

# Speech, Subsidies, and Traditions: *AID v. AOSI* and the First Amendment

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Stating the issue in the term’s only First Amendment case, *Agency for International Development v. Alliance for Open Society International, Inc.*,<sup>1</sup> suffices for most to agree with its holding: May the federal government, as a condition for a private entity to receive funds to implement a government program, require the recipient to pledge ideological support for government policies? As the Court held, of course not. While the government may impose limits on its grants to ensure that the funds are used appropriately, such limits can’t regulate a private entity’s speech outside the funded project. The government may set conditions on its programs and control the delivery of a government message, but must not repress recipients’ expression (or their other constitutional rights and liberties) beyond the program’s scope.<sup>2</sup>

Yet Justice Antonin Scalia’s dissent—while continuing his too dismissive approach to the real threat to liberty from funding restrictions—raised a valid concern: the malleability of, and the constitutional source for, the Court’s articulated distinction between conditions “inside” and “outside” the program.<sup>3</sup> The distinction between inside-program speech and outside-program speech is, as the majority admitted, “hardly clear.”<sup>4</sup> This indefiniteness flags dangers of both underinclusiveness and overinclusiveness. The government must be checked from manipulating subsidies and the scope of its programs as a subterfuge to regulate its citizens’ beliefs and commu-

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<sup>1</sup> 133 S. Ct. 2321 (2013) [hereinafter *AID v. AOSI*].

<sup>2</sup> *Id.* at 2330–32.

<sup>3</sup> *Id.* at 2333–35 (Scalia, J., dissenting).

<sup>4</sup> *Id.* at 2328 (majority op.).

nications. On the other hand, the government in certain situations has a compelling need to consider outside viewpoints in selecting partners to accomplish its objectives.

These concerns can be alleviated, though, by recognizing that the inside/outside program classification is a useful analytical tool, but it's just that—a tool. The First Amendment provides the relevant limits on government-funding conditions. A core First Amendment principle is outlawing state regulation based on the ideas, messages, or viewpoints citizens express.<sup>5</sup> Although the government doesn't have to retain viewpoint neutrality with respect to its own speech and to further the objectives of its own undertakings, its imposition of viewpoint constraints on citizens effectively removes at least some of their speech from typical First Amendment protections. Just as the government can't exclude other types of expression from constitutional coverage without a historical warrant,<sup>6</sup> it shouldn't be allowed to leverage funding and other subsidies to withdraw core First Amendment safeguards from private expression without a supporting tradition. Enduring traditions authorize the government to fund speech within a public project to accomplish state purposes and to choose those funding recipients who will effectively accomplish the state's objectives. But no tradition allows the government either to control outside-program speech or to manipulate a program's scope to assert control over a traditional sphere of expression.

In this essay, I'll outline the Court's prior holdings on the constitutionality of conditions on government funding and other subsidies before turning to *AID v. AOSI*. While I applaud *AID*'s holding, its inside/outside program distinction, though appropriate in the presented context, can't govern every funding condition. The overarching appraisal should depend on continued judicial acquiescence in traditional government-funding practices. Inside-program limitations are one such tradition, but additional complementary traditions exist that must be taken into account—such as protecting traditional public forums and other expressive spheres—to check government overreach.

<sup>5</sup>See, e.g., *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

<sup>6</sup>*United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010).

## I. Existing First Amendment Limits on Conditioning Funds and Subsidies

The Spending Clause grants Congress discretion to tax and spend for the “general Welfare,” allowing Congress to subsidize activities of—or fund programs implemented by—private entities.<sup>7</sup> As a condition for receiving such grants, Congress may establish limits to ensure their use in Congress’s intended manner. The recipient doesn’t have to accept the subsidy and the accompanying restrictions. But an assenting recipient typically must abide by the attached strings.

Such conditions may, in specific circumstances, constrain a recipient’s expression. For example, if Congress offered a grant to private entities to advocate for democracy in the Middle East, the grant recipients could be barred from using the money to advocate for communism, monarchy, or any other form of government. Expressive conditions for obtaining funding or other subsidies don’t violate the First Amendment when the limitations merely either refuse to fund specified expressive activities or are necessary to accomplish the objectives of a particular government program.

*Regan v. Taxation with Representation of Washington* provides an illustration.<sup>8</sup> A nonprofit public-interest corporation claimed that the government had unconstitutionally conditioned its receipt of tax-deductible contributions on its forbearance from undertaking substantial lobbying activities. The nonprofit urged that the government was therefore denying a benefit (tax-deductible contributions) because it was exercising an expressive right (to influence legislation). In rejecting this claim, the Supreme Court reasoned that the nonprofit hadn’t been denied “any independent benefit on account of its intention to lobby.”<sup>9</sup> The nonprofit could still lobby and receive tax-deductible contributions for its other activities through an affiliated organization; Congress merely ensured that the public fisc wasn’t used to support its lobbying.<sup>10</sup> Moreover, the First Amendment doesn’t compel government support of expressive activities, so Congress’s decision

<sup>7</sup>See U.S. Const. art. I, § 8, cl. 1.

<sup>8</sup>461 U.S. 540 (1983).

<sup>9</sup>*Id.* at 545.

<sup>10</sup>*Id.* at 544–45.

to subsidize most nonprofit activities while not subsidizing lobbying was well within its taxing and spending power.<sup>11</sup>

*Rust v. Sullivan* employed a similar rationale to uphold a funding restriction operating within a government program.<sup>12</sup> Health and Human Services departmental regulations barred physicians in a federally financed family-planning project that offered pre-conception counseling, education, and reproductive health services from counseling abortion as a method of family planning. The regulations didn't, however, prevent the project grantee from providing abortion counseling and even abortion services; the grant recipient just had to do so through programs separate from and independent of the funded project.<sup>13</sup> The Court held that the government was free to bar funding recipients from using project funds to counsel abortion:

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 . . . . In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>14</sup>

Such selective grants within public programs—along with mechanisms to ensure the funds are used in the intended manner—have a long history.<sup>15</sup> This tradition buoyed the constitutionality of the regulations challenged in *Rust*. Nonetheless, the Court acknowledged that subsidy conditions restricting the recipient's expression may sometimes run aground the First Amendment.<sup>16</sup>

The First Amendment is violated, for instance, if the government attempts to leverage a funding grant to regulate the recipient's speech beyond the program. *FCC v. League of Women Voters of California* addressed a challenge to a federal statute barring any

<sup>11</sup> *Id.* at 546–50.

<sup>12</sup> 500 U.S. 173 (1991).

<sup>13</sup> *Id.* at 196.

<sup>14</sup> *Id.* at 193.

<sup>15</sup> For an early example, see Act for the Relief of Sick and Disabled Seamen, 1 Stat. 605 (July 16, 1798) (allowing president to “direct” under his “general instructions” funding for the temporary relief of sick or disabled seamen).

<sup>16</sup> *Rust*, 500 U.S. at 197–200.

noncommercial broadcasting station receiving federal funds from editorializing.<sup>17</sup> One of the government's defenses to this challenge was that the ban merely refused to subsidize public broadcasting station editorials, as permitted by *Regan*.<sup>18</sup> But the Supreme Court disagreed. The challenged program wasn't simply a permissible refusal to expend public funds on editorializing by public broadcasting stations, but an absolute ban on such editorials by stations receiving any federal financial support.<sup>19</sup> Although the nonprofit in *Regan* could operate separate affiliates and thereby obtain the tax breaks for its non-lobbying activities while ensuring that the public didn't support its lobbying activities, no such mechanism existed in *League of Women Voters*.<sup>20</sup> A broadcasting station receiving any money from a federal grant—no matter how small a percentage of its operating funds—was absolutely barred from all editorializing, even when private funds solely supported the editorials.<sup>21</sup> While the government has no constitutional obligation to expend public money to support a private entity's expression, it can't exploit funding conditions to regulate or ban other expression by the recipient.

Moreover, the government is limited in regulating some traditional spheres of expression, even when the sphere is funded or subsidized by the government. Take traditional public forums, for instance. Private speakers using state-owned property historically open for expressive activity (such as parks, streets, and sidewalks) are granted a benefit that could be described as a subsidy from the government. But this subsidy doesn't allow the state to support only selected speakers or specified content or viewpoints on its property without demonstrating the necessity of doing so to serve a compelling government interest.<sup>22</sup> Government funding similarly doesn't allow state control over all expression of teachers and students in university classrooms and other university facilities.<sup>23</sup> Such historical enclaves or forums for expressive activity fall outside the typi-

<sup>17</sup> 468 U.S. 364 (1984).

<sup>18</sup> *Id.* at 399.

<sup>19</sup> *Id.* at 400.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>23</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 187–88 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603–06 (1967).

cal tradition allowing the government to selectively fund certain expression.

A subsidy condition that distorts these historical spheres triggers First Amendment concerns. An illustration is *Legal Services Corporation v. Velazquez*.<sup>24</sup> Congress established the nonprofit Legal Services Corporation to distribute appropriated federal funds to local grantee organizations to use in hiring and supervising lawyers to represent indigent clients in noncriminal matters (such as proceedings for welfare benefits). Attorneys receiving these funds to represent an indigent client couldn't, however, assert any constitutional or statutory challenge to the validity of existing welfare laws in the course of their representation.<sup>25</sup> The government urged that this condition be upheld because it defined the contours of the federal program and merely declined to fund challenges to existing welfare laws—just as *Rust* upheld the government's refusal to fund abortion counseling.<sup>26</sup> But the Supreme Court disagreed with this analogy, reasoning that the LSC-funded attorneys, instead of promoting a government message as the physicians in *Rust* did, were to represent indigent clients *against* the government.<sup>27</sup> In other words, the government was providing funds for attorneys to represent the interests of indigent clients rather than to represent the government's interests or viewpoints. Congress's attempt to control attorneys' traditional representation of their clients' interests distorted the "usual functioning" of the legal system.<sup>28</sup> As this funding condition insulated existing welfare laws from challenge in contravention of traditional norms of expression and advocacy before the judiciary, the Court refused to accept this condition as merely defining the limits of the funded program: "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."<sup>29</sup>

The plurality in *United States v. American Library Association, Inc.* also considered the traditional usage of an expressive sphere in

<sup>24</sup> 531 U.S. 533 (2001).

<sup>25</sup> *Id.* at 536–37.

<sup>26</sup> *Id.* at 540–41.

<sup>27</sup> *Id.* at 542.

<sup>28</sup> *Id.* at 543.

<sup>29</sup> *Id.* at 547.

concluding that Congress could require libraries receiving federal subsidies for Internet access to install filtering software to block sexual materials.<sup>30</sup> The plurality explained that “public libraries have traditionally excluded pornographic material from their other collections,” which indicated the reasonableness of Congress’s establishing a parallel limitation on Internet subsidy programs.<sup>31</sup> While the plurality—which consisted of the *Velazquez* dissenters—subsequently continued to distinguish *Velazquez*’s distortion rationale on a cramped basis,<sup>32</sup> the distinct traditions of each medium supported the disparate holdings. LSC funding interfered with the usual operation of expression in the legal system by banning attorneys representing welfare claimants from making a specified type of argument. In contrast, public libraries traditionally limited or barred access to pornographic material, so the funding limitation didn’t interfere with the usual operations of libraries.

These decisions highlight the constitutionality of certain traditional expressive conditions on subsidies and grants. But instead of following these traditions, Congress enacted an anomalous ideological-commitment provision in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the “Leadership Act”).<sup>33</sup> This commitment provision required organizations seeking funding from the federal government for overseas HIV and AIDS programs to adopt a policy explicitly opposing prostitution and sex trafficking.<sup>34</sup> This policy requirement was challenged by American organizations combating HIV and AIDS overseas who were concerned that adopting such a policy would require them to censor their privately funded communications and would detrimentally affect their programs by disrupting their efforts to assist prostitutes

<sup>30</sup> 539 U.S. 194, 210–13 (2003) (plurality op.).

<sup>31</sup> *Id.* at 212.

<sup>32</sup> See *id.* at 213. The plurality indicated that the distortion rationale didn’t apply because public libraries didn’t have a comparable role to attorneys that “pit[ted] them against the Government.” *Id.* But *Velazquez* claimed support for analyzing the “accepted usage” of a particular medium from prior cases that likewise didn’t involve an antagonistic role, such as broadcasting and student publications. 531 U.S. at 543. Unsurprisingly, then, no other member of the *American Library Association* Court joined the plurality’s proffered distinction.

<sup>33</sup> Pub. L. No. 108-25, 117 Stat. 711, codified as amended at 22 U.S.C. §§ 7601–82.

<sup>34</sup> 22 U.S.C. § 7631(f).

and to collaborate with certain foreign governments. The Supreme Court resolved this constitutional challenge in *AID v. AOSI*.

## II. Commitments and *AID*

The Leadership Act detailed a “comprehensive, integrated” strategy to combat the “pandemic” of HIV/AIDS (the fourth-highest cause of death worldwide at the time) and the associated hike in the spread of tuberculosis and malaria stemming from the compromised immune systems of those with the disease.<sup>35</sup> Part of this strategy authorized appropriations of billions of dollars in funding to non-governmental organizations to assist in the worldwide fight against HIV/AIDS. In order to receive these funds, organizations didn’t have to use or endorse a comprehensive approach to combating HIV/AIDS, nor did they need to support or participate in any religiously or morally objectionable program or activity.<sup>36</sup> But because Congress found that prostitution and sex trafficking contributed (along with numerous other identified factors) to the spread of HIV/AIDS,<sup>37</sup> it incorporated two related conditions in its Leadership Act funding grants. First, the funds couldn’t be used “to promote or advocate the legalization or practice of prostitution or sex trafficking.”<sup>38</sup> Second, in order to receive any funds, a group or organization had to “have a policy explicitly opposing prostitution and sex trafficking.”<sup>39</sup> To fulfill this second condition, known as the policy requirement, the funding recipient had to pledge in the award document its opposition to “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.”<sup>40</sup>

Several groups receiving federal funding to battle the HIV/AIDS pandemic challenged the constitutionality of the policy

<sup>35</sup> *Id.* §§ 7601 & 7611(a).

<sup>36</sup> *Id.* § 7631(d)(1).

<sup>37</sup> *Id.* § 7601(23).

<sup>38</sup> *Id.* § 7631(e).

<sup>39</sup> *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, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.”).

<sup>40</sup> 45 CFR § 89.1(b).



requirement.<sup>41</sup> These organizations argued that, unlike the first grant condition banning the use of funds to support prostitution or sex-trafficking advocacy, the policy requirement didn't impose a condition on the *funds*, but instead impermissibly imposed a condition on the *recipient*, compelling its espousal of the government's viewpoint. This requirement effectively prevented the organizations from expressing their own viewpoints even with private funds, despite the fact that organizations were to combat a malady rather than to deliver a government message. The government protested that the policy requirement didn't entail legal compulsion, but was rather merely a mechanism to ensure that organizations receiving federal funds subscribed to the government's goal of eradicating prostitution and sex trafficking. Because this goal was an integral aspect of the Leadership Act, the government asserted that *Rust* governed. But the district court disagreed, issuing a preliminary injunction barring the government from cutting the organizations' funding or otherwise penalizing them for their privately funded speech.<sup>42</sup>

While the appeal was pending, the administering federal agencies developed new guidelines allowing a recipient organization to affiliate with a group that "engages . . . in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking" as long as the recipient maintained "objective integrity and independence from any affiliated organization."<sup>43</sup> The requisite independence depended on the totality of the circumstances, including but not limited to separate legal status, personnel, financial records, facilities, and outward identification.<sup>44</sup> The court of appeals remanded for reconsideration in light of these new guidelines, with the district court issuing a new but substantially similar preliminary injunction.<sup>45</sup> The

<sup>41</sup> Alliance for Open Society International, Inc., filed suit in 2005, with Pathfinder International joining as a plaintiff later that year. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 237–38 (S.D.N.Y. 2006). In 2008, the Global Health Council and InterAction, which are associations of organizations that collectively include most U.S. organizations receiving funding under the Leadership Act, also joined as plaintiffs. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 570 F. Supp. 2d 533, 538, 550 (S.D.N.Y. 2008).

<sup>42</sup> 430 F. Supp. 2d 222, 278 (S.D.N.Y. 2006).

<sup>43</sup> 45 CFR § 89.3.

<sup>44</sup> *Id.* § 89.3(b)(1)–(5).

<sup>45</sup> 570 F. Supp. 2d 533, 550 (S.D.N.Y. 2008).

court of appeals then affirmed<sup>46</sup>—and was in turn affirmed by the Supreme Court in a 6–2 opinion by Chief Justice John Roberts.<sup>47</sup>

### A. *The AID Opinion*

Chief Justice Roberts opened his legal analysis with first principles. The First Amendment blocks any government attempt to force citizens to pronounce a specific message or to endorse a particular idea or viewpoint.<sup>48</sup> The challenged policy requirement transgressed this basic principle by mandating that funding recipients agree to oppose prostitution and sex trafficking. A direct regulation sanctioning citizens or certain groups of citizens who didn't pledge their fealty to the government's policy on prostitution and sex trafficking undeniably would offend the First Amendment. The issue was whether the government could avoid this result by imposing the mandate as a funding condition rather than a direct regulation of speech.

Although acknowledging that funding conditions often affect expressive rights without violating the Constitution—such as in *American Library Association* and *Regan*—the Court highlighted that, in certain cases, such conditions unconstitutionally abridge protected First Amendment expression. Contrary to the dissent's misreading of the Court's prior precedents, unconstitutional funding conditions aren't merely those that are coercive or unrelated to the government program at issue. Rather, the Court interpreted the relevant precedential distinction as “between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the program itself.”<sup>49</sup> While conceding this line was “hardly clear,” partially because “the definition of a particular program can always be manipulated to subsume the challenged condition,” the Court reiterated its prior assurance that “Congress cannot recast a condition on funding as a mere defini-

<sup>46</sup> *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 240 (2d Cir. 2011) (2–1), reh'g en banc denied, 678 F.3d 127, 128 (2d Cir. 2012) (three judges dissenting).

<sup>47</sup> *AID v. AOSI*, 133 S. Ct. 2321 (2013). Justice Scalia, joined by Justice Clarence Thomas, dissented, while Justice Elena Kagan was recused.

<sup>48</sup> *Id.* at 2327.

<sup>49</sup> *Id.* at 2328.

tion of its program in every case.”<sup>50</sup> The Court then outlined the precedential support from *Regan*, *League of Women Voters*, and *Rust* for distinguishing between conditions defining the federal program and those extending beyond the program’s boundaries.<sup>51</sup>

Although the Court’s distinction between inside- and outside-program speech is aptly supported by these precedents, that isn’t the only relevant guidepost in determining the constitutionality of funding conditions. The Court at least implicitly acknowledged that other indicators existed by describing the difference between conditions operating within and without the government program as the relevant precedential distinction “[i]n the present context.”<sup>52</sup> But the Court’s narrow focus on this particular distinction might still be faulted—as the dissent pointed out—for lacking any stated connection to the First Amendment’s underlying policies or foundational principles.<sup>53</sup> Without this grounding, the distinction, being dependent on the congressional definition of the program, is easily manipulated by the government. While reassuring that Congress couldn’t merely recast funding conditions as program definitions “in every case,” the Court didn’t illuminate the principles that would preclude such manipulation beyond its citation to *Velazquez*.<sup>54</sup> On the positive side, though, at least the Court allowed itself leeway to establish further limitations in subsequent controversies while selecting the inside/outside program distinction as the appropriate guide under the presented circumstances.

The Court invalidated the policy requirement under this guide because it compelled “the affirmation of a belief that by its nature” couldn’t be confined within the Leadership Act’s scope.<sup>55</sup> The Court first explained that the policy requirement didn’t operate merely to prevent the use of federal funds for promoting or supporting prostitution and sex trafficking; the other funding condition in the Leadership Act already accomplished this goal by specifically restricting funds from being used for such purposes. The policy requirement

<sup>50</sup> *Id.* (quoting *Velazquez*, 531 U.S. at 547).

<sup>51</sup> *Id.* at 2328–30.

<sup>52</sup> 133 S. Ct. at 2328.

<sup>53</sup> Cf. *id.* at 2333 (Scalia, J., dissenting).

<sup>54</sup> *Id.* at 2328 (quoting *Velazquez*, 531 U.S. at 547) (internal quotation marks omitted).

<sup>55</sup> *Id.* at 2332.

also was more than a means for selecting funding recipients, as it established an ongoing mandate on a recipient's expression, authorizing the government to terminate a grant based on the recipient's subsequent speech and activities. The Court regarded the policy requirement as not designed for the government "to enlist the assistance of those with whom it already agrees," but rather to oblige "a grant recipient to adopt a particular belief as a condition of funding."<sup>56</sup>

Requiring funding recipients to adopt the government's position on a civic issue as their own, the Court believed, inevitably affected protected expression outside the program's scope. The funding recipient had to comply with the pledge in all of its dealings; it couldn't profess support for eradicating prostitution and sex trafficking when spending Leadership Act funds, but then adopt another position while conducting operations "on its own time and dime."<sup>57</sup> This prohibition violated *Rust's* principle that funding conditions may limit the *program's* scope but can't restrict the *recipient's* activities beyond the program.<sup>58</sup>

The affiliation guidelines didn't afford a lifeline for the policy requirement's constitutionality. The significance of affiliates in prior cases stemmed from their capacity to grant the funding recipient a means to exercise its expressive rights outside the program's scope. But that wasn't possible here when the government was compelling the recipient organization to adopt a particular belief as its own and then to adhere to that belief. A truly distinct affiliate wouldn't "afford a means for the *recipient* to express *its* beliefs," whereas a closely identified one would require the recipient organization to speak from both sides of its mouth in "evident hypocrisy."<sup>59</sup>

The government's final claims floundered on doctrinal and evidentiary grounds. The government protested that, without the policy requirement, the Leadership Act could be undermined if recipients used federal funds to conduct their operations and then funneled their other private funds to promote prostitution or sex trafficking. But the Court determined that neither proof nor precedential support

<sup>56</sup> *Id.* at 2330.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2330–31 (citing *Rust*, 500 U.S. at 197).

<sup>59</sup> 133 S. Ct. at 2331 (emphasis in original).

existed for this contention. The government offered no substantiation for its suggestion that federal funding would supplant private funding rather than pay for new programs or expand existing ones. Moreover, the government's argument contravened the holding in *League of Women Voters* and much of the analysis in *Regan* and *Rust*.<sup>60</sup> The policy requirement wasn't merely an attempt to ensure that the government program wasn't undermined, as the government maintained, but a requirement that the recipient organizations "pledge allegiance to the Government's policy of eradicating prostitution."<sup>61</sup> Such a required affirmation of belief "by its nature" couldn't be confined within the program's scope, and therefore violated the First Amendment.<sup>62</sup>

### B. *Dissenting from AID*

Justice Scalia's dissent, joined by Justice Clarence Thomas, renewed his assault on First Amendment constraints on government-funding conditions.<sup>63</sup> His premise is that funding conditions only "abridge" First Amendment speech when they operate to compel, coerce, or ban expression.<sup>64</sup> Perhaps such conditions might also be unconstitutional when wholly unrelated to the federal program, although Scalia expressed serious doubts regarding whether every such "disadvantage is a coercion."<sup>65</sup> In general, as long as the government is merely offering a limited funding program that each organization can freely accept or reject, the First Amendment isn't, in his view, infringed by any attached conditions on the funds. It is merely "the reasonable price of admission to a limited governmental spending program."<sup>66</sup>

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2332.

<sup>62</sup> *Id.* at 2333.

<sup>63</sup> *Id.* at 2332 (Scalia, J., dissenting). For prior examples of similar protestations by Justice Scalia, see *Velazquez*, 531 U.S. at 552 (Scalia, J., dissenting); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 595–99 (1998) (Scalia, J., concurring); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236–37 (1987) (Scalia, J., dissenting).

<sup>64</sup> *AID*, 133 S. Ct. at 2335 (Scalia, J., dissenting); *Velazquez*, 531 U.S. at 552, 558 (Scalia, J., dissenting); *Finley*, 524 U.S. at 595–99 (Scalia, J., concurring); *Ark. Writers' Project*, 481 U.S. at 236–37 (Scalia, J., dissenting).

<sup>65</sup> *AID*, 133 S. Ct. at 2333 (Scalia, J., dissenting).

<sup>66</sup> *Id.* at 2335.

According to Justice Scalia, the Leadership Act's policy requirement was merely a method to select those organizations to implement the government's program to eradicate HIV/AIDS.<sup>67</sup> He urged that the government was allowed to discriminate on viewpoint in making such selections, enrolling those who support its policies while leaving the unsupportive on the sidelines. As is his wont, Scalia besprinkled his reasoning with colorful illustrations: The United States shouldn't have to use a domestic equivalent of Hamas to distribute food assistance overseas irrespective of the organization's distributive efficiency, and a healthy-eating public service program could exclude the American Gourmet Society, which is ambivalent about healthy foods.<sup>68</sup> The Leadership Act's policy requirement here, he contended, was likewise reasonable in selecting, as government-funded HIV/AIDS combatants, only those organizations believing in eradicating prostitution.<sup>69</sup>

But Justice Scalia's position ignores the pervasiveness of—and the threat to liberty from—the government's ability to leverage funding and other subsidy conditions to regulate speech. Such conditions can be used to effectively control expression as much as even so-called coercive regulations. Numerous forms of public discourse are funded or subsidized by the government. For instance, print media receive subsidized mailing rates, nonprofits enjoy tax-exempt status, and higher education and the arts obtain public financial support. Not to mention the thousands of grant programs the government operates: government agencies have an estimated 200,000 grant agreements and other contracts with approximately 33,000 human-service nonprofit organizations, with government funding providing almost two-thirds of all revenue for these organizations.<sup>70</sup> The threat to liberty if the government can leverage all of these subsidies and grants to require entities to pledge allegiance to government policies wouldn't be speculative, but a real abridgement on free expressive rights.

<sup>67</sup> *Id.* at 2332.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 2333.

<sup>70</sup> Elizabeth T. Boris et al., Human Service Nonprofits and Government Collaboration: Findings from the 2010 National Survey of Nonprofit Government Contracting and Grants vii, 5–8 (Oct. 2010), available at <http://www.urban.org/publications/412228.html>.

Cato's amicus brief to the Supreme Court provided apt examples.<sup>71</sup> If the government, via the Leadership Act, could require funding recipients to pledge opposition to prostitution because prostitution contributed to HIV/AIDS, the government could also mandate that funding recipients pledge opposition to all organizations (even religious one) objecting to contraceptive use, as Congress found condom use to be effective in preventing the spread of HIV/AIDS.<sup>72</sup> Or, in the federal healthcare context, because Congress identified a national "policy objective" in expanding healthcare coverage,<sup>73</sup> the government could use Justice Scalia's logic to require, as a condition for physicians to receive Medicaid benefits or for private entities to run insurance exchanges, the recipients to pledge their support for the Affordable Care Act or other government interventions in health care. Or, because of findings that marijuana use may promote certain cancers and disrupt the immune system, Congress could require that research facilities and hospitals, in order to receive funding grants to fight cancer, adopt a policy opposing the legalization of marijuana.<sup>74</sup> Thousands of such government programs exist—and all are similarly manipulable to reward favored viewpoints while punishing disfavored ones.

Consider again the Leadership Act. The only policy required of funding recipients was opposition to prostitution and sex trafficking. But why? Why not a policy requiring the organization to promote contraceptive use, which was at least as (and likely more) integral to the Leadership Act's objectives than opposing prostitution?<sup>75</sup> But

<sup>71</sup> See Brief for Cato Institute as Amicus Curiae Supporting Respondents at 11, *AID v. AOSI*, 133 S. Ct. 2321 (No. 12-10).

<sup>72</sup> See 22 U.S.C. § 7601(35). Yet instead of adopting anything close to such a mandate, the Leadership Act took the exact opposite tact and specified that organizations didn't have to support or participate in any religiously or morally objectionable program or activity. *Id.* § 7631(d)(1). As discussed below, this in itself signifies the danger, as Congress was clearly favoring religious or moral points of view—even when such views contravened clear program objectives—while requiring a pledge regarding prostitution, which appeared no more central (and likely less so) to the program's objectives.

<sup>73</sup> See 42 U.S.C. § 18091(2)(C).

<sup>74</sup> See Brief of the Rutherford Institute as Amicus Curiae Supporting Respondents at 23, *AID v. AOSI*, 133 S. Ct. 2321 (No. 12-10).

<sup>75</sup> The policy requirement was a committee amendment to the Leadership Act by Representative Christopher Smith, whose primary purpose apparently was targeting

instead of requiring such a policy, Congress specified that funding recipients didn't have to either endorse a comprehensive approach to combating HIV/AIDS or support any religiously or morally objectionable program or activity.<sup>76</sup> Congress thereby allowed the participation of many not believing in all the program's objectives, while excluding only those not wanting to adopt a policy against prostitution and sex trafficking. And Congress wasn't finished playing favorites; it then waived the policy requirement for specified organizations.<sup>77</sup> The Leadership Act thus cherry-picked the application of a preferred political ideological pledge as the basis to award billions of dollars of funding, funding essential to many of the recipient organizations.<sup>78</sup> In the real world, that's an abridgement on expression.

Justice Scalia's dissent next took aim at the majority's inside/outside program distinction, asserting in part that it was unsupported by precedent.<sup>79</sup> He premised this argument, though, on a misreading of the Court's cases. He conjured a new rationale for *Rust's* discussion of the inside/outside program distinction,<sup>80</sup> dismissed aspects of *Regan* as "nonessential" footnoted material (even though the material was also contained in the opinion's text and has been cited

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prostitution and sex trafficking in general rather than merely diminishing HIV/AIDS infections. See U.S. Leadership Act Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the H. Comm. on Int'l Relations, 108th Cong. 148–49 (statement of Rep. Christopher Smith). Smith's amendment barely passed the committee in a 24–22 vote. *Id.* at 160. This legislative history buttresses the inference from the act's text as a whole that the targeting of prostitution and sex trafficking—which was mentioned in just one of the act's 41 findings—wasn't as central as many other provisions. See 22 U.S.C. §§ 7601–82.

<sup>76</sup> 22 U.S.C. § 7631(d)(1).

<sup>77</sup> *Id.* § 7631(f) (excluding from the policy requirement all United Nations agencies, the International AIDS Vaccine Initiative, the World Health Organization, and the Global Fund to Fight AIDS, Tuberculosis and Malaria).

<sup>78</sup> See Boris, *supra* note 70, at vii, 5–8 (detailing that approximately 60 percent of all human-service nonprofit organizations obtained over half their funds from government, with government providing in the aggregate 65 percent of all nonprofit operating funds).

<sup>79</sup> AID, 133 S. Ct. at 2333–34 (Scalia, J., dissenting).

<sup>80</sup> *Id.* at 2333. Justice Scalia acknowledged that the distinction "was alluded to" in *Rust*, but was only relevant because *Rust* didn't involve an anti-abortion program. *Id.* But he cited no specific language from *Rust* for this proposition, and with good reason: *Rust's* discussion of subsidies operating within the program versus those operating on the recipient had no such limitation. *Rust*, 500 U.S. at 196–99.



as essential to the holding in subsequent cases),<sup>81</sup> and distinguished *League of Women Voters* by citing a segment of the opinion that addressed a wholly separate alternative argument.<sup>82</sup> Although inventive, his interpretation wasn't a fair reading of any of these cases, which, as mentioned previously, aptly support the majority's inside/outside program distinction.

Yet Justice Scalia also raised two more consequential objections to the inside/outside distinction, ones that the majority didn't fully answer. First, he highlighted its constitutional grounding: "I am at a loss to explain what this central pillar of the Court's opinion . . . has to do with the First Amendment."<sup>83</sup> Although he immediately turned in his next sentence to his (mis)reading of its precedential support, he had stumbled upon an important question: the First Amendment foundation for distinguishing between conditions operating within and without a government program.

He closed with a more pragmatic appeal. He maintained that it was "common" for the government to consider viewpoints in selecting those to accomplish its objections, but doubted that such ideological selections could be made after the Court's holding: "Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. As far as the Constitution is concerned, it is quite impossible to distinguish between the two."<sup>84</sup> He therefore envisioned a rash of future challenges to funding decisions on ideological grounds.

<sup>81</sup> AID, 133 S. Ct. at 2334. Justice Scalia maintained that the fact that the nonprofit could operate a separate lobbying affiliate in *Regan* was "alluded to in a footnote" and "entirely nonessential to the Court's holding." *Id.* This is misleading because the affiliation opportunity was also discussed in the text of *Regan's* analysis, 461 U.S. at 544–45, and has been viewed as the basis of *Regan's* holding in subsequent cases, including one by *Regan's* author. See *Rust*, 500 U.S. at 197–98.

<sup>82</sup> AID, 133 S. Ct. at 2334. Justice Scalia's proffered distinction solely relied on a quote from page 397 of *League of Women Voters*. See *id.* This portion of *League of Women Voters*, however, addressed whether the government's editorializing ban was permissible as a direct regulation of speech and not the government's wholly alternative argument that its editorializing ban—even if an invalid direct regulation—was a valid funding condition. *League of Women Voters*, 468 U.S. at 399–401.

<sup>83</sup> AID, 133 S. Ct. at 2333.

<sup>84</sup> *Id.* at 2335.

His last two objections aren't without their merit, and deserve a fuller answer than was necessary for the majority to provide in resolving the case—so I offer a response in the following section. I'll first discuss a potential constitutional grounding for First Amendment limitations on funding conditions. Then I'll explain how this grounding both subsumes the majority's holding and provides a basis for appropriately resolving other controversies, allowing the government to make necessary selection choices while respecting expressive liberty.

### III. First Amendment Traditions as Limits on Funding Conditions

Expressive conditions on funding and other subsidies highlight a tension between two fundamental First Amendment precepts: the viewpoint-neutrality mandate and government control of its own speech and undertakings. This tension may be reconciled, however, through longstanding American expressive traditions.

#### A. *Viewpoint Neutrality and State Subsidies*

A foundational First Amendment principle is that the government can't restrict speech based on the ideas, messages, or viewpoints expressed.<sup>85</sup> This tenet has been described by scholars as the cardinal concern of the First Amendment.<sup>86</sup> The Supreme Court appears to agree: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>87</sup>

This maxim even extends to categories of speech outside the First Amendment's typical coverage. For example, although fighting words, threats, fraud, obscenity, and similar traditional unprotected categories of utterances may be outlawed without offending the First

<sup>85</sup> See, e.g., *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>86</sup> See, e.g., Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 696 (2011); Kathleen M. Sullivan, *Artistic Freedom, Public Funding, and the Constitution, in Public Money and the Muse: Essays on Government Funding for the Arts* 80, 89–90 (Stephen Benedict ed., 1991).

<sup>87</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Amendment, the government can't pick and choose favored viewpoints within these otherwise unprotected categories.<sup>88</sup> To take another example, while the government is allowed almost free rein to limit speech or make content choices on state-owned property that hasn't been traditionally or intentionally opened for the public's indiscriminate expressive use, viewpoint discrimination within these nonpublic fora is still prohibited.<sup>89</sup> This mandate of state regulatory neutrality in ideas and messages—even in areas outside the First Amendment's typical protections—is necessary to ensure the vigorous public discourse between speakers and audiences on which democratic self-government and the marketplace of ideas depend.

But despite this viewpoint-neutrality regulatory mandate, the government has to make viewpoint choices with respect to its own speech and undertakings. The First Amendment simply can't demand that the state acts in a viewpoint-neutral manner when operating within its own managerial sphere to accomplish its objectives. The government often must select certain viewpoints in expressing its own messages to the public—the health hazards of smoking, the benefits of a healthy diet, the need for particular legislation, the means for preventing forest fires, and strategies to prevent HIV/AIDS. The government also adopts certain viewpoints when it designs programs for private partners to express its messages or to support its undertakings. A blanket prohibition on viewpoint discrimination with respect to the government's own speech and undertakings is neither possible nor desirable.<sup>90</sup> So even though government can't "burden the speech of others in order to tilt public debate in a preferred direction," it can express its views through its own speech, undertakings, and associations with private parties.<sup>91</sup>

But a real concern arises because every time the government makes a choice to subsidize a particular message, that choice "has the effect of 'singling out a disfavored group on the basis of speech

<sup>88</sup> *R.A.V.*, 505 U.S. at 386.

<sup>89</sup> See, e.g., *Rosenberger*, 515 U.S. at 829–30; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–49 (1983).

<sup>90</sup> See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. Rev.* 1713, 1825 (1987) (positing government might "grind to a halt were the Court to seriously prohibit viewpoint discrimination in the internal management of speech").

<sup>91</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011).

content,' namely the group that does not receive the subsidy because it seeks to express a different message."<sup>92</sup> Moreover, government's unique access to and control over speech avenues—and its trillions of dollars of financial resources—risk unduly influencing public discourse and distorting the marketplace of ideas. State involvement with speech is pervasive: providing public forums, subsidizing mailing rates, authorizing tax breaks, and funding numerous activities wholly or partially involving expression. Many of these government-subsidized benefits have traditionally been accorded without reference to viewpoint and are relied on by private parties.<sup>93</sup> The government must be checked from interfering with private speech in all these spheres to ensure state accountability, to safeguard individual liberty, and to foster the independent expression of ideas.

Subsidized private speech thus can't always be immune from the viewpoint-neutrality mandate. And the Court's precedents acknowledge as much. Otherwise, governments could exclude individuals from public property based on the messages expressed;<sup>94</sup> publicly funded libraries could remove books based on viewpoint;<sup>95</sup> public universities could bar student groups based on their objectionable perspectives;<sup>96</sup> public art grants could be awarded based on favored government themes;<sup>97</sup> and public universities could fire professors with unorthodox beliefs.<sup>98</sup> But still, sometimes the government has

<sup>92</sup> David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 690 (1992).

<sup>93</sup> See, e.g., *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151–52 & n.7 (1946) (discussing the longstanding history of special postage rates based on objective criteria for specified classes of publication and their importance to the publishing industry).

<sup>94</sup> But see *Rosenberger*, 515 U.S. at 829–31 (holding university engaged in impermissible viewpoint discrimination by excluding religious perspectives from its student publication funding); *Perry Educ. Ass'n*, 460 U.S. at 49 (recognizing that viewpoint discrimination is prohibited in even nonpublic fora).

<sup>95</sup> But see *Bd. of Educ. v. Bd. of Educ.*, 457 U.S. 853, 870–72 (1982) (plurality op.) (concluding books couldn't be removed from a school library due to partisan or ideological ideas).

<sup>96</sup> But see *Healy v. James*, 408 U.S. 169, 187–88 (1972) (holding public university couldn't deny school affiliation to a student group because the school found "the views expressed by [the] group to be abhorrent").

<sup>97</sup> But see *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583–87 (1998) (indicating that "directed viewpoint discrimination" or "penalt[ies] on disfavored viewpoints" in public arts funding would violate the First Amendment).

<sup>98</sup> But see *Rust*, 500 U.S. at 200 (recognizing that a university is a "traditional sphere of free expression so fundamental to the functioning of our society" that First

to make funding choices based in part on viewpoint, such as funding a center for democracy (but not communism). The difficulty is drawing a principled line, grounded in the First Amendment, between permissible and impermissible viewpoint-based funding.

The inside/outside program distinction is helpful here, but it can't reconcile all the Court's precedents. Consider *Velazquez* again.<sup>99</sup> The LSC regulations there, as Justice Scalia explained in dissent, allowed "funding recipients to establish affiliate organizations to conduct litigation and other activities that fall outside the scope of the LSC program."<sup>100</sup> In other words, the regulations only operated within the program and didn't constrain the recipient. Yet the Court still invalidated it. More than the inside/outside principle was—and still is—afoot.

So consider a broader perspective. The concern with viewpoint-based government funding arises when the conditions affect citizens' expression. Such viewpoint constraints effectively remove at least some speech from the very heart of the First Amendment, that is, its ban on state favoritism toward certain ideas and messages. In other situations in which the Court has allowed analogous government incursions into core First Amendment principles, a supporting historical tradition has been required.<sup>101</sup> The basic premise is that such a history demonstrates that the First Amendment was never intended to serve as a shield against the government action at issue.<sup>102</sup> The presumption is that the First Amendment's typical restraints apply unless the government establishes a tradition to the contrary. As developed more fully below, an analogous presumption appears appropriate for government-funding conditions imposing viewpoint restraints.

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Amendment freedoms limit the government's ability to constrain speech); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (holding that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom").

<sup>99</sup> 531 U.S. 533 (2001).

<sup>100</sup> *Id.* at 556 (Scalia, J., dissenting).

<sup>101</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010).

<sup>102</sup> See Charles W. "Rocky" Rhodes, *The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth in United States v. Stevens*, 2010 Emerging Issues 5227 (LexisNexis July 2010); Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009-2010 *Cato Sup. Ct. Rev.* 67, 82–83 (2010).

*B. Historical Exceptions to Prohibiting Speech Discrimination*

Government neutrality in speech regulation is a core First Amendment principle, as speech regulations that discriminate on either a content or viewpoint basis are typically invalid.<sup>103</sup> The content-discrimination ban nullifies state regulations favoring or disfavoring certain subject matters or speakers, unless the regulation is necessary to serve a compelling government interest.<sup>104</sup> The viewpoint-discrimination ban outlaws “an egregious form of content discrimination” occurring when the government targets “the specific motivating ideology or the opinion or perspective of the speaker.”<sup>105</sup> Both of these types of expressive discrimination pose inherent (and intolerable) risks of suppressing ideas and manipulating public discourse.<sup>106</sup>

Despite these risks, though, “certain well-defined and narrowly limited classes of speech” may be prohibited or punished on a subject-matter or content basis.<sup>107</sup> These classes—such as incitement of illegal activity, fighting words, true threats, obscenity, fraud, and speech integral to criminal conduct—thus fall outside the normal First Amendment ban against content discrimination. Until recently, a common understanding was that these so-called unprotected categories of speech were identified through a balancing test, which compared communicative value with associated harms.<sup>108</sup> Relying on this balancing approach in a case decided three terms ago, the government in *United States v. Stevens* contended that animal cruelty depictions should likewise be excluded from the content-discrimination

<sup>103</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

<sup>104</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 811–13 (2000).

<sup>105</sup> *Rosenberger*, 515 U.S. at 829.

<sup>106</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>107</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>108</sup> See Strossen, *supra* note 102, at 70–71 (detailing examples from legislatures, courts, and litigants). See also *Chaplinsky*, 315 U.S. at 572 (describing unprotected speech classes as “of such slight social value to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”). This formulation has been oft-repeated. See, e.g., *R.A.V.*, 505 U.S. at 382–83; *New York v. Ferber*, 458 U.S. 747, 763–64 (1982); *Beauharnais v. Illinois*, 343 U.S. 259, 256–57 (1952).

ban.<sup>109</sup> But the *Stevens* Court spurned the government's cost-benefit premise as "startling and dangerous."<sup>110</sup>

*Stevens* instead held that, for a category of speech to be outside the content-discrimination ban, a longstanding historical tradition of its exclusion from the principles of free expression is necessary.<sup>111</sup> The mere fact that speech is adjudged valueless, or an ad hoc judicial appraisal of its costs outweigh its benefits, is insufficient to remove it from this constitutional safeguard.<sup>112</sup> A "simple cost-benefit analysis"—representing a "freewheeling authority" to declare speech unprotected because the speech is just "not worth it"—dishonors the American people's judgment expressed in the First Amendment.<sup>113</sup> Only when words or utterances have never been considered as within the First Amendment should they be removed from the guarantee's typical protections.

This historical approach has normative appeal because it prevents judges from arbitrarily weighing the costs and the benefits of new forms or subject matters of speech. If the associated costs of the speech are sufficiently significant, the government might perhaps establish that a content-based regulation is necessary to further a compelling government interest. But the judiciary shouldn't summarily excise some speech from core First Amendment protections based on a case-by-case weighing of the costs and benefits of the expression. The First Amendment is too sacrosanct to entrust to such ad hoc balancing.

This sacredness counsels against confining the historical prerequisite to content-based regulations while continuing to engage in ad hoc appraisals of viewpoint-based funding conditions. Through viewpoint-based funding conditions, the government favors certain ideas and messages while disfavoring others. Simply because the government has "purchased" favored views, rather than punishing

<sup>109</sup> 130 S. Ct. 1577, 1584–85 (2010).

<sup>110</sup> *Id.* at 1585.

<sup>111</sup> *Id.* at 1584, 1586. As Professor Strossen highlighted, in order to adopt this historical approach, *Stevens* had to "significantly recast" almost seven decades of precedent. See Strossen, *supra* note 102, at 69. The Court has since, though, adhered to the historical approach. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544–47 (2012) (plurality op.); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734–35 (2011).

<sup>112</sup> *Stevens*, 130 S. Ct. at 1585–86.

<sup>113</sup> *Id.*

disfavored ones, doesn't pardon transgressing the First Amendment's command against obliging orthodoxy in public ideals, especially in light of government's vast financial resources. Targeting one side or perspective in the public discourse is "an egregious form of content discrimination."<sup>114</sup> So just as *Stevens* held that the First Amendment prevents a "freewheeling authority" to create new exceptions to the content-discrimination ban "simply on the basis that some speech is not worth it,"<sup>115</sup> the government shouldn't be free to impose viewpoint-based subsidy conditions simply because the government defines a funding program to encompass them. Instead, the government should only be authorized to impose viewpoint-based funding conditions when falling within a traditional managerial sphere in which government has employed analogous conditions to achieve government objectives.

This traditional prerequisite would preclude the government from attempting to use viewpoint-based funding conditions in subsidized venues that have long been open to a variety of viewpoints, such as public forums, the postal service, public broadcast editorials, public grants for the arts, publicly funded adversarial advocacy, or public university student groups. In these traditional "domains of public discourse," the government's attempts to leverage subsidies or other government benefits to control private expression would violate the First Amendment.<sup>116</sup> Only those funding conditions comparable to historic "baselines," in which the government has traditionally employed viewpoint-based funding conditions to accomplish government objectives, would be valid.<sup>117</sup>

The Court's prior decisions addressing viewpoint-based funding are consistent with this approach. *Velazquez* emphasized that the funding condition preventing challenges to welfare laws contravened the traditional norms and usual functioning of the legal system.<sup>118</sup> And while not discussed in the opinion, *Rust* might be defended as being within longstanding traditions allowing the gov-

<sup>114</sup> *Rosenberger*, 515 U.S. at 829.

<sup>115</sup> *Stevens*, 130 S. Ct. at 1585–86.

<sup>116</sup> See Robert C. Post, *Subsidized Speech*, 106 *Yale L. J.* 151, 157–58 (1996).

<sup>117</sup> Cf. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa. L. Rev.* 1293, 1359–63 (1984).

<sup>118</sup> *Velazquez*, 531 U.S. at 543.



ernment to specify the available services in a public health program and to ensure that its funds are used for those services.<sup>119</sup> The government may adopt viewpoint-based funding conditions to ensure the appropriate delivery of its expressive messages—for example, that smoking is hazardous to your health, or that democracy is preferable to communism—as the government has historically exercised managerial viewpoint control over those compensated to engage in a governmentally funded enterprise to project certain messages to the populace.

This traditional approach also authorizes the government to employ funding limitations based on content and speaker status, as long as the constraints aren't viewpoint-based and any conditions are on the funding, not the recipient. Government grants and subsidies historically have depended on content and speaker status. Take mailing subsidies: From the beginning of our nation, Congress has provided special rates for certain classes of publications. Initially, Congress granted this special rate just to newspapers, with magazines and pamphlets added shortly thereafter.<sup>120</sup> These rates have always been based on the content and form of the publication—such as different rates for public-interest newspapers and other periodicals than for books or for advertising publications—but not on the quality or viewpoints within the publication.<sup>121</sup> The Court has tacitly approved these longstanding content classifications in mailing subsidies, while warning that differentiating on “economic or political ideas”

<sup>119</sup> See Act for the Relief of Sick and Disabled Seamen, 1 Stat. 605 (July 16, 1798). This act authorized the executive branch to issue “instructions” to local physicians working in private boarding residences in locales without a marine hospital. These instructions included such matters as qualifying seamen to the program, permissible stay lengths, and treatable conditions. See Gautham Rao, *Sailors’ Health and National Wealth*, 9 *Common-place* (Oct. 2008), available at <http://www.common-place.org/vol-09/no-01/rao>. But while a longstanding tradition thus supports defining limits on a public-health program’s scope (such as the *Rust*’s program confinement to pre-conception family planning), the portion of *Rust* upholding muzzling a doctor’s advice arguably is of a different ilk. Although governments in America have provided funds to private entities for specifically defined public health purposes since even before the Revolution, and these defined health purposes can encompass delivering a specific message to the populace, my research hasn’t revealed any indication that such programs limited physicians’ advice to patients. See Steven Rathgeb Smith & Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (1993).

<sup>120</sup> See Act of February 20, 1792, 1 Stat. 232, 238; Act of May 8, 1794, 1 Stat. 354, 362.

<sup>121</sup> See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151–52 (1946).

would raise “grave constitutional questions.”<sup>122</sup> Similarly, *Regan* approved the traditional practices of Congress since the enactment of the income tax in defining tax exemptions by content and speaker status.<sup>123</sup> *Regan* accordingly upheld denying tax-deductible contributions for nonveteran organizations engaged in substantial lobbying activities (even though this ruling favored veterans’ groups over other speakers), while indicating that the result would be different if the exemptions were to “discriminate invidiously” to suppress “dangerous ideas.”<sup>124</sup> The Court likewise expressed in *League of Women Voters* that Congress could deny funding to public broadcast editorializing while funding other public broadcasting programs. The constitutional difficulty in that case was that Congress prohibited stations receiving any federal financial support from all editorializing, even with private funds.<sup>125</sup> These cases confirm that *content-based* funding conditions are constitutional as long as the restrictions are on the funding, not the recipient. But *viewpoint-based* funding restrictions require a more searching analysis.

That jurisprudence accords with the Court’s approach to nonpublic fora. State-owned property that isn’t by tradition or design a channel for public communication can be reserved by the government to its dedicated purposes.<sup>126</sup> The government is free to discriminate based on content or speaker status in such nonpublic fora, but it can’t discriminate on viewpoint.<sup>127</sup> Government funding is somewhat comparable: the government’s money (rather than other types of property) is dedicated to accomplishing certain objectives. In general, this money can be reserved for its dedicated purposes, allowing the government to discriminate based on content or speaker status. Yet when the government uses this funding or other subsidies to discriminate based on viewpoint, a tradition of comparable viewpoint-based conditions to accomplish government objectives should be required before removing typical First Amendment protections.

<sup>122</sup> *Id.* at 155–56.

<sup>123</sup> See, e.g., *Regan*, 461 U.S. at 546–48; *Cammarano v. United States*, 358 U.S. 498, 503–07, 513 (1959).

<sup>124</sup> *Regan*, 461 U.S. at 545–51 (internal quotations omitted).

<sup>125</sup> *League of Women Voters*, 468 U.S. at 400.

<sup>126</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 461 U.S. 37, 46 (1983).

<sup>127</sup> See, e.g., *Perry Educ. Ass’n*, 461 U.S. at 46–53; *Greer v. Spock*, 424 U.S. 829, 838–40 & n.10 (1976).

This will sometimes be a difficult analysis. As one example, consider public funding to private educational facilities, a practice existing since colonial times.<sup>128</sup> Government viewpoint-based subsidies are impermissible mechanisms to control student organizations or to dampen intellectual freedom,<sup>129</sup> but funding conditions related to other educational aspects, such as curriculum, resource allocation, and nondiscrimination policies, have been allowed.<sup>130</sup> Any education-funding condition based on viewpoint, then, would necessitate a consideration of the appropriate traditional analogue. And of course, similar classification difficulties would arise in other contexts, which would be especially vexing when ascertaining the correct historical analogue for any new forms of subsidies and grants without an existing tradition. Yet this inherent difficulty exists in all historical analyses, including those necessary after *Stevens* for categorical exclusions from the content-discrimination ban. And such an effort is warranted when considering its benefits.

These benefits include harmonizing the Court's analytical approach to departures from the First Amendment's core principles. A traditions-based prerequisite provides leeway for the government to employ viewpoint-based conditions when necessary to accomplish its managerial objectives, while still protecting traditional spheres of subsidized public discourse necessary to check government overreach, to safeguard individual expressive autonomy, and to preserve the independence of the marketplace of ideas. This requirement subsumes the Court's prior holdings on funding conditions, on a basis grounded in the underlying principles of the First Amendment. For good measure, it even provides a principle to address Justice Scalia's concerns regarding the occasional need for viewpoint to be considered in selection criteria, as illustrated by revisiting *AID* under a historical approach.

<sup>128</sup> See Lester M. Salamon, *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State* 35 (1995).

<sup>129</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 187–88 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>130</sup> See, e.g., *Rosenberger*, 515 U.S. at 833; *Grove City College v. Bell*, 465 U.S. 555, 575–76 (1984).

### C. *Subsidy Traditions and AID*

By mandating that funding recipients agree to oppose prostitution and sex trafficking due to psychological and physical risks, the policy requirement challenged in *AID* entailed a viewpoint-based endorsement of a specific government message.<sup>131</sup> The lack of any analogous viewpoint-based ideological pledge imposed by Congress—apparently ever!—aptly illustrates that this wasn't a necessary condition to obtain a government objective in a traditional managerial government sphere. Neither the government's briefing in *AID* nor that of any of its amici identified a comparable condition ever imposed as a condition to obtain federal funding for a project.<sup>132</sup> At oral argument, the government likewise failed to point to any specific examples of a similar condition in any government program, much less a public-health program.<sup>133</sup> Because no tradition supported such a viewpoint-based ideological pledge, the normal rules of the First Amendment should apply—including the nearly absolute prohibition on state compulsion of personal beliefs.<sup>134</sup>

But does this mean, as Justice Scalia asserted, that the government would have to allow a domestic equivalent of Hamas to distribute food assistance overseas?<sup>135</sup> I think not. First, my intuition here (shared perhaps ironically by Justice Scalia) is that the government could establish a tradition of selecting overseas grant recipients in part on their ability to foster American goodwill abroad, which is of course an overarching goal of any foreign aid program.<sup>136</sup> But even if we both are wrong, I still think that the government could satisfy strict scrutiny—especially in light of *Holder v. Humanitarian Law Proj-*

<sup>131</sup> *AID*, 133 S. Ct. at 2327.

<sup>132</sup> See, e.g., Brief for the Petitioners at 32–33, *AID v. AOSI*, 133 S. Ct. 2321 (No. 12-10) (suggesting hypothetical statutes that in the government's view would be constitutional without providing any actual legislative examples).

<sup>133</sup> See Transcript of Oral Argument at 8–10, *AID v. AOSI*, 133 S. Ct. 2321 (No. 12-10). In response to Justice Ruth Bader Ginsburg's query whether there was "anything else quite like this where you make a pledge to the government," Deputy Solicitor General Sri Srinivasan didn't identify any such program, but instead sought to explain why "this kind of requirement makes sense in this particular context."

<sup>134</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>135</sup> *AID*, 133 S. Ct. at 2332 (Scalia, J., dissenting).

<sup>136</sup> *Id.* at 2335 (assuming that selecting "competing applicants on relevant ideological grounds is undoubtedly quite common").

*ect's* teaching regarding the provision of nonviolent material support to terrorist organizations<sup>137</sup>—by demonstrating that allowing such an organization to participate would undermine foreign relations and impede the program's objectives.

Justice Scalia may be right that a healthy-eating public-service program couldn't exclude the American Gourmet Society simply because of its ambivalence toward healthy eating—at least assuming that the society could establish that it was otherwise superiorly qualified to promote a government message through a public-service program, which perhaps is unlikely.<sup>138</sup> I wouldn't envision that some tradition supports such a viewpoint-based selection criteria in a domestic public-service program, and the government probably couldn't satisfy strict scrutiny. But I'm not troubled by this result, assuming that an organization has the technical proficiency, qualifications, and experience to achieve the program's objectives without undermining them. So although I believe that there is some room for viewpoint-based selection criteria when either historical traditions support them or the government can establish their necessity to prevent the undermining of its programs, the government shouldn't enjoy *carte blanche* to select funding recipients based on viewpoint. Such a government power would risk a dangerous state-imposed orthodoxy that the First Amendment is designed to prevent.

## **Conclusion**

*AID v. AOSI* is a victory for free speech, individual liberty, and limited government. The Court's holding—and general approach—was aptly supported by its prior precedents, and I commend the result. While the Court didn't exhaust the considerations that should govern the constitutionality of funding conditions, it appropriately granted itself leeway to establish further limitations in subsequent controversies. These further limitations should depend on the traditions-based prerequisite outlined in this article, which would both encompass its existing doctrine and serve as a useful future guide for invalidating those funding conditions infringing on private expressive liberty.

<sup>137</sup> 130 S. Ct. 2705, 2725–28 (2010).

<sup>138</sup> *AID*, 133 S. Ct. at 2332 (Scalia, J., dissenting).