AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government

Legal Services Corporation v. Velazquez, et al., 531 U.S. 533 (2001)

The Legal Services Corporation began as a presidential creation under Lyndon Johnson in the Office of Economic Opportunity as an effort to provide legal aid to the poor. Though conservatives favored killing the program entirely, President Nixon proposed moving it to a federally funded but private, nonprofit corporation in the hopes that it would depoliticize the program. He signed the bill creating the Legal Services Corporation (LSC) into law in 1974, two weeks before resigning from office. The Corporation is governed by a politically appointed board and distributes federal funds to local legal service providers. The continued existence of the LSC depends on annual congressional appropriations. The LSC has been controversial since its origins, and its grantees have always been subject to various restrictions, including restrictions on lobbying, political activity, and specific types of cases (including desertion from the military and abortion cases). At the outset of the Clinton administration, the Democrats expanded the budget of the LSC dramatically (First Lady Hillary Clinton had been chairman of the board of the LSC during the Carter administration), and the LSC responded. Among the recent complaints of conservatives was that LSC grantees had mounted broad legal challenges designed to obstruct welfare reform in the state and to block efforts to evict drug dealers from public housing units. When the Republicans took over Congress in 1994, they sought to insulate their policies from legal challenges from federally funded legal aid lawyers. Their first budget proposed eliminating the LSC, to which the president strongly objected. Ultimately, the two sides compromised with a significant cut in funding for the LSC and restrictions on its activities. Among the new restrictions was a prohibition on LSC grantees taking or pursuing cases challenging the validity of the welfare laws.

With Justice Kennedy breaking from the Court's conservatives in a narrow vote, the Court struck down this restriction on the LSC. Of particular note is Kennedy's emphasis on the congressional interference with the judicial function by hampering the freedom of the lawyers who bring cases to the courts. As you read the opinions in the case, consider whether the majority seems to value what Justice Scalia calls the "normal work of lawyers" more than the "normal work of doctors"?

JUSTICE KENNEDY delivered the opinion of the Court.

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This suit requires us to decide whether one of the conditions imposed by Congress on the use of LSC funds violates the First Amendment rights of LSC grantees and their clients. For purposes of our decision, the restriction . . . prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law. As interpreted by the LSC and by the Government, the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.

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From the inception of the LSC, Congress has placed restrictions on its use of funds. For instance, the LSC Act prohibits recipients from making available LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." . . . Act further proscribes use of funds in most criminal proceedings and in litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute. Act further proscribes use of funds in most criminal proceedings and in litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or

violations of the Selective Service statute. . . . Fund recipients are barred from bringing class-action suits unless express approval is obtained from LSC. . . .

The restrictions at issue were part of a compromise set of restrictions enacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 . . . continued in each subsequent annual appropriations Act. . . .

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The United States and LSC rely on *Rust* v. *Sullivan* (1991), as support for the LSC program restrictions. In *Rust*, Congress established program clinics to provide subsidies for doctors to advise patients on a variety of family planning topics. Congress did not consider abortion to be within its family planning objectives, however, and it forbade doctors employed by the program from discussing abortion with their patients. . . . [Recipients asserted] that Congress had imposed an unconstitutional condition on recipients of federal funds by requiring them to relinquish their right to engage in abortion advocacy and counseling in exchange for the subsidy.

We upheld the law . . . . The restrictions were considered necessary "to ensure that the limits of the federal program [were] observed." Title X did not single out a particular idea for suppression because it was dangerous or disfavored; rather, Congress prohibited Title X doctors from counseling that was outside the scope of the project.

The Government has designed this program to use the legal profession and the established Judiciary of the States and the Federal Government to accomplish its end of assisting welfare claimants in determination or receipt of their benefits. The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.

The private nature of the speech involved here, and the extent of LSC's regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations. In *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Court was instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium. . . .

By providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the State and Federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems . . . it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.

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Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. *Marbury* v. *Madison* (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is"). An informed, independent judiciary presumes an informed, independent bar. Under § 504(a)(16), however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source. "Those then

who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law."

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Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The LSC and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest. . . .

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The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Appropriations Act) defines the scope of a federal spending program. It does not directly regulate speech, and it neither establishes a public forum nor discriminates on the basis of viewpoint. The Court agrees with all this, yet applies a novel and unsupportable interpretation of our public-forum precedents to declare § 504(a)(16) facially unconstitutional. This holding not only has no foundation in our jurisprudence; it is flatly contradicted by a recent decision that is on all fours with the present case. . . .

The Legal Services Corporation Act of 1974 . . . is a federal subsidy program, the stated purpose of which is to "provide financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." . . . Congress, recognizing that the program could not serve its purpose unless it was "kept free from the influence of or use by it of political pressures," has from the program's inception tightly regulated the use of its funds. . . .

Accordingly, in 1996 Congress added new restrictions to the LSC Act and strengthened existing restrictions. . . .

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The LSC Act is a federal subsidy program, not a federal regulatory program, and "there is a basic difference between [the two]." . . . Regulations directly restrict speech; subsidies do not. Subsidies, it is true, may *indirectly* abridge speech, but only if the funding scheme is "'manipulated' to have a 'coercive effect'" on those who do not hold the subsidized position. . . . Proving unconstitutional coercion is difficult enough when the spending program has universal coverage and excludes only certain speech -- such as a tax exemption scheme excluding lobbying expenses. The Court has found such programs unconstitutional only when the exclusion was "aimed at the suppression of dangerous ideas." . . . Proving the requisite coercion is harder still when a spending program is not universal but limited, providing benefits to a restricted number of recipients, see *Rust* v. *Sullivan*. . . . The Court has found such selective spending unconstitutionally coercive only once, when the government created a public forum with the spending program but then discriminated in distributing funding within the forum on the basis of viewpoint. . . . When the limited spending program does not create a public forum, proving coercion is virtually impossible, because simply denying a subsidy "does not 'coerce' belief," . . . and because the criterion of unconstitutionality is whether denial of the subsidy threatens "to drive certain ideas or viewpoints from the marketplace." . . . Absent such a threat, "the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." . . .

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. . . . The LSC Act, like the scheme in *Rust* . . . does not create a public forum. Far from encouraging a diversity of views, it has always, as the Court accurately states, "placed restrictions on its use of funds." Nor does § 504(a)(16) discriminate on the basis of viewpoint, since it funds neither challenges to nor defenses of existing welfare law. The provision simply declines to subsidize a certain class of litigation, and under *Rust* that decision "does not infringe the right" to bring such litigation. . . . The Court's repeated claims that § 504(a)(16) "restricts" and "prohibits" speech, and "insulates" laws from judicial review, are simply baseless. No litigant who, in the absence of LSC funding, would bring a suit challenging existing welfare law is deterred from doing so by § 504(a)(16). *Rust* thus controls these cases and compels the conclusion that § 504(a)(16) is constitutional.

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The Court's "nondistortion" principle is . . . wrong on the facts, since there is no basis for believing that § 504(a)(16), by causing "cases [to] be presented by LSC attorneys who cannot advise the courts of serious questions of statutory validity," will distort the operation of the courts. It may well be that the bar of § 504(a)(16) will cause LSC-funded attorneys to decline or to withdraw from cases that involve statutory validity. But that means at most that fewer statutory challenges to welfare laws will be presented to the courts because of the unavailability of free legal services for that purpose. So what? The same result would ensue from excluding LSC-funded lawyers from welfare litigation entirely. It is not the mandated, nondistortable function of the courts to inquire into all "serious questions of statutory validity" in all cases. Courts must consider only those questions of statutory validity *that are presented by litigants*, and if the Government chooses not to subsidize the presentation of some such questions, that in no way "distorts" the courts' role. It is remarkable that a Court that has so studiously avoided deciding whether Congress could entirely eliminate federal *jurisdiction* over certain matters. . . would be so eager to hold the much lesser step of declining to subsidize the litigation unconstitutional under the First Amendment.

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It is clear to me that the LSC Act's funding of welfare benefits suits and its prohibition on suits challenging or defending the validity of existing law are "conditions, considerations [and] compensations for each other" that cannot be severed. Congress through the LSC Act intended "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel," . . . but only if the program could at the same time "be kept free from the influence of or use by it of political pressures." More than a dozen times in § 504(a) Congress made the decision that certain activities could not be funded *at all* without crippling the LSC program with political pressures. . . . The severability question here is, essentially, whether, without the restriction that the Court today invalidates, the permission for conducting welfare litigation would have been accorded. As far as appears from the best evidence (which is the structure of the statute), I think the answer must be no.

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Today's decision is quite simply inexplicable on the basis of our prior law. The only difference between *Rust* and the present case is that the former involved "distortion" of (that is to say, refusal to subsidize) the normal work of doctors, and the latter involves "distortion" of (that is to say, refusal to subsidize) the normal work of lawyers. The Court's decision displays not only an improper special solicitude for our own profession; it also displays, I think, the very fondness for "reform through the courts" -- the making of innumerable social judgments through judge-pronounced constitutional imperatives -- that prompted Congress to restrict publicly funded litigation of this sort. The Court says today, through an unprecedented (and indeed previously rejected) interpretation of the First Amendment, that we will not allow this restriction -- and then, to add insult to injury, permits to stand a judgment that awards the general litigation funding that the statute does not contain. I respectfully dissent.