authority to enact laws and regulations by which the citizens of the United States must abide.[1] Certain uses of that authority, however, are impermissible.[2] Any legislation promulgated by the government must not exceed the limits created by the Constitution.[3] The Constitution forbids Congress from directly exercising its legislative power to achieve certain goals.[4] For example, Congress cannot directly remove a state official from office for engaging in political activity[5] or ban an organization from speaking out about abortion.[6] Through use of the spending power[7]

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* J.D. Candidate, 2013, Georgia State University College of Law. Thank you to Patrick Wiseman and everyone involved with the Georgia State University Law Review for your valuable feedback and suggestions.

1. *E.g.*, 18 U.S.C. § 111 (2006) (prohibiting the assault of a United States government employee); *id.* § 242 (prohibiting the deprivation of constitutionally protected rights because of a person's color or race); *id.* § 157 (prohibiting bankruptcy fraud).

2. *E.g.*, *id.* § 922(2)(A) (1994) (federal statute prohibiting the possession of firearms in a school zone found unconstitutional in *United States v. Lopez*, 514 U.S. 549, 568 (1995)); *id.* § 2256(8)(B) (2000) (statute that criminalized the distribution of what appeared to be, but was not, child pornography held unconstitutional in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002)); 42 U.S.C. § 13981 (2000) (statute creating a federal civil remedy for victims of gender-motivated violence held unconstitutional in *United States v. Morrison*, 529 U.S. 598, 627 (2000)).

3. Saenz v. Roe, 526 U.S. 489, 508 (1999). The Court stated:

> Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution."

Id. (citing Williams v. Rhodes, 393 U.S. 23, 29 (1968)).

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

5. Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) ("[T]he United States . . . has no power to regulate local political activities as such of state officials . . . .").

6. *See* U.S. CONST. amend I.

7. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the

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and government subsidies, however, Congress can indirectly achieve legislative goals it would not otherwise be able to achieve.[8] Although the government cannot simply prohibit an organization from lobbying,[9] the government can provide subsidies to organizations that refrain from doing so.[10] When exercising its spending power, the constitutional limitations on Congress "are less exacting than those on its authority to regulate directly."[11]

One of the most common methods of indirectly promoting legislative goals is to provide federal funding on the condition that the recipient must adhere to certain regulatory guidelines.[12] For example, if the government believes abortion to be an unacceptable method of family planning, the government can provide funding to those organizations who agree not to use the funding to promote abortion.[13] This practice is generally a permissible use of the

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United States . . . .").

8. For example, in *South Dakota v. Dole*, South Dakota challenged the constitutionality of 23 U.S.C. § 158, which directed the Secretary of Transportation to withhold federal highway funds from states that did not have a minimum drinking age of twenty-one. South Dakota v. Dole, 483 U.S. 203, 205 (1987). The Court did not expressly state that Congress would be acting outside its authority by directly requiring a minimum drinking age of twenty-one but stated that, even if that were the case, "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id.* at 207 (internal citation omitted).

9. The right to petition the government is protected under the First Amendment and cannot be infringed. U.S. CONST. amend. I.

10. 26 U.S.C. § 501(c)(3) provides tax-exempt status to charitable and other organizations that do not engage in lobbying. 26 U.S.C. § 501(c)(3) (2006). The Supreme Court upheld § 501(c)(3) as constitutional in *Regan v. Taxation with Representation of Washington* on the grounds that the government, if it so desires, can choose not to subsidize lobbying and that such a refusal does not violate the First Amendment. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983). Although *Regan* deals with a tax issue rather than an actual government outlay, the Court conflated the taxing and spending powers and analyzed the tax exemption as if it were a "cash grant." *Id.* at 544. The Court stated "tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system." *Id.* "A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Id.* For the purposes of this Note, tax exemptions, as they were in *Regan*, are treated as subsidies.

11. *South Dakota*, 483 U.S. at 209. This proposition apparently applies to the taxing power as well. *See Regan*, 461 U.S. at 544. Although Congress could never prohibit an organization from lobbying outright, it can offer tax exemptions to those organizations that refrain from doing so. *Id.* at 551.

12. *E.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (conditioning receipt of federal funds on libraries adopting internet filters); *South Dakota*, 483 U.S. at 203 (conditioning receipt of federal highway funds on a state's adoption of a minimum drinking age); *Regan*, 461 U.S. at 540 (conditioning receipt of a tax exemption on recipient refraining from lobbying).

13. Title X of the Public Health Service Act was enacted to provide funding for prenatal family planning services. 42 U.S.C. § 300(a). None of the funds appropriated under the Act, however, could be

spending power.[14] Not all funding conditions, however, are constitutionally acceptable.[15] Congress cannot, for example, "place a condition on the receipt of a benefit or subsidy that infringes upon [a] recipient's constitutionally protected rights."[16]

Among the rights a funding condition cannot infringe upon is, of course, the First Amendment right to engage in constitutionally protected speech.[17] Although this limitation on conditions seems elementary on the surface, courts and legal professionals alike have had a difficult time determining when, if ever, a condition on the receipt of funds actually infringes a constitutional right.[18] Recent legislation has further contributed to the confusion by presenting funding conditions not yet seen by the Supreme Court—conditions that require organizations to espouse a particular viewpoint on a controversial issue as a prerequisite to receiving funds.[19]

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act)[20] requires a non-

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used by programs where abortion was considered a method of family planning. *Id.* at § 300(a)(6). The constitutionality of this provision was challenged and upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991).

14. *E.g.*, *Am. Library Ass'n*, 539 U.S. at 214; *Rust*, 500 U.S. at 203; *South Dakota*, 483 U.S. at 212.

15. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (finding unconstitutional a provision of the Affordable Care Act that conditioned states' receipt of all Medicaid expenses on their expansion of Medicaid coverage); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001) (invalidating a funding condition that prohibited lawyers who received funds under the Act from challenging existing welfare statutes); FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (declaring unconstitutional a regulation that conditioned the receipt of federal funds on a broadcast station refraining from editorializing).

16. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). This limitation is known as the doctrine of "unconstitutional conditions." *Id.*

17. In *Rumsfeld v. Forum for Academic and Institutional Rights*, the Supreme Court reviewed the constitutionality of the Solomon Amendment, which required law schools as a condition of receiving federal funds, to allow military recruiters the same access to campus as non-military recruiters. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 51 (2006). The Supreme Court reiterated its previous statements that a funding condition cannot infringe the right to free speech but held that the Solomon Amendment did not actually regulate *speech*. *Id.* at 59–60. Consequently, the Court did not feel the need to conduct a First Amendment analysis. *Id.* at 70.

18. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (explaining that there is confusion regarding the application of the unconstitutional conditions doctrine); 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, 594 (1990) ("The various puzzles produced by the [unconstitutional conditions] doctrine have created considerable doctrinal confusion and provoked a wide range of commentary.").

19. 22 U.S.C. § 7631(f) (2006).

20. *Id.* §§ 7601–82.

governmental organization (NGO), as a condition of receiving funds,[21] to adopt a policy explicitly opposing prostitution and sex trafficking ("policy requirement").[22] On two occasions, NGOs have challenged the policy requirement claiming that it violated their First Amendment rights.[23] In *DKT International v. USAID* (*DKT*), the United States Court of Appeals for the D.C. Circuit upheld the policy requirement as a permissible condition on federal funding.[24] In contrast, the United States Court of Appeals for the Second Circuit in *Alliance for Open Society International v. USAID* (*Alliance*) struck down the condition as an unconstitutional violation of free speech rights.[25]

This Note analyzes the constitutionality of the Leadership Act's policy requirement and proposes factors to consider in determining the constitutionality of a funding condition requiring an organization to affirmatively express a particular viewpoint on an issue. Part I discusses Congress's use of funding conditions and provides a brief

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21. The Act provides funding to organizations to, among other things, provide medical care to those infected with HIV/AIDS, to educate populations on HIV/AIDS prevention, and to test individuals for the disease. *Id.* § 7611(a)(4)(C)–(E).

22. *Id.* § 7631(f) ("No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking . . . .").

23. *See generally* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 225 (2d Cir. 2011); DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 761 (D.C. Cir. 2007).

24. DKT International is an organization that provides family planning and HIV/AIDS prevention programming in foreign countries. *DKT*, 477 F.3d at 760. DKT receives roughly 16% of its budget from Agency grants. *Id.* In Vietnam, DKT operates as a subgrantee under Family Health International (FHI) where it distributes condoms and lubricant. *Id.* The distribution of condoms is to encourage safe sex. *Id.* In 2005, FHI provided DKT with an agreement to run an Agency-funded lubricant distribution program. *Id.* The agreement included a certification that DKT explicitly opposed prostitution. *Id.* DKT refused to sign the agreement with the certification requirement, and FHI informed DKT that it would be unable to provide additional funding to DKT. *Id.* at 760–61. DKT claimed that requiring an organization to explicitly oppose prostitution violates First Amendment rights. *Id.* at 761. The D.C. Circuit rejected DKT's claim and upheld the condition. *Id.* at 764.

25. Alliance for Open Society International (AOSI) and Pathfinder are two organizations involved in the international fight against HIV/AIDS. *Alliance*, 651 F.3d at 224. AOSI runs a program in Central Asia that aims to prevent the spread of HIV/AIDS by reducing injection drug use. *Id.* Pathfinder provides family planning and reproductive health services in more than twenty countries. *Id.* Both receive funding from sources other than the USAID, and neither actively supports prostitution. *Id.* Both groups' work, however, includes educating and assisting prostitutes, as well as advocating strategies for fighting AIDS among prostitutes at policy conferences. *Id.* In 2005, both organizations adopted policy statements stating their opposition to prostitution in order to remain eligible to receive funds. *Id.* The organizations then initiated suit on the grounds that the policy requirement was a violation of the First Amendment. *Id.* at 225. The Second Circuit struck down the condition as unconstitutional. *Id.* at 239.

background of the constitutional doctrines that have provided the basis for the Supreme Court's decisions as to the constitutionality of funding conditions.[26] Part II evaluates the current tests and standards employed by the Supreme Court in considering the constitutionality of funding conditions.[27] Part III proposes that the constitutionality of a condition—such as the one imposed by the Leadership Act—should depend on: (1) whether a particular viewpoint is being espoused; and (2) whether the public is aware that the statement is required by the government.[28] If the organization is required to espouse the government's particular viewpoint and if there is no way to discern that the organization is simply adhering to a governmental regulation, strict scrutiny should apply.[29]

I. CONSTITUTIONAL DOCTRINE OF FUNDING CONDITIONS

Congress and state legislatures alike have often used subsidies as a means of indirectly promoting government policy.[30] Conditioning funding on compliance with regulatory guidelines is a common method of achieving legislative goals.[31] Occasionally, however, certain conditions cross the line into unconstitutionality.[32] In *Speiser v. Randall*, for example, the Supreme Court found that a tax exemption conditioned[33] on a potential recipient agreeing not to

26. *See* discussion *infra* Part I.

27. *See* discussion *infra* Part II.

28. *See* discussion *infra* Part III.

29. *See* discussion *infra* Part III.B.

30. *E.g.*, 23 U.S.C. § 158 (2006) (encouraging the adoption of a minimum drinking age of twenty-one by permitting the withholding of federal highway funds from states who refused to adopt the minimum, upheld in *South Dakota v. Dole*, 483 U.S. 203, 212 (1987)); 42 U.S.C. § 666 (requiring states who hope to receive federal funds to operate their child support and public assistance programs to meet certain goals regarding, among other things, the placement of welfare recipients into work, upheld in *Kansas v. United States*, 24 F. Supp. 2d 1192, 1200 (D. Kan. 1998)).

31. *See generally, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003); *South Dakota*, 483 U.S. 203; Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).

32. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001); FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984).

33. In *Speiser*, the Court reviewed a portion of the California tax code that withheld tax exemptions for which military veterans were otherwise eligible unless the veteran signed an oath stating that he did not advocate the overthrow of the government. Speiser v. Randall, 357 U.S. 513, 514 (1958). Admittedly, there are some differences between providing tax exemptions and directly subsidizing

advocate the forcible overthrow of the government was an unconstitutional infringement of free speech.[34] The courts, however, have generally experienced difficulty determining when exactly a condition crosses the line into unconstitutionality, which has led to inconsistency in funding conditions doctrine.[35]

When analyzing the constitutionality of a condition on a benefit's receipt, courts often consider, among other factors,[36] whether the statute or regulation has a coercive effect on the recipient,[37] whether the regulation is "aimed at the suppression of dangerous ideas,"[38] and whether the expression at issue, in instances where speech is implicated, falls under the category of government speech.[39] Members of the Supreme Court often have differing opinions on how

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certain activity. However, the Supreme Court has stated, "[T]ax exemptions . . . are a form of subsidy that is administered through the tax system." *Regan*, 461 U.S. at 544.

34. *Speiser*, 357 U.S. at 529.

35. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1303–04 (1984) (explaining judicial opinions on unconstitutional conditions cases as having "manifested an inconsistency"); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 914 (explaining the application of the unconstitutional conditions doctrine as "wildly inconsistent").

36. When an organization argues that its First Amendment rights have been infringed because a condition prohibits funding recipients from engaging in certain expression, courts have considered whether other avenues are available that the recipient can use to engage in the proscribed expression. *E.g.*, *League of Women Voters*, 468 U.S. at 400 (explaining that if the condition prohibiting television stations that hoped to receive funding from "editorializ[ing]" allowed organizations to editorialize through affiliates, the condition would be constitutional); *Regan*, 461 U.S. at 544 (stating that although an organization could not receive a benefit if it chose to lobby, it could continue to lobby through an affiliate organization).

37. *E.g.*, Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (asserting that an Arkansas sales tax scheme that provided a tax exemption to religious, sports, and professional journals but not other magazines should be upheld because it has no coercive effect on potential recipients); *Speiser*, 357 U.S. at 519 (striking down a condition that would "have the effect of coercing the claimants to refrain from the proscribed speech"); *see also* Sullivan, *supra* note 18, at 1429 ("[T]he degree of scrutiny applied to rights-pressuring conditions has tended to turn on conclusory references to coercion or freedom of choice.").

38. *E.g.*, *Regan*, 461 U.S. at 548–50 (stating that the law in question may have been found unconstitutional if the regulation was aimed at the suppression of dangerous ideas); *Speiser*, 357 U.S. at 519 (declaring unconstitutional a condition because it was "aimed at the suppression of dangerous ideas").

39. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 567 (2005) (upholding a regulation that taxed the sale of cattle to pay for advertising campaigns for beef because the advertising qualified as government speech and was thus not subject to First Amendment challenges); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (striking down a condition prohibiting recipients of federal funding from challenging welfare statutes partially because the funding program was meant to encourage private speech not to relay a governmental message).

certain staples of First Amendment doctrine apply in a government subsidy context.[40] The manner in which these and other considerations are applied is often determinative of a regulation's constitutionality.[41] If a condition is viewpoint-based or has a coercive effect on the recipient, it is more likely to be held unconstitutional.[42]

A. Coercive Effect

The Leadership Act requires funding recipients to adopt a policy explicitly opposing prostitution.[43] Although the government enjoys broad discretion to condition the receipt of its funds, "[t]he government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights."[44] When a petitioner challenges a condition on free speech grounds, the court must determine whether the condition actually *infringes* the right to free speech.[45] In analyzing whether a condition *infringes* upon a right, courts have attempted to determine whether a condition or regulation is so coercive that it can be equated to a direct regulation or law.[46] When a coercive effect exists, strict scrutiny[47]

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40. *Compare* United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003) (stating that the analyzed condition did not deny a benefit to libraries who chose not to install internet filters on their computers), *with id.* at 226–27 (Stevens, J., dissenting) (stating that the condition threatened the denial of benefits to libraries that did not install internet filters). *Compare* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (stating that the government was not discriminating on the basis of viewpoint by choosing to fund family planning methods other than abortion), *with id.* at 207 (Blackmun, J., dissenting) (stating that the majority opinion upheld a viewpoint-based suppression of speech).

41. In *South Dakota v. Dole*, the Supreme Court found that a condition that required recipients of federal highway funds to adopt a minimum drinking age of twenty-one was *not* coercive and was thus constitutional. South Dakota v. Dole, 483 U.S. 203, 211 (1987). In *Rust v. Sullivan*, the Supreme Court found that a condition that prohibited funding recipients from advocating for abortion was not viewpoint discrimination and was thus constitutional. *Rust*, 500 U.S. at 193.

42. *E.g.*, *Velazquez*, 531 U.S. at 549; *Speiser*, 357 U.S. at 518.

43. 22 U.S.C. § 7631(f) (2006).

44. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

45. "[T]he government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.'" FCC v. League of Women Voters of Cal., 468 U.S. 364, 408 (1984) (citing *Perry*, 408 U.S. at 597).

46. *E.g.*, Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting). Justice Scalia writes:

> The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive

often applies,[48] frequently to the detriment of the condition or regulation.[49] Whether a court finds that a statute has a coercive effect—and thus infringes a right—often depends on a condition's classification as either a penalty on the exercise of speech rights or a mere refusal to subsidize certain expression.[50] If a condition is characterized as a "penalty," the regulation or statute likely will be found unconstitutional;[51] however, if the court determines that a condition prohibiting certain speech is simply a refusal to subsidize that speech, the condition likely will be upheld.[52] Scholars have

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> effect. It may, of course, be manipulated so as to do so, in which case the courts will be available to provide relief.

Id. See also, e.g., *Speiser*, 357 U.S. at 518 (finding a condition unconstitutional because denial of the tax exemption coerced applicants into refraining from expressing disfavored speech); Am. Commc'ns Ass'n, C.I.O. v. Douds, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.").

47. "Strict Scrutiny" is a "judicially crafted formula for implementing constitutional values." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007). Under strict scrutiny, legislation will only be upheld if it is "necessary" or "narrowly tailored" to serve a "compelling governmental interest." *Id.* at 1269. Very few laws meet the requirements to survive strict scrutiny. J. Michael Connolly, *Loading the Dice in Direct Democracy*: *The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 134 (2008). As a result, the strict scrutiny standard has been described as "strict in theory, fatal in fact." *Id.* at 135.

48. In *Clarke v. United States*, the District Court applied strict scrutiny to a regulation that conditioned a substantial amount of the District of Columbia's operational funding on the adoption of a law that allowed religiously affiliated institutions to deny benefits to persons condoning homosexuality. Clarke v. United States, 705 F. Supp. 605, 609 (D.D.C. 1988), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990). The district court, applying strict scrutiny, found the condition was coercive and infringed protected speech. *Id.* at 609–10; *see also Speiser*, 357 U.S. at 518, 529 (applying strict scrutiny because the regulation coerced speech such that the statute had a similar effect on speech as a direct regulation).

49. *See supra* note 47.

50. The courts have drawn a distinction between denying a benefit to someone *because* he exercises his constitutional right (the *Speiser* condition) and simply not *paying for* someone to exercise that right (*Regan*). Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983). Scholars have argued that the characterization of a condition as a "penalty" or a "nonsubsidy" depends upon the baseline from which one measures. *E.g.*, Sullivan, *supra* note 18, at 1436. Take the *Regan* condition for example, *Regan*, 461 U.S. at 543–44; if one assumes a baseline of subsidies for all nonprofit organizations, then withholding a subsidy from an organization that lobbies would be considered "penalizing" that expression. Sullivan, *supra* note 18, at 1441. However, if one assumes a baseline of no subsidies for lobbying activities, then the condition would not act as a penalty on that expression; the condition would just be a nonsubsidy. *Id.* This Note does not focus on the use of baselines but on the deterrent effect of conditions regardless of the characterization as a penalty or nonsubsidy.

51. *Speiser*, 357 U.S. at 528 (finding that denial of a tax exemption penalized exercise of free speech rights and was thus unconstitutional); Sullivan, *supra* note 18, at 1420 (stating that conditioned benefits labeled "penalties" are usually struck down).

52. *Regan*, 461 U.S. 540 (upholding a funding condition because refusal to subsidize a certain right does not infringe that right); Sullivan, *supra* note 18, at 1420 (stating that conditioned benefits labeled

criticized the penalty/nonsubsidy dichotomy as arbitrary, thus leading to inconsistent results even when the courts are presented with factually analogous scenarios.[53] Additionally, scholars have argued that constitutional rights can be impermissibly burdened even if not necessarily "coerced" through the offer of a benefit.[54] Despite these criticisms, courts continue to look to a condition's coercive effect in determining its constitutionality.

B. Viewpoint-Based Regulations

Congress cannot impose a condition on a benefit's receipt that acts as a coercive penalty on the exercise of free speech rights.[55] Additionally, Congress cannot regulate speech based on the speech's message.[56] "It is either as a coercive penalty or as viewpoint suppression . . . that the denial of a government benefit may 'infringe [a person's] constitutionally protected . . . freedom of speech . . . .'"[57] Typically, when the government attempts to regulate or burden certain speech specifically because of the speech's particular message or content, strict scrutiny applies.[58] However, regulations that confer benefits or impose burdens on speech irrespective of its content are considered content-neutral and are subject only to intermediate scrutiny.[59] Application of the normal standards for content-based and

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"nonsubsidies" are usually upheld).

53. *See* Sullivan, *supra* note 18, at 1420 ("Conclusory labels often take the place of analysis . . . ."). Sullivan also explores the difference in outcomes of two cases—cases dealing with almost identical conditions—caused by use of the penalty/nonsubsidy distinction. *Id.* at 1441–42.

54. *Id.* at 1499 ("[G]overnment can as readily aggrandize excessive power or maldistribute power among rightholders through selective subsidization as through conditions that more obviously restrict liberty. Cases drawing a distinction between permissible 'nonsubsidies' and impermissible 'penalties' often miss just this point." (footnote omitted)).

55. *Speiser*, 357 U.S. at 518 (holding unconstitutional a condition that penalized certain speech and had the effect of coercing claimants to refrain from proscribed speech).

56. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

57. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 246 (2d Cir. 2011) (Straub, J., dissenting) (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59 (2006)).

58. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

59. *Id.*

content-neutral regulations has varied in the government subsidy context.[60] Despite the fact that certain funding conditions seemingly discriminate on the basis of content or viewpoint, the Court has, in certain opinions, neglected to apply strict or intermediate scrutiny.[61] At times, the Court has instead applied minimal scrutiny, reasoning that refusing to subsidize one activity while simultaneously funding another is simply not discriminating on the basis of viewpoint.[62] In *Speiser*, however, the Court chose to apply strict scrutiny.[63] The Court found that the condition was "aimed at the suppression of dangerous ideas" and thus discriminated on the basis of viewpoint.[64]

The majority of case law on the conditioning of subsidies indicates that when the government selectively funds one activity to the exclusion of another, the government is not discriminating on the basis of viewpoint; therefore, First Amendment rights are not infringed.[65] Similarly, courts have held that when the government itself is "speaking" through the distribution of its largesse, no First Amendment concerns are implicated.[66]

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60. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193 (1991) (finding that when the government chooses to fund one activity as opposed to another, the government has not discriminated on the basis of viewpoint); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548–49 (1983) (finding that a restriction prohibiting recipients of a tax exemption from lobbying did not infringe First Amendment rights, thus minimal scrutiny was applied).

61. For example, the *Rust* Court failed to apply strict or intermediate scrutiny to a regulation that provided funding for projects promoting childbirth but not for projects promoting abortion as an alternative. *Rust*, 500 U.S. at 193.

62. *Id.*

63. Speiser v. Randall, 357 U.S. 513, 529 (1958).

64. *Id.* at 519.

65. *E.g.*, *Rust*, 500 U.S. at 193 ("'[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'" (quoting *Regan*, 461 U.S. at 549)); *see also* Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.").

66. *Legal Services Corporation v. Velazquez* explained *Rust v. Sullivan* as standing for the proposition that the government is entitled to use its funds to convey its own message. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (citing *Rust*, 500 U.S. 173). When the government performs this action it is engaging in "government speech." Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 236 (2d Cir. 2011). "Government speech" is exempt from First Amendment scrutiny. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

C. Government Speech

When the government itself "speaks" to further its own policies, the First Amendment's ordinary limitations do not apply.[67] Furthermore, the Supreme Court has held that when the government disburses funds through private entities to convey a particular policy, that too is government speech and is exempt from First Amendment scrutiny.[68] Accordingly, classification of speech as "government speech" is often determinative of a regulation or condition's constitutionality.[69] Although the government cannot typically regulate speech on the basis of viewpoint,[70] the Supreme Court has stated that viewpoint-based funding decisions are permissible when the government enlists private speakers to be a conduit for the government's message or programs.[71] One of the principal concerns when a private entity is required to espouse a governmental viewpoint is that the public will be unable to discern that the speech is not an entirely voluntary expression but is, in fact, required by the government as a condition of receiving a benefit.[72] The larger public policy concern is that if the government can disguise its message as

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67. *Johanns*, 544 U.S. at 553.

68. *Velazquez*, 531 U.S. at 541.

69. *E.g.*, Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009) (finding the placement of a Ten Commandments monument in a park did not violate the First Amendment because it was a form of government speech); *Johanns*, 544 U.S. at 562 (finding a regulation placing a tax on the sale of cattle to promote beef advertising was constitutional because the advertising was a form of government speech); *Velazquez*, 531 U.S. at 545 (finding that restriction prohibiting funding recipients from challenging existing welfare statutes was unconstitutional because program was designed to facilitate private speech not governmental speech).

70. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 546 (1980) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech . . . .'" (citing U.S. CONST. amend. I)).

71. *Velazquez*, 531 U.S. at 541 (explaining *Rust* as having allowed a viewpoint-based funding decision because the government was transmitting its message through a private entity).

72. Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v St. Paul*,* Rust v Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 55 (explaining that the public may give more credence to speech coming from private entities; if the government can disguise its message as that of a private organization, the risk exists that the government will be able to steer public discourse on issues).

being that of a private entity, the government can steer public discourse on controversial issues.[73]

The Supreme Court has analyzed conditions on government funding and other similar conditions on numerous occasions.[74] The majority of conditions on government funding simply restrict the purposes for which federal funds can be used.[75] The Supreme Court has yet to consider a statute that requires an organization to take an affirmative ideological stance on a controversial issue as a condition of receiving funding.[76] In *Alliance* and *DKT*, however, federal circuit courts (Second and D.C. Circuits, respectively) attacked the problems presented by affirmative expression requirements and the Leadership Act's policy requirement in particular.[77] The *DKT* court upheld the policy requirement, basing its decision principally on the government speech doctrine.[78] The D.C. Circuit held that the policy requirement did not *compel DKT* to advocate for the government's position; it only required that *DKT* communicate the government's message if it wished to receive the Act's funds.[79] Because the court believed the requirement to be an instance of government speech, the court did not conduct a First Amendment analysis.[80] The *Alliance* court, however, characterized the requirement as compelling recipients to espouse the government's favored viewpoint.[81] The Second Circuit elected to apply "heightened" or intermediate scrutiny and found that the

73. *Id.*

74. *E.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); South Dakota v. Dole, 483 U.S. 203 (1987) FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); Speiser v. Randall, 357 U.S. 513 (1958).

75. *E.g.*, *Rust*, 500 U.S. 173 (prohibiting use of federal funds to promote abortion as a method of family planning); *League of Women Voters*, 468 U.S. 364 (prohibiting broadcasting stations receiving federal funding from editorializing); *Regan*, 461 U.S. 540 (prohibiting recipients of a tax exemption from lobbying).

76. The majority in *Alliance* described the policy requirement as requiring funding recipients to "affirmatively oppose prostitution." Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 237 (2d Cir. 2011).

77. *Alliance*, 651 F.3d 218; DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758 (D.C. Cir. 2007).

78. *DKT*, 477 F.3d at 764.

79. *Id.*

80. The *DKT* majority stated that the policy requirement did not violate the First Amendment. *Id.* No level of scrutiny was used in their decision. *Id.*

81. *Alliance*, 651 F.3d at 234.

requirement could not pass constitutional muster under that standard.[82]

Alliance and *DKT* demonstrate the inconsistent application of constitutional doctrine in the government subsidy context. Although the Supreme Court has analyzed numerous funding conditions that prohibit certain expression,[83] the Court has yet to address the situation created by the Leadership Act's policy requirement. The standard application of constitutional doctrine to restrictive conditions is insufficient to address the First Amendment concerns created by conditions requiring affirmative expression. Accordingly, existing constitutional doctrine must adapt to conditions requiring affirmative expression so that the principles protected by the First Amendment remain intact.

II. CURRENT CONSTITUTIONAL DOCTRINE AS APPLIED TO GOVERNMENT SUBSIDIES

A. Conditions On Funding: Compulsory, Coercive, Or Simply A Choice?

Whether a condition is "coercive" and thus unconstitutional depends, at least in part, on whether the potential recipient of the benefit is truly free to make a choice regarding acceptance of the benefit.[84] Is the recipient able to make a wholly voluntary choice as

82. *Id.* The Second Circuit affirmed the District Court's opinion applying heightened scrutiny. *Id.* The District Court did not believe strict scrutiny to be the appropriate standard of review because the policy requirement was "not a direct regulation on speech, but rather affect[ed] First Amendment freedoms indirectly." Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 267 n.38 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011).

83. *E.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (prohibiting use of federal funds to promote abortion as a method of family planning); FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (prohibiting broadcasting stations receiving federal funding from editorializing); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (prohibiting recipients of a tax exemption from lobbying).

84. In *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926), the Supreme Court struck down a regulation that conditioned the privilege of using a state's highways on a private carrier's submission to common carrier liability. *Id.* The Court stated that giving the carrier the option to forego a privilege vital to its livelihood or to submit to an "intolerable burden" was, in fact, no choice at all. *Id.* at 593. In contrast, the court in *South Dakota v. Dole*, 483 U.S. 203 (1987), upheld a regulation that conditioned the receipt of 5% of federal highway funds on a state's adoption of a minimum drinking age of twenty-one. *Id.* at 205. The Court found that because the State only stood to lose 5% of funds by

to whether he should accept the benefit, or has the government created the condition such that, while the recipient is able to make a choice in the literal sense of the word, he must choose between complying with the condition or refusing to comply and suffering potentially drastic consequences?[85] As Justice Sutherland asked in *Frost v. Railroad Commission of California*, has the potential recipient been given the choice "between the rock and the whirlpool"?[86] Has Congress mildly encouraged compliance with a regulation or put "a gun to the [recipient's] head"?[87] If a condition provides the potential recipient with only the illusion of a choice, the government has impermissibly "coerced" the recipient into complying with the government's regulations.[88] The government cannot condition the receipt of a benefit that is so vital to an

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refusing to comply, the State had the option to make a choice whether it wanted to comply with the regulation. *Id.* at 211. Recently, in the landmark decision of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Court held unconstitutional a provision of the Affordable Care Act conditioning states' continued receipt of *all* Medicaid funding on an expansion of Medicaid coverage. *Id.* at 2571. The Court determined that the condition was impermissibly coercive, stating "Congress is not free to . . . penalize States that choose not to participate in that new program by taking away their existing Medicaid funding." *Id.* at 2607. Chief Justice Roberts explained that, unlike the "relatively mild encouragement" in *South Dakota v. Dole*, the "financial inducement Congress employed here . . . is a 'gun to the head.'" *Id.* at 2639–40. Roberts's vivid description makes clear that the states had no choice but to accept the condition, thus the condition was an invalid use of Congressional spending power.

85. *Compare South Dakota*, 483 U.S. at 205 (analyzing a regulation that conditioned the receipt of 5% of federal highway funds on a state's adoption of a minimum drinking age of twenty-one), *with Sebelius*, 132 S. Ct. at 2604 (analyzing a regulation that conditioned future receipt of *all* Medicaid funding, or up to 10% of a state's overall budget, on that state's expansion of Medicaid coverage). In *Arkansas Writers' Project, Inc., v. Ragland*, the Court analyzed a tax regulation exempting from sales tax certain publications, including newspapers and sports or religious journals. Ark. Writers' Project, Inc., v. Ragland, 481 U.S. 221, 224 (1987). Although the Court found the differential tax application unconstitutional, Justice Scalia argued that it was "implausible that the 4% sales tax, generally applicable to all sales in the State with the few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, [the] appellant's publication." *Id.* at 237 (Scalia, J., dissenting). Although Scalia did not say so expressly, he suggested that the tax exemption was not coercive because the publisher was left with a legitimate choice as to whether he should continue his publication—the tax was not prohibitive. *See id.*

86. *Frost*, 271 U.S. at 593.

87. *Sebelius*, 132 S. Ct. at 2604.

88. In *United States v. Butler*, the Court reviewed a regulation that conditioned the receipt of a subsidy on farmers reducing their crop production. United States v. Butler, 297 U.S. 1, 54 (1936). The Court found the regulation impermissibly coerced compliance because the farmers could not afford to turn down the substantial financial benefit. *Id.* at 70–71. If the farmer refused to reduce production and declined the benefit, the farmer would not be able to competitively price his crops in comparison with those who received the subsidy. *Id.* The Court characterized the farmers "choice" as illusory. *Id.* at 71.

individual or organization's well-being that the individual or organization must comply with the terms of the condition.[89] Just as the government cannot use a direct regulation to compel a person to express certain speech,[90] the government cannot indirectly *force* compliance where directly forcing compliance would be a violation of the Constitution.[91] Certain conditions can "be so coercive as to pass the point 'at which pressure turns into compulsion.'"[92]

In addition to conditions that effectively eliminate the ability of a recipient to refuse compliance, conditions that "penalize" the exercise of a constitutional right can also be "coercive" and thus infringe constitutionally protected rights.[93] The statute analyzed in *Speiser* is demonstrative of such a regulation.[94] In *Speiser*, if an applicant chose not to sign the document containing the loyalty oath and thereby exercised his constitutional right to remain silent, the applicant would be "penalized" by losing a tax exemption.[95] The Court stated that a regulation that denied a benefit on the basis of a person engaging in certain expression was tantamount to fining that expression—both indirect "penalties" and direct fines necessarily have a deterrent effect on the proscribed conduct.[96] *Speiser* and other similar cases indicate that, at least in certain instances, acts of the government that have the effect of influencing an individual into waiving his constitutional rights are impermissible.[97]

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89. *E.g.*, *id.* at 70–71. In contrast to *Butler*, the *South Dakota* Court found that conditioning 5% of federal highway funds on the adoption of a drinking age of twenty-one was only "mild encouragement" and could not be considered coercive. *South Dakota*, 483 U.S. at 211–12. The conditioned benefit was not so substantial that it forced the state to comply with the regulation. *Id.*

90. The government cannot directly require a person to speak because such a regulation would be a violation of the First Amendment. *E.g.*, Wooley v. Maynard, 430 U.S. 705 (1977). In *Wooley*, the Court held that New Hampshire could not require that noncommercial vehicles bear a license plate embossed with the state motto. *Id.* at 717. The law in question subjected those who covered the motto to criminal fines and other sanctions. *Id.* at 708.

91. *E.g.*, *Butler*, 297 U.S. at 70–71.

92. *South Dakota*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

93. *E.g.*, Speiser v. Randall, 357 U.S. 513, 518 (1958); *see also* Kagan, *supra* note 72, at 46 (explaining that conditions that are labeled penalties are often considered "coercive" and unconstitutional).

94. *Speiser*, 357 U.S. 513.

95. *Id.* at 516–18.

96. *Id.*

97. In *Sherbert v. Verner*, the Supreme Court analyzed the application of a welfare regulation that denied a claimant unemployment benefits. Sherbert v. Verner, 374 U.S. 398, 400–01 (1963). The

Despite the apparent teachings of *Speiser* and its progeny, the Supreme Court has infrequently found conditions to be coercive when attached to government subsidies.[98] In *Regan*, the Supreme Court analyzed a provision of the tax code that denied tax exemptions to charitable organizations that engaged in lobbying.[99] The Court rejected the argument that the condition was analogous to the condition imposed in *Speiser*, reasoning that unlike in *Speiser* where the tax exemption was denied *because* the individual chose to exercise his protected rights, Congress was not denying organizations a benefit *because* the organization chose to lobby.[100] "Congress [had] merely refused to pay for the lobbying out of public monies."[101] By refusing to subsidize lobbying, Congress had not *infringed* the

claimant was unemployed because she could only find a job that would require her to work on Saturdays, and she refused to work on Saturday—her Sabbath. *Id.* The Court found the regulation coercive and unconstitutional because it required the claimant to choose between exercising her constitutional right to practice her religion and foregoing a benefit or abandoning one of the precepts of her religion. *Id.* at 404. "Imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine." *Id.* The *Sherbert* Court did not expressly say that the regulation "penalized" the exercise of religion, but it seems evident through the "fine" language that the reasoning was similar to the reasoning in *Speiser*. *Id.*

98. *E.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991) (upholding a regulation that provided federal funding to organizations provided the organization agreed not to use the funding to promote abortion as a method of family planning); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 551 (1983) (upholding a regulation that prohibited recipients of a tax exemption from lobbying); *see also* Sullivan, *supra* note 18, at 1431 ("The Court has been reluctant in practice to find that conditions on federal spending coerce recipients . . . .").

99. *Regan*, 461 U.S. at 542.

100. *Id.* at 545–46. In upholding the condition, the Court focused heavily on the fact that the organization was not entirely prohibited from lobbying if they chose to accept the benefit. *Id.* Alternative channels remained available for the organization to continue to conduct lobbying activity. *Id.* at 544. If the organization wished to continue its lobbying activities, it could do so by creating an affiliate 501(c)(4) organization. *Id.* The organization would then be eligible for the tax exemption for its non-lobbying activities and could continue to lobby through its affiliate. *Id.* This opportunity seemingly strengthens the Court's argument that, in enacting the regulation, Congress did not intend to discourage charitable organizations from lobbying—it simply chose not to pay for the lobbying activity. *Id.* at 545. Nevertheless, the opinion did not discuss the potential deterrent effect the condition would have on lobbying. Sullivan, *supra* note 18, at 1441. The Leadership Act contains a provision similar to the regulation analyzed in *Regan* that allows a recipient to create an affiliate organization that would not be required to adopt a policy explicitly opposing prostitution. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 226 (2d Cir. 2011). Although this ability means organizations are not entirely prohibited from receiving funding if they advocate for prostitution, the condition would still have a deterrent effect on pro-prostitution speech. *Id.* As *Speiser* teaches, the Constitution frowns upon regulations that influence an individual or organization to waive their constitutionally protected rights. *Speiser*, 357 U.S. at 517.

101. *Regan*, 461 U.S. at 545.

organization's right to lobby.[102] The law was not an impermissible "penalty" on the exercise of a right; it was simply a "nonsubsidy."[103]

The Court again used the nonsubsidy label in *United States v. American Library Association, Inc.* (*American Library*).[104] In *American Library*, Congress passed a regulation that provided federal funding only to libraries that agreed to install internet filters designed to prohibit the viewing of obscene images.[105] The Court held that Congress had not "penalized" those libraries that elected not to install filters to censor online content available to library patrons, it had simply refused to subsidize unfiltered Internet access.[106] The Court, addressing the libraries' freedom of choice, stated that any library that wished to provide unfiltered Internet access could do so and simply decline federal funding.[107]

Two theories of what constitutes a "coercive" condition seem to arise from the case law.[108] A condition is coercive if it substantially limits an actor's ability to make an entirely voluntary choice or if it penalizes the exercise of a right and thus deters certain constitutionally protected conduct.[109] It would be difficult to argue that the Leadership Act's conditions eliminate a recipient's ability to make a voluntary choice regarding acceptance of funding.[110]

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102. *Id.*

103. Sullivan, *supra* note 18, at 1441 (explaining *Regan v. Taxation with Representation of Washington* as a case where the Court characterized the condition as a "nonsubsidy").

104. United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003). The Court did not explicitly label the regulation as a "nonsubsidy" but reiterated that refusing to subsidize activity does not necessarily penalize that activity. *Id.* at 212.

105. *Id.*

106. *Id.*

107. *Id.*

108. As discussed above, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), and *United States v. Butler*, 297 U.S. 1, 54 (1936), focus on the voluntariness of the choice possessed by the funding recipient. *Speiser v. Randall*, 357 U.S. 513, 518 (1958), and *Sherbert v. Verner*, 374 U.S. 398, 405 (1963), focus on the deterrent effect of penalizing the exercise of a constitutional right.

109. *Compare* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (declaring unconstitutional a provision of the Affordable Care Act that conditioned the receipt of *all* Medicaid funding on states' expansion of Medicaid coverage), *with Speiser*, 357 U.S. at 518 (declaring regulation unconstitutionally coercive because it penalized the exercise of First Amendment rights).

110. None of the organizations that have challenged the constitutionality of the Leadership Act have been solely or principally reliant on Leadership Act funds for their operations. *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 224 (2d Cir. 2011); *see also* DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758, 760 (D.C. Cir. 2007). DKT International received only 16% of its funds from USAID. *DKT*, 477 F.3d at 760. AOSI and Pathfinder both receive funding from

Regardless, however, of whether recipients are free to make a voluntary choice, the policy requirement will necessarily have a deterrent effect on the exercise of free speech.[111] For example, both AOSI and Pathfinder were willing to sacrifice their constitutional right to speak out for the legalization or decriminalization of prostitution, as well as their right to remain silent on the issue, in order to receive funding.[112] The Leadership Act acts as an incentive for organizations to sacrifice their constitutional rights.[113] In this way, the Leadership Act can easily be analogized to the *Speiser* condition. Although there are some differences between the two conditions,[114] both offer a government subsidy to encourage the waiver of constitutionally protected rights.[115] Under *Speiser*, it seems that the Leadership Act could be labeled "coercive."

The case law also makes clear that a refusal to subsidize a right cannot be equated with the imposition of a penalty on the exercise of that right.[116] There is a difference between "nonsubsidies" and

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sources other than USAID. *Alliance*, 651 F.3d at 224. Neither AOSI nor Pathfinder complained that Leadership Act funds were vital to their survival. *Id.* at 256. This does not mean that some organizations could not be solely reliant on Leadership Act funds. If an organization was heavily dependent on Leadership Act funds for its operations, it is possible the condition could be considered coercive under *Butler*. *Butler*, 297 U.S. at 70–71.

111. In an effort to remain eligible for Leadership Act funds, both AOSI and Pathfinder, prior to filing suit, adopted policies explicitly opposing prostitution. *Alliance*, 651 F.3d at 225. Adoption of policy statements with which the organizations disagree evinces the deterrent effect of the condition on the exercise of protected rights.

112. *Id.*

113. Prior to the implementation of the policy requirement, neither AOSI nor Pathfinder explicitly opposed prostitution. *Id.* at 224. However, neither organization actively supported prostitution. *Id.* at 225. Both organizations worked closely with prostitutes and were engaged in advocating approaches for fighting HIV/AIDS among prostitutes. *Id.* at 224. AOSI and Pathfinder were hesitant to adopt such a policy for fear of alienating the prostitutes with whom the organizations were working. *Id.* at 236. However, both organizations still adopted policies opposing prostitution. *Id.* at 224.

114. In the *Alliance* dissent, Justice Straub drew a distinction between the *Speiser* condition, which he classified as an "already-existing benefit[]," and the Leadership Act, which did not deny organizations a subsidy to which they were otherwise entitled. *Id.* at 258 (Straub, J., dissenting). The veterans in *Speiser* were eligible for the tax exemption simply because they were veterans. *Speiser*, 357 U.S. at 514–15. If a veteran did not sign the loyalty oath, he would *lose* his entitlement to the tax exemption. *Id.* at 516. In contrast, recipients of the Leadership Act are *only* entitled to the subsidy *if* they choose to explicitly oppose prostitution. 22 U.S.C. § 7631(f) (2006). By remaining silent, the organizations are not losing a subsidy; they are just not receiving one. *Alliance*, 651 F.3d at 258 (Straub, J., dissenting). This distinction is related to the "baselines" discussed above. I focus on the deterrent effect of the conditions regardless of the baseline from which one measures.

115. *See Speiser*, 357 U.S. at 518–519; *Alliance*, 651 F.3d at 239.

116. Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

"penalties," and mere "nonsubsidies" do not interfere with protected rights.[117] Whether a regulation is labeled a penalty or a nonsubsidy, the condition can still have a deterrent effect.[118] Because the Leadership Act does not deny an "already-existing benefit," the Court would likely label the condition a permissible "nonsubsidy" rather than an impermissible "penalty" on the exercise of rights.[119] Simply labeling a condition a "nonsubsidy," however, does not change the fact that the regulation will deter the exercise of protected rights. As Justice Stevens stated in his *American Library* dissent, "[a]n abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty."[120]

B. It's Not That We Don't Support Abortion, We Just Don't Want To Pay For It

It is axiomatic in constitutional doctrine that the government cannot regulate speech based specifically on the viewpoint expressed because such a regulation would run counter to the goals of the First Amendment.[121] "[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."[122] The reasoning for guarding free expression is to place decisions as to what views will be expressed in

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117. According to the Court, a "penalty" can be coercive and have a deterrent effect on the exercise of rights; however, "coercion [is] conceptually impossible when government has merely declined to subsidize a right." Sullivan, *supra* note 18, at 1439.

118. Courts often fail to analyze the deterrent effect of regulation on the exercise of constitutional rights, choosing instead to uphold "nonsubsidies" and strike down "penalties." Sullivan, *supra* note 18, at 1420.

119. When dealing specifically with government subsidies, the Court has been hesitant to label conditions "penalties" and find them coercive. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193 (1991); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983).

120. United States v. Am. Library Ass'n, 539 U.S. 194, 227 (2003) (Stevens, J., dissenting).

121. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("[T]he First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals."); Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

122. FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

the hands of the public.[123] If the government can burden or punish the expression of certain viewpoints, the government may use its power to effectively drive certain disfavored viewpoints from the marketplace of ideas.[124] Because viewpoint-based regulations are so abhorred by the courts, strict scrutiny is applied to viewpoint-based funding decisions.[125] In order to survive strict scrutiny, the viewpoint-based law must serve a compelling governmental interest and use the least restrictive means available to achieve that interest.[126] In actuality, few laws meet the requirements to pass strict scrutiny.[127] The strict scrutiny standard has been described as "strict in theory, fatal in fact."[128]

The prohibition on viewpoint-discriminatory regulations theoretically applies to conditions on government funding as well as to direct prohibitions on speech.[129] The courts, however, can circumvent the prohibition by characterizing conditions as permissible selective funding decisions rather than impermissible viewpoint discrimination.[130] By recasting a condition as a

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123. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (quoting Leathers v. Medlock, 499 U.S. 439, 448–49 (1991)).

124. Connolly, *supra* note 47, at 134.

125. *Id.* at 135 ("Viewpoint-based regulation is generally considered to be the most disapproved category of speech regulation under the First Amendment, and approaches the standard of judicial scrutiny that is strict in theory, fatal in fact." (internal quotation marks omitted) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))).

126. Fallon, *supra* note 47, at 1268–69.

127. Connolly, *supra* note 47.

128. Gunther, *supra* note 125.

129. In *Regan*, the Supreme Court upheld a regulation prohibiting recipients of a tax exemption from lobbying. Regan v. Taxation with Representation of Wash. 461 U.S. 540, 551 (1983). However, the Court qualified its holding by stating that the outcome "would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim[] at the suppression of dangerous ideas.'" *Id.* at 548 (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)). The *Rust* dissent argued that viewpoint discriminatory regulations could not be upheld just because the regulation was a funding condition. Rust v. Sullivan, 500 U.S. 173, 206–07 (1991) (Blackmun, J., dissenting). The majority, however, found that the regulation was not viewpoint discrimination at all but just a decision to fund some activities to the exclusion of others. *Id.* at 193 (majority opinion).

130. *Rust*, 500 U.S. at 193. The Court explained:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. 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.

permissible, selective funding decision rather than a viewpoint-discriminatory regulation, the Court can avoid applying strict scrutiny.[131]

In determining whether a condition is viewpoint-discriminatory, the Court has drawn a distinction between regulations that are "intended to suppress . . . ideas" and regulations that simply limit the purposes for which funds can be used.[132] In *Rust*, for example, the Court found that Congress's intention was not to suppress pro-abortion ideas but to limit the use of funds to family planning counseling.[133] Establishing program limits, the majority reasoned, was not discriminating on the basis of viewpoint.[134] Justice Blackmun strongly disagreed with the majority's ruling in *Rust*.[135] Blackmun believed the regulation was clearly viewpoint-discriminatory as it refused to fund "family-planning projects that advocate abortion *because* they advocate abortion . . . ."[136] Blackmun believed that, regardless of the Court's characterization of the condition,[137] the regulation "plainly . . . targeted a particular viewpoint."[138] Accordingly, the dissenting justices would have applied strict scrutiny to the condition.

Id.

131. The *Rust* Court did not apply strict scrutiny to the regulation that funded pro-life activities, but not abortion activities, because the Court determined that the regulation was not viewpoint discriminatory. *Id.* at 193.

132. *E.g.*, *Rust*, 500 U.S. at 194; *see also Regan*, 461 U.S. at 548.

133. *Rust*, 500 U.S. at 193–95. The *Rust* Court believed that Congress intended to provide funds only for *preventive* family planning. *Id.* at 179. Funds were not to be used to provide prenatal care or advice. *Id.* Accordingly, the Court believed that Congress had not discriminated against abortion but had chosen to limit funds for use in preconceptional services. *Id.* at 193. Abortion did not fall under the Congressional definition of "family planning." *Id.* at 179.

134. *Id.* at 194.

135. *Id.* at 207–15 (Blackmun, J., dissenting).

136. *Id.* at 210.

137. Justice Blackmun was skeptical of the idea that Congress intended to provide funds only for preventive family planning counseling. *Id.* Blackmun stated, "the majority's claim that the regulations merely limit a Title X project's speech to preventive or preconceptional services rings hollow in light of the broad range of nonpreventive services that the regulations authorize Title X projects to provide." *Id.* (citation omitted). The regulations allowed grantees to provide general health services, treatment for sexually transmitted diseases, etcetera. *Id.* at 210 n.2. None of these, Blackmun stated, "are strictly preventive, preconceptional services." *Id.*

138. *Id.* at 210.

The Leadership Act can easily be analogized to the regulation analyzed in *Rust*—both regulations prohibit funding recipients from advocating for controversial practices.[139] The Leadership Act, however, goes beyond the conditions imposed in *Rust* and requires funding recipients to affirmatively denounce prostitution.[140] Any organization that refuses to denounce prostitution is ineligible for funds.[141] The dissent in *Alliance* follows the *Rust* majority's reasoning and states that, in promulgating the regulations, Congress did not intend to suppress pro-prostitution speech but to reduce HIV/AIDS behavioral risks by, in part, eradicating prostitution.[142] The dissent, quoting *Rust*, stated that Congress has the authority to "ensure that government funds are used for the purposes for which they were authorized."[143]

Although the Leadership Act may ensure appropriated funds are being used for their authorized purposes, in doing so, the Act necessarily discriminates on the basis of viewpoint. The Leadership Act only provides support to those organizations that agree with the government's stance on prostitution or, at least, agree to affirmatively express that viewpoint.[144] Viewpoint-based regulations, such as the Leadership Act—even if they are just conditions on funding—carry the risk that the government could, at least to a degree, drive certain viewpoints from the marketplace.[145] The Leadership Act increases

139. 22 U.S.C. § 7631(e) (2006) (prohibiting recipients from advocating for the legalization of prostitution); 42 U.S.C. § 300a-6 (prohibiting funding recipients from providing counseling on abortion).

140. 22 U.S.C. § 7631(f).

141. *Id.*

142. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 257 (2d Cir. 2011) (Straub, J., dissenting). The majority believed the principal goal of the Leadership Act was to fight the spread of HIV/AIDS and not to eradicate prostitution. *Id.* at 237–38 (majority opinion). Consequently, the majority did not believe that Congress was simply ensuring that funds were being used for their authorized purpose. *Id.*

143. *Id.* at 248 (Straub, J., dissenting).

144. *See* § 7631(f).

145. Justice Blackmun argued in his dissent in *Rust* that ideologically based regulations should not be upheld just because they are conditions on funding and not direct regulations. Rust v. Sullivan, 500 U.S. 173, 211 (1991) (Blackmun, J., dissenting). Blackmun believed that, by failing to consider the free speech interests of the petitioners and upholding a regulation aimed at the suppression of ideas, the majority failed to implement the protection the First Amendment provides for ideological messages. *Id.* at 214–15. Justice Blackmun's reasoning could easily apply to an analysis of the Leadership Act.

the likelihood that organizations will adopt the government's viewpoint on prostitution instead of offering their own or remaining silent on the issue altogether.[146] If the Court continues to recast viewpoint-discriminatory regulations like the Leadership Act as permissible selective funding decisions subject to only minimal scrutiny, the government's viewpoint will have a stronger presence in the marketplace in contravention of the goals of the First Amendment.

C. Who Said That?

The government speech doctrine exempts from First Amendment scrutiny instances where the government itself "speaks" or where the government conveys its own message by disbursing funds through private entities.[147] In order to effectively govern, the government has to be able to promote its own policies, which, in some cases, will run contrary to the preferences of the citizenry.[148] The government is not required to support the opposite side of an issue every time it takes an ideological stance.[149]

1. Dangers of the "Government Speech" Doctrine

The purpose of the First Amendment is to create an uninhibited marketplace of ideas in which the truth will prevail.[150] The danger presented by the government speech doctrine is that the government,

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146. The Leadership Act increases the likelihood that the organizations will adopt the government's viewpoint by incentivizing the waiver of constitutionally protected rights. This is demonstrated by AOSI and Pathfinder's adoption of anti-prostitution policies despite their disagreement with the viewpoint. *Alliance*, 651 F.3d at 224.

147. *Legal Services Corp. v. Velazquez* explains that where the government itself "speaks" or where the government enlists private entities to convey its message, that message is considered "government speech." Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541–42 (2001). "Government speech" is exempt from First Amendment scrutiny. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005).

148. *See Johanns*, 544 U.S. at 574 ("To govern, government has to say something . . . ."); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.").

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

150. FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

free from First Amendment scrutiny, could use its considerable resources to push its favored viewpoint to the forefront of any debate.[151] The government's viewpoint could dominate the "marketplace of ideas."[152] When the government itself is speaking, the concern that the government's viewpoint will dominate the public discourse is diminished because the public will be aware that the speech is coming from the government and will thus discount the viewpoint as biased.[153] The same is true where it is made clear that a private entity is being required, as a condition on funding, to espouse the *government's* viewpoint[154]: when it is clear that a private entity is espousing the government's viewpoint and not its own, the public will be able to discount the value of that speech as if it were the government itself speaking.[155] Problems arise where it is unclear who exactly is "speaking."[156] Is it the government? Is it the private entity itself, or is the private entity conveying the government's message? If the origin of or reason for the speech is unclear, there is a risk that the public will lend more credibility to that expression than it would if it were aware that the speech was offered only as a means to an end.[157] In this way, the government could indirectly dominate the public discourse by concealing the origin of the speech.[158]

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151. Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008); Kagan, *supra* note 72, at 55.

152. *See* Kagan, *supra* note 72, at 55–56.

153. *Id.*

154. *Id.* Another reason that "government speech" is not subject to First Amendment scrutiny is that, if the public is aware that the government is the entity conveying the message, the public will be able to hold the government accountable through the electoral process. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 571 (2005). Where the origin of the speech is disguised, "the resulting lack of transparency permits the government to advance its policy positions without being held accountable for its advocacy." Corbin, *supra* note 151, at 610. Typically, "[d]emocracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message." *Johanns*, 544 U.S. at 575 (Souter, J., dissenting). However, where the electorate is oblivious as to the true identity of the speaker, it will be unable to hold the proper parties accountable for their message.

155. Kagan, *supra* note 72.

156. *See id.*

157. *Id.* at 55–56.

158. Corbin, *supra* note 151; *see also Johanns*, 544 U.S. at 579–80 (Souter, J., dissenting). Justice Souter argued in his dissent that "expression that is not ostensibly governmental, which government is not required to embrace as publicly as it speaks, *cannot constitute government speech* . . . ." *Id.* at 580 (emphasis added). In *Johanns*, the Court analyzed a program that required beef producers to submit a

2. Government Speech and the Leadership Act

The Leadership Act requires recipients, if they wish to receive the Act's funds, to adopt a policy *of their own* opposing prostitution.[159] Consequently, anyone who interacts or is familiar with organizations receiving Leadership Act funds will likely believe that those organizations oppose prostitution and are acting on their own initiative in adopting that policy. The policy requirement thus raises the concern that the public will not be able to discern that the statement was adopted only as a means of receiving necessary funding.[160] Allowing the government to impose the policy requirement free from First Amendment scrutiny raises the risk that the government will be able to control the public discourse on the issue of prostitution.

As the courts currently apply the concepts of coercion, viewpoint discrimination, and government speech, Congress can easily bypass normal constitutional limitations provided the regulation is only a funding condition and not a direct regulation.[161] Conditions on funding, however, present many of the same First Amendment concerns as direct regulations or prohibitions.[162] The current

one dollar fee per head of cattle that would go towards beef advertising. *Id.* at 553 (majority opinion). Some beef producers objected on the grounds that the advertisements promoted beef as a generic commodity thus inhibiting their ability to promote the superiority of American beef, grain-fed beef, etcetera. *Id.* at 556. Many of the advertisements failed to indicate the messages were funded by a mandatory government fee but instead indicated that the advertisements were funded by "America's Beef Producers." *Id.* at 555. Justice Souter disagreed with the Court, which found the advertisements to be government speech, and claimed that a governmental message of concealed origin should not fall under the umbrella of government speech. *Id.* at 580 (Souter, J., dissenting). In line with Justice Souter's dissent, the policy requirement, or any other government expression where the true speaker is concealed, should not be considered government speech. As in *Johanns*, there is no way for an independent observer to know that the anti-prostitution speech originates from the government. The government should not be able to use its wallet to force the hands of organizations while it hides behind the wall of the government speech doctrine.

159. 22 U.S.C. § 7631(f) (2006).

160. This assumes that the Leadership Act would not allow an organization to state that the United States government opposes prostitution or that it adopted the statement in order to receive federal funding. If the Act somehow made it clear that the statement was unequivocally the message of the government, the First Amendment concerns would be diminished.

161. Congress was, for example, able to discriminate on the basis of viewpoint where it otherwise would not be able to because the regulation was a funding condition. Rust v. Sullivan, 500 U.S. 173, 207 (1991) (Blackmun, J., dissenting).

162. For example, because the Leadership Act makes it unclear whether the private organization or the government is actually speaking, the First Amendment concern that the government may be able to

constitutional doctrine does not adequately protect expression in accordance with the goals of the First Amendment.

III. PROTECTING THE INTEGRITY OF THE MARKETPLACE OF IDEAS THROUGH STRICT SCRUTINY

In order to keep the marketplace of ideas free from government distortion and to ensure the realization of the goals of the First Amendment, the Supreme Court should alter its analysis when presented with a funding condition requiring affirmative expression of the government's viewpoint.[163] First, the Court should depart from the conventional but complicated and unworkable "coercion" analysis used to analyze the constitutionality of funding conditions.[164] Instead, the Court should analyze each regulation independently, looking to see whether the regulation would potentially allow the government to distort the marketplace of ideas. Conditions, such as the one imposed by the Leadership Act, which require affirmative expression and conceal the origin of the message,[165] undoubtedly allow the government to skew the public debate towards its favored viewpoint. When a regulation provides for such distortion, the Court should apply strict scrutiny.

A. The Court Should Reject The "Coercion" Analysis And Determine—On A Case-By-Case Basis—Whether A Regulation Allows The Government To Distort The Marketplace Of Ideas

When analyzing the constitutionality of government subsidies, the Supreme Court has continuously looked to whether the government is "penalizing" the exercise of a constitutional right or whether the government has simply refused to subsidize certain speech.[166] If a

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steer the public discourse is present.

163. § 7631(f).

164. *See supra* text accompanying note 17.

165. *See supra* Part II.

166. *Compare* Speiser v. Randall, 357 U.S. 513, 518 (1958) (explaining the condition on receipt of a tax exemption as penalizing the expression of speech), *with* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545–46 (1983) (explaining that refusing to subsidize First Amendment rights is not the same as "penaliz[ing]" the exercise of those rights).

condition acts as a *penalty*, it is coercive and unconstitutional.[167] If the government, however, simply chooses not to subsidize certain activity, it has not "coerced" individuals or organizations into compliance.[168]

The principal problem with this analysis is the Court's failure to consider—independent of whether a regulation is technically coercive—the deterrent effect of speech-based regulations, such as the Leadership Act.[169] Regardless of whether the regulation is a "penalty" or a "nonsubsidy," regulations that withhold benefits from organizations that choose to fully exercise their constitutional rights necessarily deter the exercise of those rights.[170] By offering benefits in exchange for the waiver of constitutional rights, the government is essentially allowing organizations to barter away their constitutional rights[171]—a practice that should not be permissible. If the government can incentivize the waiver of First Amendment rights, the government could eventually control the marketplace of ideas in contravention of the goals of the First Amendment.[172] In order to avoid this occurrence, the Court should reject the "coercion" analysis and determine on a case-by-case basis whether a regulation provides

167. Kagan, *supra* note 72, at 56; Sullivan, *supra* note 18, at 1439.

168. Kagan, *supra* note 72, at 56; Sullivan, *supra* note 18, at 1439.

169. Kathleen Sullivan lamented the Court's failure to conduct an analysis as to the deterrent effect of the regulation analyzed in *Regan* in her article, *Unconstitutional Conditions*. Sullivan, *supra* note 18, at 1441. The Court simply considered the condition to be a refusal to subsidize rather than a penalty and thus applied minimal scrutiny. *Id.* In a concurring opinion, Justice Blackmun pointed to charitable organizations' ability to lobby through affiliate organizations as a reason for upholding the regulation as constitutional. *Regan*, 461 U.S. at 553 (Blackmun, J., concurring). Blackmun states that Congress's failure to completely prohibit an organization from lobbying is evidence Congress was not trying to suppress any ideas. *Id.* Although Blackmun did not explicitly refer to the deterrent effect of the regulation, he stated that the law would be unconstitutional if Congress were to prevent charitable organizations that received the tax exemption from lobbying altogether. *Id.* It could be inferred from the concurrence that, due to the loophole in the regulation, Blackmun believed organizations would not be seriously deterred from lobbying. Blackmun, however, failed to consider that regardless of the fact that an organization could continue to lobby, it might still be deterred from doing so due to the burden of creating an affiliate organization.

170. United States v. Am. Library Ass'n, 539 U.S. 194, 227 (2003) (Stevens, J., dissenting).

171. For example, in response to the Leadership Act, organizations, such as AOSI and Pathfinder, "traded away" their constitutional right to remain silent for the government's subsidy.

172. FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (quoting Leathers v. Medlock, 499 U.S. 439, 448–49 (1991)).

the government with the ability to alter the public discourse on a certain issue. If the Court finds that the regulation would allow the government to skew the marketplace of ideas in its favor, it should apply strict scrutiny. If, on the other hand, the Court finds that a regulation would not allow the government to alter the public debate, minimal scrutiny or "rational basis" scrutiny should apply.

B. The Court Should Apply Strict Scrutiny To The Leadership Act's Policy Requirement And Other Similar Conditions

The Leadership Act's policy requirement undoubtedly warrants strict scrutiny application under the proposed analysis. Conditions requiring affirmative expression of the government's ideological viewpoint arguably provide the greatest risk that the government will be able to alter the public discourse—certainly a greater risk than conditions that simply prohibit speech.[173] When Congress, as it did in implementing Title X, restricts the use of funds to activities designed to promote childbirth as opposed to abortion-related activities,[174] it may imply that the government does not support abortion as a method of family planning. However, no express anti-abortion message is being espoused.[175] There is no explicit message or statement shared with the public and used to sway people's thinking in one direction or another. This obviously is not the case with a condition requiring affirmative expression. If an organization is required to explicitly oppose prostitution, people may internalize that anti-prostitution message, and the public discourse on the issue may begin to favor the government's viewpoint. Furthermore, the

173. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (finding that an "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence"). In *Barnette*, the state required schoolchildren to salute the flag and recite the pledge of allegiance or be expelled. *Id.* The *Barnette* regulation was not a condition on funding; however, it still represents that requiring affirmative expression is potentially more dangerous than prohibiting expression.

174. 42 U.S.C. § 300a-6 (2006); Rust v. Sullivan, 500 U.S. 173 (1991).

175. Funding recipients were not required to condemn abortion or state that they disagreed with the practice. If a client sought advice about abortion, the doctor or employee of the organization could simply say that "advice regarding abortion is simply beyond the scope of the program." *Rust*, 500 U.S. at 200.

Leadership Act allows the government to conceal the origin of the anti-prostitution message.[176]

Because conditions like the Leadership Act's policy requirement (1) require the recipient to affirmatively express the government's favored viewpoint and (2) do not make clear that the viewpoint is the government's and not the private entity's, strict scrutiny should apply.[177] It is possible that application of a strict scrutiny standard to the policy requirement would invalidate the provision. The Court could find fighting the spread of HIV/AIDS to be a compelling governmental interest; however, it is unlikely the Court would find the policy requirement to be the "least restrictive means" of advancing that interest.[178]

1. Strict Scrutiny Should Not Apply to Every Condition Requiring Affirmative Expression

Every condition requiring affirmative expression, or even affirmative expression of the government's viewpoint, should not be subject to strict scrutiny; only those that require a private entity to express the government's viewpoint in such a manner that the viewpoint appears to be the entity's own and not the government's. Where the required expression does not espouse a particular

176. *See supra* Part II.C.

177. 22 U.S.C. § 7631(e)–(f); *see also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting). Although Justice Scalia disagreed with the Court's application of strict scrutiny to the tax exemption at issue in *Ragland*, he suggested that more stringent tests may be appropriate (strict scrutiny for example) "when [a] subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy." *Id.* Essentially, the policy requirement mirrors this exact hypothetical. Subsidies are only available to those organizations that take a particular viewpoint on a controversial issue.

178. *See supra* Part II.B. Few laws actually meet the requirements necessary to pass strict scrutiny. Connolly, *supra* note 47. Given that the Supreme Court has yet to consider a condition similar to the Leadership Act, it is difficult to say for certain how the Court would decide the issue of compelling interest and least restrictive means. However, the District Court for the Southern District of New York found that the policy requirement could not pass intermediate or heightened scrutiny. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 276 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011). The regulation was not "narrowly tailored" to promote the government's interests. *Id.* at 269. The Second Circuit agreed with the District Court that the regulation could not survive heightened scrutiny. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 234 (2d Cir. 2011). It could be inferred that a regulation that does not pass heightened scrutiny will probably not survive a strict scrutiny analysis.

viewpoint, there is little concern that public discourse on the issue would be distorted. For example, a regulation could require an organization to give directions regarding the government-sponsored program.[179] A regulation that provided funding to organizations to give flu shots or vaccinations to the underprivileged could require the organization to inform the public that only people who meet certain qualifications will receive medication. If expression of a particular viewpoint is required, but it is clear that the viewpoint expressed is the government's, the public will be able to view the expression with proper skepticism. The goal of the First Amendment to prevent the government from distorting the marketplace is not jeopardized in these situations. This is not the case with conditions like the policy requirement.

2. Application of Strict Scrutiny Would Not Prevent Congress from Achieving Its Legislative Goals

Assuming that application of strict scrutiny would invalidate the policy requirement or other similar regulations, Congress can still achieve its legislative goals; it will simply have to do so in a way that does not allow for the distortion of the marketplace of ideas. One of the ostensible goals of the Leadership Act is to prevent the spread of HIV/AIDS by reducing behavioral risks such as prostitution.[180] Congress hoped to reduce these behavioral risks in part by speaking out against prostitution and increasing awareness of the health risks created by such activity.[181] Even if Congress cannot achieve its goals

179. Kathleen Sullivan suggests a similar analysis in *Unconstitutional Conditions*. Sullivan, *supra* note 18, at 1500. She proposes that where Congress passes legislation with the purpose of "pressuring rights," as it did in passing the legislation analyzed in *South Dakota v. Dole*, strict scrutiny should apply. *Id.* at 1501. However, where Congress passes legislation that incidentally affects constitutional rights, minimal scrutiny should apply. *Id.* Sullivan uses a regulation that restricts the use of child support to expenditures on children as an example. *Id.* Although one could argue that such a restriction infringes the person's constitutional right to privacy because it prevents the recipient from spending money on other items, it is clear that Congress's purpose in passing the law was not to pressure constitutional rights. *Id.* Similarly, if a regulation required a funding recipient to affirmatively inform the public of a program's parameters, Congress would not be "pressuring rights" or attempting to control the public discourse. Accordingly, strict scrutiny would not be necessary to protect First Amendment rights.

180. 22 U.S.C. § 7611(a)(4) (2006).

181. *Id.* § 7601(23).

through the policy requirement, other means remain available through which Congress could voice its opposition to prostitution. If Congress desires to speak out against prostitution, it could do so directly through government agencies as opposed to NGOs. If the government itself espoused anti-prostitution messages, there would be little concern that the government could distort the marketplace of ideas.[182] Additionally, Congress could avoid the First Amendment problems raised by the policy requirement by altering the current terms of the condition. Instead of requiring the NGO itself to adopt a policy explicitly opposing prostitution, Congress could require the NGO to state that the United States Government explicitly opposes prostitution. Once again, this sort of statement would allow the government to speak out against prostitution while avoiding the risk that the public discourse might be altered in some way. Application of strict scrutiny to conditions like the policy requirement would prevent the government from dangling its purse in the eyes of financially strapped organizations in hopes of having them peddle the government's favored viewpoints in the marketplace of ideas.

CONCLUSION

In its current form, the Leadership Act requires NGOs, as a condition of receiving federal funds, to adopt a policy explicitly opposing prostitution.[183] Two federal circuit courts reviewed the regulation and arrived at different conclusions about the Act's constitutionality.[184] Each circuit court, however, based its decision on different aspects of the "unconstitutional conditions" and "government speech" doctrines.[185] The courts' diverging opinions are an expected product of an area of law that has been described as a "minefield to be traversed gingerly."[186] In addition to being generally

182. Kagan, *supra* note 72, at 55.
183. 22 U.S.C. § 7631(f).
184. *See generally* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218 (2d Cir. 2011); DKT Int'l, Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758 (D.C. Cir. 2007).
185. *See Alliance*, 651 F.3d at 231, 238; *DKT*, 477 F.3d at 763, 764.
186. Sullivan, *supra* note 18, at 1415.

confusing,[187] the current doctrines applied to conditions on the receipt of government subsidies inadequately serve the goals of the First Amendment. The First Amendment is designed to create an "uninhibited marketplace of ideas" where the public—not the government—makes decisions as to what viewpoints will be expressed.[188] By applying minimal scrutiny to viewpoint-discriminatory regulations simply because the regulation is a funding condition and not a direct prohibition,[189] the Supreme Court has effectively allowed Congress to do an "end-run" around First Amendment law. Presently, Congress can deter the expression of certain viewpoints as long as it does so through a funding condition.[190] This allows the government to push its favored viewpoint to prominence while diminishing the existence of contrary opinions.

In order to prevent the government from skewing the public debate in its favor, the Court should apply strict scrutiny to all funding conditions that require affirmative expression of the government's ideological viewpoint and that fail to make clear the expression is the government's rather than the private entity's. Application of a strict scrutiny standard to regulations like the Leadership Act would not eliminate Congress's ability to effectively promote its policies; it would simply require Congress to implement regulations that further policy objectives in a way that does not allow Congress to steer public discourse toward its favored viewpoint.

Strict scrutiny analysis for conditions like the policy requirement strikes a proper and workable balance between the rights of organizations and the needs of government. Accordingly, the Court should apply strict scrutiny to the policy requirement and any other

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187. Sunstein, *supra* note 18, at 594 ("The various puzzles produced by the [unconstitutional conditions] doctrine have created considerable doctrinal confusion and provoked a wide range of commentary.").

188. FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (quoting Leathers v. Medlock, 499 U.S. 439, 448–49 (1991)).

189. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991).

190. *Id.* at 207–08 (Blackmun, J., dissenting).

condition that requires an organization to affirmatively espouse the government’s favored viewpoint as if it were the organization’s own.