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Conditional Spending and the First Amendment: Maintaining The Commitment to Rational Liberal Dialogue, 57 Mo. L. Rev. 1117 (1992)

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Conditional Spending and The First Amendment: Maintaining The Commitment to Rational Liberal Dialogue

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I. INTRODUCTION

Questions concerning the constitutional validity of conditions placed on recipients of government funds have a long history,[1] but they recently have received greater attention as the types of constitutional concerns have changed. Earlier cases dealt with issues of federalism, and claims that conditions unduly limited states in the exercise of their reserved powers.[2] As courts moved to a generally consistent position of deference to Congressional choices concerning the proper distribution of power between the states and the national government, challenges to conditional spending faded in both their significance and interest.[3]

While federalism concerns have not been entirely absent from recent cases involving conditional spending, the impact of conditions on individual rights has attracted more attention.[4] Specifically, limits on the speech or other expression of grant recipients have raised significant First Amendment concerns.[5] So far, the Supreme Court has found little reason to increase its scrutiny of these conditions because of the shift from federalism concerns to First Amendment, or other individual rights concerns. This position has attracted significant criticism, much of it seeming to rest upon the stated or unstated presumption that in matters pertaining to individual rights, the government must maintain a strict neutrality.[6]

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1. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-42 (1989).

2. *See* United States v. Butler, 297 U.S. 1 (1936) (finding unconstitutional a program in which tax revenue was distributed to farmers in return for agreements to reduce output). *Butler* marked the high point for acceptance of this theory.

3. Since Steward Machine Co. v. Davis, 301 U.S. 548 (1937) and Helvering v. Davis, 301 U.S. 619 (1938) (upholding conditions for participation in federal programs to assure unemployment benefits and old age benefits against claims that they violated state autonomy), this argument has been consistently unsuccessful. *See, e.g.*, North Carolina *ex. rel.* Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978).

4. Sullivan, *supra* note 1, at 1433-42.

5. *See infra* notes 55-85 and accompanying text.

6. *See, e.g.*, Michael Perry's contention that denial of government funding of abortion may not be based upon the conclusion that abortion is morally objectionable. Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1115-24 (1980). Robert Kamenshine also suggests

While the bare statement that the First Amendment places obligations of neutrality on government is true, a failure to enunciate clearly just what that neutrality may entail has led some to an untenable conclusion, namely that the same type of neutrality called for by the Establishment Clause in matters of religion is also required on other subjects.[7] This position fails to fully acknowledge the central commitment of the First Amendment, and less directly much of the rest of the Constitution, to a government which will act in a way that is both rational and liberal. This commitment demands different types of neutrality on different questions.

The Establishment Clause demands that the government withhold its opinion on questions which are beyond rational debate. The neutrality called for here is a strong and consistent agnosticism. But on most questions, a commitment to rational liberalism does not require such a position. The government may take positions on secular values. Indeed, it is hard to imagine how it could avoid doing so. But there are limits on the way in which these positions may be maintained and expressed. In short, this Article maintains that the government must take and express its opinions in a way which is essentially rational and liberal.[8] That is, the government must accept and even welcome alternative views, and be ready to engage them rather than suppress them. It may hold beliefs quite strongly. Yet, it must be prepared to acknowledge that these beliefs are open to the possibility of refutation and change in light of new evidence. And, significantly, while the government may participate in the debate on secular values, its unique position of power places special requirements upon it to see that it does not dominate that debate.

When these principles are applied to questions of conditions placed on government spending, the result is neither to endorse the Court's tendency to accept the validity of any non-coercive condition,[9] nor to hold that government subsidies may never carry restrictions on expression.[10] Instead, the fundamental question should be whether the condition at issue is consistent with the government's duty under the First Amendment to act as a liberal, rational participant in the ongoing debate concerning social values.

Part II of this Article will briefly review the history of the Supreme Court's approach to conditional spending.[11] Part III will critique the use of

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that the neutrality demanded of the government by the Establishment Clause in religious matters should be extended to political viewpoints as well. Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1105-19 (1979).

7. Kamenshine, *supra* note 6, at 1105-19. Of course, even with respect to the Establishment Clause, precisely defining "neutrality" is not an easy task. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1101 (1990).

8. *See infra* notes 86-114 and accompanying text.

9. "Coercion" has been the most commonly invoked standard in these cases. *See* Sullivan, *supra* note 1, at 1428-56.

10. *See, e.g.*, Enrique R. Carrasco, Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1534-44 (1986) (arguing against any content-based restrictions).

11. *See infra* notes 14-85 and accompanying text.

the concept of coercion as the central inquiry in such cases,[12] and Part IV will discuss the alternative approach of asking, in cases involving First Amendment concerns, whether the condition threatens the First Amendment commitment to rational liberal dialogue.[13]

II. THE LAW OF UNCONSTITUTIONAL CONDITIONS: AN OVERVIEW

A. Federalism

Challenges to conditions restricting the activity of recipients of federal funds have a long history. Early cases focused on questions of federalism rather than individual rights.[14] In an era in which the Supreme Court narrowly construed the Commerce Clause and other sources of federal regulatory power,[15] Congress began to use the incentives of federal spending to further goals which could not be furthered by police power.[16]

Early in the century, the Court had denied Congress the power to regulate intrastate activity even when it had a serious effect on interstate commerce.[17] Thus, the Court prevented Congress from banning the products of child labor from interstate commerce.[18] In response, Congress attempted to discourage child labor by placing a special tax on goods manufactured by children. The Court invalidated the tax.[19] During the early years of the Depression, Congress again attempted to change the behavior of businessmen and farmers through its taxing and spending powers.[20] Specifically, Congress offered cash grants to farmers who would participate in a program to reduce acreage,[21] and tax credits to employers who made contributions to a qualified state fund for unemployment insurance.[22]

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12. *See infra* notes 86-153 and accompanying text.

13. *See infra* notes 154-212 and accompanying text.

14. Sullivan, *supra* note 1, at 1428-42.

15. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding Congress may not regulate the "production" of coal); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (holding Congress may not mandate a retirement and pension system for interstate railroads); Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding Congress may not prohibit interstate shipment of products of child labor).

16. *See* Helvering v. Davis, 301 U.S. 619, 634-38 (1938); Steward Mach. Co. v. Davis, 301 U.S. 548, 573-78 (1937); United States v. Butler, 297 U.S. 1, 53-59 (1936).

17. *See* United States v. E.C. Knight Co., 156 U.S. 1, 11-18 (1895) (rejecting the government's attempt to apply the Sherman Antitrust Act to thwart monopolization of the manufacture of refined sugar. The court argued that manufacturing was a local, rather than interstate, activity).

18. *Hammer*, 247 U.S. at 273-77.

19. Bailey v. Drexel Furniture Co., 259 U.S. 20, 36-44 (1922).

20. *Steward Mach. Co.*, 301 U.S. at 578-98; *Butler*, 297 U.S. at 68-78.

21. This program was invalidated in *Butler*, 297 U.S. at 68-78.

22. This program was upheld in *Steward Machine Co.*, 301 U.S. at 578-98, the case which marked a significant shift in favor of recognizing broad congressional power under the Commerce Clause.

Even the most conservative justices agree that Article I gives Congress wider authority to spend than to regulate,[23] but when the spending consists of grants to others who will, in turn, actually pursue the program's goals, the line between spending and police power inevitably blurs.[24] Obviously, when the federal government provides funding for the purpose of, say, building a highway, it may require that the funds actually go toward highway construction, rather than toward refurbishing the governor's mansion. Some level of regulation will be not only a permissible, but an essential part of any spending program.

At the same time, there has been a persistent sense that there must be some limits. Whether grounded in sentiment that government should not be able to do indirectly what it cannot do directly,[25] or in skepticism that there is a real distinction between direct and indirect means,[26] the notion remains that at some point the carrot turns into the stick. And if all agree that some types of conditions placed on grantees are valid, likewise all concede that at least some conditions may go too far.[27] The difficult task, of course, is defining the limits.

While federalism was the chief concern of inquiries into conditional spending, the scope of permissible conditions evolved with the scope of congressional power under Article I and state power under the Tenth Amendment. Sensitive to the preservation of state autonomy, early cases made it appear that there were few permissible conditions.[28] As Article I, particularly the Commerce Clause expanded, and the force of the Tenth Amendment receded, it appeared that only the rarest of conditions would be held excessive.[29] Although outcomes changed to the point where conditions

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23. In *Butler*, prior to invalidating the program as involving regulation rather than spending, the Court rejected the position taken by James Madison that the power to spend "for the general welfare" meant only the power to spend in support of the goals enumerated in Article I. Instead, it endorsed the position of Alexander Hamilton that "general welfare" was an independent, and broader, term. *Butler*, 297 U.S. at 64-65.

24. The political debate over how much control of programs should be left to the grantees has gone on for years. *See generally* Symposium: *The New Federalism and the Cities*, 52 J. URB. L. 55 (1974).

25. This principle was central to the holding in *Butler*, 297 U.S. at 74, as well as such cases as Hammer v. Dagenhart, 247 U.S. 251, 271-75 (1918), and Bailey v. Drexel Furniture Co., 259 U.S. 20, 39-43 (1922) (invalidating a federal tax on products of child labor enacted after *Hammer* struck down regulation in this area). Of course, with respect to federalist concerns, this principle no longer has much practical effect. *See supra* note 2.

26. Even while upholding conditions on spending, the Court implies that at some point, "temptation is equivalent to coercion," and "pressure turns into compulsion." *Steward Mach. Co.*, 301 U.S. at 590. *See also* South Dakota v. Dole, 483 U.S. 203, 211 (1987). In Speiser v. Randall, 357 U.S. 513 (1958), the Court invalidated a state requirement conditioning a property tax exemption upon the taking of a loyalty oath. The Court characterized the exception as "coercing the claimants" to abandon First Amendment rights. *Id.* at 519.

27. *Speiser*, 357 U.S. at 519.

28. *See supra* notes 2, 6.

29. *See supra* note 3.

were consistently upheld, the Court never abandoned the notion that there was a limit, at least in theory, to the power to attach conditions to spending.[30]

B. *The* Dole *Standard*

Certainly the most concise recent attempt to restate the criteria by which the Court will measure conditions on spending was set forth in *South Dakota v. Dole*.[31] Congress had provided that federal highway funds would be withheld from any state which permitted the sale of alcoholic beverages to anyone under the age of twenty-one.[32] South Dakota challenged the restriction as a violation of state sovereignty, relying not on long discredited views of the scope of the Tenth Amendment, but rather on the argument that the Twenty-first Amendment placed the regulation of alcohol uniquely within state, rather than federal authority.[33]

1. The *Dole* Test:

a. "General Welfare"

The Court upheld the restriction.[34] Although the justices were not unanimous in the outcome, they agreed that this type of dispute was subject to a four-part inquiry.[35] First, the spending involved must be in pursuit of the "general welfare."[36] This, of course, is an easy test to satisfy; the very fact that the program has been enacted is powerful, perhaps irrefutable

30. Occasionally, a restriction was found to be coercive and thus invalid. *See, e.g.*, F.C.C. v. League of Women Voters, 468 U.S. 364, 381-99 (1984) (Court struck down a requirement that broadcast stations receiving federal funds should refrain from editorializing).

31. 483 U.S. 203 (1987).

32. *Id.* at 205. The provision is codified at 23 U.S.C. § 158 (1986). At the time, South Dakota permitted persons nineteen or older to purchase beer containing 3.2% alcohol. *Dole*, 483 U.S. at 205.

33. *Dole*, 483 U.S. at 205. Section 2 of the amendment ratifies the power of states to establish and maintain prohibition despite its abolition by the federal government. *Id.* at 206. This provision was necessary to refute the argument, often made in the late nineteenth century, that state liquor laws interfered with interstate commerce. *See* Leisy v. Hardin, 135 U.S. 100, 124-25 (1890). The amendment has been interpreted to grant the states significant leeway in subjecting liquor sales to greater restrictions than might be permissible for other businesses. *See, e.g.*, New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715-18 (1981) (states have enhanced power to prohibit non-obscene but "adult" speech on premises where liquor is sold); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106-14 (1980) (while striking down a state program of resale price maintenance for wine as contrary to federal antitrust law, the Court suggested that the outcome might be different if the state were acting to further temperance).

34. *Dole*, 483 U.S. at 212.

35. *Id.* at 207-08.

36. *Id.* at 207.

evidence that it seeks to promote the welfare of the community, as perceived by the community's representatives.[37]

b. "Unambiguous Conditions"

Next, the condition attached to the grant must be set forth "unambiguously."[38] This requirement in *Dole* is aimed at assuring that the potential recipient is able to understand the choice presented and to accept or decline the entire package, both the good (the money) and the bad (the restrictions).[39] This clearly addresses what is often considered the key question in the analysis of conditional spending: whether it is properly considered to be an act of choice or coercion.[40] One who has accepted benefits may object to the burdens attached to those benefits. The most immediately appealing rejoinder to this would be that the burdens were freely accepted. This conception of conditional grants as essentially matters of contract leads to the type of analysis which might be made of any agreement between parties with some degree of inequality of bargaining power.[41] Is the contract so unfair as to be unconscionable? The existence of hidden or surprise terms is, of course, one of the classic signs of possible unconscionability[42] in a private contract; similarly, such questions are raised in this public context.[43]

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37. *Id.* ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."). A footnote questions "whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 n.2.

38. *Id.* at 207.

39. *Id.* The Court points out that this requirement "enabl[es] the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

40. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1125-60 (1987); Sullivan, *supra* note 1, at 1428-42.

41. *See* Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966). Professor O'Neil suggests that conditions placed on welfare recipients ought to be subjected to greater scrutiny than those placed on corporations, as welfare recipients may not be in the same position to make "reasoned choice[s]." *Id.* at 471-73. This, of course, is quite similar to the type of argument which might be made in a case involving a claim that a private contract is unconscionable.

42. In Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.D.C. 1965), the court stated:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party .... Did each party ... have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?

Id. at 449. *See generally* John E. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

43. Professor O'Neil, in discussing conditions placed on welfare recipients, stresses the importance of adequate notice: "Some conditions are fully explained to the applicant at the time the benefit is offered, and the consequences of a breach are made quite clear. Other conditions, however, remain largely obscure, and the withdrawal of the benefit may catch the beneficiary

Although this requirement has played little role in the resolution of litigation challenging conditions on spending, it is theoretically significant.

c. Main Purpose Test

The third requirement is that the condition placed on the recipient must be "directly related to one of the main purposes" of the spending program itself.[44] At first glance, this requirement is not self-explanatory. If the spending program is within the constitutional power of Congress, and the goal sought by the condition might constitutionally be sought directly, why would linking the spending to an unrelated goal violate constitutional norms?[45] As with the rule against ambiguous conditions, improper means may not be justified by the existence of permissible ends. Here, the means used are not deceptive, and the requirement does not resemble contract rules as clearly as in the case of the rule against ambiguity, but the means are still troubling.

Requiring a single choice for or against two or more unrelated propositions is an improper way to make law. Many state constitutions contain a provision that a bill enacted by the legislature may address only a single subject.[46] Such provisions seek to guard against a distortion of legislative and popular will. In order to obtain outcome *A*, a voter may accept outcome *B*, which if presented alone would be rejected. Thus, by controlling the way in which questions are presented, one may gain approval of proposals that actually lack support. And even more strikingly, since some legislators may vote for the package for the opposite reason, that is, enthusiasm for outcome *B* sufficient to override doubts about outcome *A*, it is possible that neither outcome, standing alone, would command majority support.[47]

This practice of "logrolling" has long been criticized by political reformers.[48] Of course, unlike state constitutions, the Constitution contains

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by surprise." O'Neil, *supra* note 41, at 473. Again, the analogy to unconscionability in private contracts is clear.

44. *Dole*, 483 U.S. at 207-08.

45. The initial, and obvious, purpose of the "relevance" test is to assure that the goal sought by the condition does not exceed the powers delegated to Congress. *See* Rosenthal, *supra* note 40, at 1131-33. If the goal sought by the condition might be sought directly, however, some other justification must be found for the relevance test.

46. *See, e.g.*, IAN SUTHERLAND, STATUTORY CONSTRUCTION §§ 7.01-.06 (Norman J. Singer ed., 4th ed. 1985); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 201-07 (1983).

47. The crucial significance of the way in which choices are presented to decision makers is at the heart of "Arrow's Paradox." Kenneth Arrow demonstrated that, due to shifting coalitions, majority voting can often lead to outcomes which actually frustrate majority will. *See* Daniel A. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337, 352-54; Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 561-64 (1977).

48. *See generally* Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389 (1958). Daniel Farber and Philip Frickey maintain that the significance of this seemingly trivial rule is borne out by recent scholarship in public choice theory. Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 922-23

no requirement that a bill confine itself to a single subject. And it might be said that the single subject rule is unwise or unworkable in light of the difficulty, and perhaps artificiality, of defining the boundaries of a single subject.[49] In *South Dakota v. Dole*, for example, was the prohibition on the sale of alcohol to teenagers germane to a program of highway construction and maintenance? Justice O'Connor thought that it was not,[50] but the majority disagreed, defining the subject matter of the spending program as the construction and maintenance of safe highways, a goal which can be seen to include keeping highways free of intoxicated teenagers.[51] Despite these analytical difficulties, the requirement that the condition be sufficiently related to the spending program retains a great deal of appeal. Like the requirement that conditions be unambiguous, it indicates concern that government might unfairly manipulate the context in which the recipient consents to the conditions accompanying a proffered grant.[52]

d. No "Independent Constitutional Bar"

The final restriction set forth by the Court is that there must be no "independent constitutional bar" to the use of the spending power to achieve the goal sought by the condition.[53] Here, the focus is on ends rather than means. Unlike the first restriction, it is the end sought by the condition, rather than that sought by the expenditure, which is at issue. The Court stated, "Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power."[54]

(1987). For an examination of how the rule would influence legislative response to an actual "highly visible" and controversial enactment, see Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 800-16 (1987).

49. Williams, *supra* note 48, at 810. Williams states that the single subject rule is judicially enforceable, but concedes that it "does not prevent logrolling within broad subject categories." *Id.* at 810 n.56. Williams cites a seventy-year old conclusion that is still valid: "Flagrant violations of this requirement may, of course, be apparent, but no test of violation is laid down by the provision itself and none has been developed by judicial action." *Id.* at 810 n.55 (citing W.F. Dodd, *The Problem of State Constitutional Construction*, 20 COLUM. L. REV. 635, 640 (1920)).

50. *Dole*, 483 U.S. at 213-14 (O'Connor, J., dissenting).

51. *Id.* at 208. ("Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.").

52. *See supra* notes 18-20 and accompanying text. Although she ultimately rejects "germaneness" as an adequate safeguard, Professor Sullivan summarizes arguments in its favor, *supra* note 1, at 1470-73.

53. *Dole*, 483 U.S. at 209.

54. *Id.* at 210-11.

C. Conditions with Impact on Individual Rights

1. Art-Funding Controversy

Early cases alleging the unconstitutionality of conditional spending pointed to the Tenth Amendment, with its reservation of power to the states,[55] as an "independent constitutional bar."[56] But a new generation of conditions affecting individual rights are now the primary focus of this part of the *Dole* test.

Two such conditions have drawn the most attention, one in the political arena, the other in the Supreme Court. Controversy over direct or indirect funding, through the National Endowment for the Arts,[57] of art regarded as offensive by some because of its defiance of social norms regarding sex,[58] politics,[59] or religion,[60] led to legislative and administrative attempts to restrict the content of art produced by NEA grantees.[61] Commentators, in both scholarly[62] and popular[63] journals, have argued that such restrictions

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55. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

56. *See* United States v. Butler, 297 U.S. 1, 68 (1936).

57. For a brief discussion of the history of the creation of the NEA, see Mary Ellen Kresse, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy?"* 39 BUFF. L. REV. 231, 250-57 (1991). *See also* Lawrence D. Mankin, *The National Endowment for the Arts: The Biddle Years and After*, 14 J. ARTS MGMT. & L., No. 2, 59, 60-75 (1984). For an overview of Congressional activity affecting art during a single Congress, see Terri L. Cornwell, *Congressional Arts Caucus Legislative Summary: 99th Congress*, 17 J. ARTS MGMT. & L., No. 1, 37 (1987).

58. *See generally* Kresse, *supra* note 57; Symposium, *Art, the First Amendment and the NEA Controversy*, 14 NOVA. L. REV. 313 (1990). For an interesting discussion of the work of contemporary artists such as NEA grant recipients Robert Mapplethorpe and Karen Finley, see Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990).

59. A case not involving federal money caused significant controversy recently when a student displayed an American flag on the floor in an exhibition organized by the School of the Art Institute of Chicago. *See* Jeffrey N. Schwartz, Comment, *Art, and First Amendment Protection in Light of* Texas v. Johnson, 14 NOVA L. REV. 487, 499-500 (1987). The Art Institute was threatened with budgetary reprisals by the local government. *See* Shawn Pojatchnik, *Flag Uproar May Cost Art Institute Money*, CHI. TRIB., June 1, 1989, at 6.

60. The most prominent example of art that was offensive on religious grounds was a photograph by NEA-supported artist Andres Serrano depicting a crucifix submerged in a jar of urine. *See* Kresse, *supra* note 57, at 234.

61. *Id.*

62. *Id. See also* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 640-47 (1980); Carrasco, *supra* note 10.

63. *See, e.g.*, C. Carr, *New Attack on Arts Funding: This Witch-Hunt's For You*, VILLAGE VOICE, Feb. 20, 1990, at 55; Grace Glueck, *A Congressman Confronts a Hostile Art World*, N.Y. TIMES, Sept. 19, 1989, § 2, at 1 (quoting First Amendment lawyer Floyd Abrams); Hilary De Vries, *Karen Finley Has Become a Symbol in the Struggle Over Public Arts Support*, L.A.

are not merely unwise, but also unconstitutional in their impact on First Amendment freedoms.

While these specific restrictions have yet to come before federal appellate courts, there is reason to doubt that under existing standards they are likely to be found unconstitutional. In the 1976 case, *Advocates for the Arts v. Thomson*,[64] the First Circuit rejected a First Amendment claim asserted against a content-based veto of a proposed state subsidy for a literary magazine.[65] New Hampshire's governor was offended by a poem printed in the magazine, which he characterized as "an item of filth."[66] There was no claim, nor almost certainly could there have been, that the poem was legally obscene.[67] Still, the court found that any decision to grant or withhold funds for the arts must be made on the basis of content, that is, "according to the literary or artistic worth of competing applicants."[68] While the court would prohibit discrimination against artists based upon "such extrinsic considerations as [their] political views, associations, or activities,"[69] guidelines limiting distinctions among works of art themselves "do not lend themselves to translation into First Amendment standards."[70] Despite its concession that some enforceable limits exist, *Thomson* illustrates the reluctance of courts to equate content-based decisions to withhold government funds with content-based prohibitions on privately funded speech.[71]

2. *Rust v. Sullivan*

The second type of condition on federal spending is exemplified by the family planning restrictions in *Rust v. Sullivan*.[72] Regulations promulgated under the Family Planning Services and Population Research Act of 1970[73]

TIMES, Oct. 21, 1990, at 3 (quoting the artist on the chilling effect of the NEA controversy).

64. 532 F.2d 792 (1st Cir. 1976).

65. *Id.* at 793.

66. *Id.*

67. Although the governor had characterized the magazine's work as consisting of "obscenities," in court it was admitted that the work was not "obscene in the constitutional sense." *Id.* at 793 n.2. The poem, entitled *Castrating the Cat*, although employing words which many would find offensive, does not deal with human sexuality at all. *Id.* at 798.

68. *Id.* at 795.

69. *Id.* at 798 n.8.

70. *Id.* at 797.

71. *See, e.g.*, Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 552-58 (1975). The court in *Thomson* distinguished this type of case from content-based refusals by the government to allow access to public forums, not only on the grounds of a "tradition of absolute neutrality" in the latter cases, but also on the grounds that access may more easily and logically be granted in ways that require no assessment of content at all. By their very nature, grants of funds to artists call for some comparative judgment. *Thomson*, 532 F.2d at 796.

72. 111 S. Ct. 1759 (1991).

73. Title X of the Public Health Services Act, 84 Stat. 1506, (1970) (codified as amended at 42 U.S.C. §§ 300-300a(6) (1990)). Title X funds are to be "made in accordance with such regulations as the Secretary [of Health and Human Services] may promulgate (42 U.S.C. § 300a-

prohibit federally funded family planning clinics from "counseling concerning the use of abortion as a method of family planning,"[74] and from "encourag[ing] . . . or advocat[ing] abortion as a method of family planning."[75] The Supreme Court rejected claims that these conditions violated the fourth part of the *South Dakota v. Dole* test by infringing either the abortion rights of the clients of these clinics,[76] or the First Amendment rights of the clinic and its staff.[77]

With respect to the right to choose abortion, the Court held that government refusal to encourage or support the exercise of the right was simply not the same as denial of the right.[78] This conclusion is hardly surprising in light of earlier cases such as *Harris v. McRae*[79] and *Webster v. Reproductive Health Services*.[80] These cases set the boundary of the right at the point at which a woman may privately, without government support, obtain an abortion.[81] Less obvious, however, is the relationship of the First Amendment elements of *Rust* to prior law. There is a diverse and extensive

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4) to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). The Act prohibits the use of federal funds "in programs where abortion is a method of family planning." *Id.* § 300a(6).

74. 42 C.F.R. § 59.8(a)(1) (1989).

75. *Id.* § 59.10(a). Title X funds are limited to "preconceptual counseling," thereby excluding not only funding for abortion, but also prenatal or obstetric care. *Id.* § 59.2. But Title X recipients refer pregnant women to agencies which do provide prenatal care. Although recipients may refer to agencies which also provide abortions, they may not favor such providers in their referrals. Nor may they include providers "whose principal business is the provision of abortions" or exclude providers who do not provide abortions. *Id.* § 59.8(a)(3). Even upon specific request by a client, recipients may not refer to a provider for the purpose of abortion. *Id.* § 59.8(b)(5).

76. *Rust*, 111 S. Ct. at 1776-78.

77. *Id.* at 1771-76. The Court also rejected the argument, significant in the case but not for purposes of this Article, that the regulations were invalid and exceeded the Secretary's statutory authority. *Id.* at 1767-76.

78. According to the Court in *Rust*:

> The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and "implement that judgment by the allocation of public funds" for medical services relating to childbirth but not those relating to abortion.

Id. at 1776 (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 510 (1989)).

79. 448 U.S. 297, 317-18 (1980) (holding that the Constitution does not invalidate a decision to exclude abortions from those procedures eligible for reimbursement under Medicaid programs).

80. 492 U.S. 490, 507-10 (1989) (upholding, among other things, a Missouri statute prohibiting the use of public employees or facilities to perform abortions not necessary to save the mother's life, even where the woman is willing to pay for the services).

81. The *Rust* Court considered where the line had been drawn in these earlier cases. The Court argued that the line could be found where the government places an obstacle which would not have been there if the state or federal government "had chosen to subsidize no health care costs at all." *Rust*, 111 S. Ct. at 1777 (quoting *McRae*, 448 U.S. at 317).

body of precedent dealing with the government's power to limit the speech of those engaged in activity directly or indirectly funded by the government. This precedent justifies a conclusion that the government can not always ensure that its dollars and facilities will not support expressions of dissent.[82] The more notable attempts to analyze the question of unconstitutional conditions have taken a global approach, and attempted to produce standards that are equally applicable whether the concern raised by the condition is one of federalism, First Amendment rights, privacy or some other constitutional value.[83] The desire to formulate a single standard is certainly understandable, and just as certainly has some validity. Claims that conditions are unconstitutional will all give rise to some common inquiries. The first three of the four tests set out in *South Dakota v. Dole* vary little, if at all, depending on the particular constitutional objection to the condition.[84] But these three tests are so easily satisfied that the final inquiry takes on added importance, and this inquiry will require careful examination of different constitutional rights and values. Too easy an analogy between cases primarily concerned with federalism and those primarily concerned with individual rights may lead to entirely unsatisfactory results, primarily because of a failure to adequately explore the particular constitutional concerns at issue in the application of *Dole*'s fourth test.[85]

Thus, this Article will focus only on the extent to which conditional spending may threaten First Amendment values. Of course, this will require some reference to broader concerns posed in all conditional spending cases, but the emphasis will be on the particularity required in *Dole*'s fourth inquiry.

III. UNCONSTITUTIONAL CONDITIONS AND THE CONCEPT OF COERCION IN THE CONTEXT OF THE FIRST AMENDMENT

Attempts to reduce the analysis of allegedly unconstitutional conditions on government spending to a single question almost invariably focus on the distinction between choice and coercion. Thus, the government will be seen as either legitimately deferring to a choice to forego a benefit, or illegitimately imposing a penalty on nonconforming grantees.[86] This formulation of the

82. Note the striking contrast between Webster v. Reproductive Health Services, 492 U.S. 490 (1989) and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). *Webster* dismissed the contention that the government, having established a hospital, could not exclude certain legal medical procedures because of an explicit choice to disfavor them. *Webster*, 492 U.S. at 507-10. *Southeastern Promotions* rejected the notion that the government had unfettered discretion to deny access to a publicly operated theatre on the the basis that the content of the production was not "in the best interest of the community." *Southeastern Promotions*, 420 U.S. at 548.

83. *See, e.g.*, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352-74 (1984); Rosenthal, *supra* note 40, at 1142-60; Sullivan, *supra* note 1, at 1442-50.

84. *See supra* notes 38-52 and accompanying text.

85. *See supra* notes 53-54 and accompanying text.

86. For a history of "the coercion debate," see Sullivan, *supra* note 1, at 1428-42. Professor

problem makes its outcome appear to turn on the amount of pressure felt by the potential grantee. It is unsurprising that the application of such a test, at least in close cases, will produce outcomes which are, in Professor Kathleen Sullivan's words, "baffling."[87] There simply is no easy formula for determining the point at which the failure to bestow a reward becomes fairly characterized as punishment. This has been demonstrated elsewhere,[88] and those arguments need not be repeated at length here.

A. Coercion

Professor Sullivan quite correctly concludes that coercion, as a legal concept, "is inevitably normative, not merely descriptive, empirical, or psychological."[89] In other words, an offer is properly seen as coercive when there is some reason why it should not have been made, at least in the way it was made.[90] This leads to the question of how to recognize such an improper offer. Sullivan reviews a number of plausible norms, based upon philosophical concepts such as autonomy, desert and equality.[91] Perhaps the most famous formulation is that of Robert Nozick, who contends that a threat can be distinguished from an offer in that the recipient of a threat would prefer that the choice had never been presented.[92] The very existence of, and need to make the choice makes the recipient worse off than before.[93]

B. Conditions and Constitutional Values

Nozick's notion of coercive offers is surely interesting, as are several competing views, but they may be unnecessarily ambitious for our purposes. One need not develop a general theory to test the moral implications of offers, nor even to test the legal treatment of all types of offers. The only concern here is to explore the acts of government, and while the analysis employs moral and philosophical concepts, its purpose is to propose legal standards.

Tribe calls this "the elusive distinction between withholding a subsidy and imposing a penalty." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 781 (2d ed. 1988).

87. Sullivan, *supra* note 1, at 1438.

88. *Id.* at 1428-56; *see also* Jeffrie G. Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79, (1981); Peter Westen, *'Freedom' and 'Coercion'—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 588-89.

89. Sullivan, *supra* note 1, at 1443. For an extensive defense of the position that coercion is primarily a normative rather than an empirical concept, see generally ALAN A. WERTHEIMER, COERCION (1987).

90. Sullivan, *supra* note 1, at 1446. In different legal settings, "a finding of coercion depended on some moral condemnation of the offer itself." *Id.*

91. *Id.* at 1446-50. Sullivan contends that the insight that coercion is essentially a normative concept does not get us very far since it does not provide a set of norms to use as a baseline measure.

92. Robert Nozick, *Coercion, in* PHILOSOPHY, SCIENCE, AND METHOD 440 (Sidney Morgenbesser et al. eds., 1969).

93. *Id.* at 463.

Thus, the first obvious source of norms for this "inevitably normative" endeavor will be the Constitution.

To some extent, of course, this is tautological. A condition on spending is unconstitutional if it clashes with constitutional values. But this is merely a starting point for the hard work of exploring just how particular conditions may implicate particular constitutional values. Constitutional provisions at least arguably embody the values catalogued as norms by Professor Sullivan, and these values can be seen as possibly conflicting with government-imposed conditions: autonomy (you may have medical care if you forego an abortion),[94] equality (government contracts are more likely to be awarded to contractors employing minority subcontractors or suppliers);[95] and desert (you may only develop your land as you wish in return for an easement).[96] Here, however, we will focus specifically on the values embodied in the First Amendment.[97]

More than any other single provision of the Constitution, the First Amendment commits the government to fundamental liberal values. It is common, and to some extent accurate, to summarize the liberal commitment as one of tolerance, a commitment made both to avoid the violence which so often accompanies the urge to repress "untruth," and also to permit individuals and non-governmental associations to flourish.[98] But the extent to which

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94. *See* Harris v. McRae, 448 U.S. 297, 315-18 (1980).

95. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (striking down a similar program enacted by the City of Richmond); Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (upholding government set-asides for minority subcontractors enacted by Congress).

96. *See* Nolan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987) (striking down a requirement that was not directly related to curing problems caused by the development).

97. *See supra* notes 86-114 and accompanying text.

98. Thus, the classic statement by Justice Holmes:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . [t]hat at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

This position, stressing the utility of tolerance in reaching the truth, goes back to the seminal writings of liberalism. John Milton wrote "Let [truth] and Falsehood grapple: who ever knew Truth put to the worse, in a free and open encounter?" JOHN MILTON, *Areopagitica in* COMPLETE POETRY AND SELECTED PROSE OF JOHN MILTON 677, 719 (Cleanth Brooks ed., 1950). John Stuart Mill wrote: "Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right." JOHN STUART MILL, ON LIBERTY 18 (Elizabeth Rapaport ed., 1978). But it has long been maintained that the promotion of truth is not a necessary condition for continuing a commitment to tolerance. *See* THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 8 (1970). Recent commentators stress the value of tolerance in allowing full autonomy or self-fulfillment to the

tolerance completely defines the liberal commitment may easily be exaggerated. While the Enlightenment was, compared to other eras, an age of tolerance, it is, after all, most commonly thought of as the age of reason.[99]

C. Rationalism and Liberalism

With three centuries of hindsight, it is easy to disparage the notion that rational dialogue will inevitably lead to an unambiguously better world, or reveal ultimate and unassailable truth in science, philosophy or government.[100] But that degree of faith in the "marketplace of ideas" is unnecessary. The framers were practical men, more skeptical and far less utopian than their French revolutionary counterparts.[101] But just as clearly, they thought that rational dialogue was more likely to benefit society than other

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individual. *See generally*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); David A.J. Richards, *Free Speech and Obscenity Law: Toward Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). Interesting theories have been put forth going beyond this assertion, to emphasize the importance of tolerance itself, *see* LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986), or even the positive value of the dissenter to society, *see* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE (1990).

99. "Hamilton and the other authors of *The Federalist* subscribed to a rationalistic theory of morality. . . . some principles of morality are self-evident and others demonstrable." MORTON G. WHITE, PHIOLOSOPHY, THE FEDERALIST AND THE CONSTITUTION 104 (1987). *See also* the discussion of the extent to which scientific rationalism underlay the Declaration of Independence in GARY WILLS, INVENTING AMERICA 91-164 (1st ed. 1978).

100. This critique can take very different forms, ranging from harsh assessments of the likelihood, let alone inevitability, of social progress, *see generally* CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS (1991), to a utopianism based not on rational progress to a static ideal, but on consistent iconoclastic choices to disrupt prevalent patterns. *See generally* ROBERTO UNGER, POLITICS (1987).

101. *See generally* SIMON SCHAMA, CITIZENS (1989). The "implicit theology" of the French revolution, including "[f]aith in the natural goodness of man, in the purity and power of reason, in the promise of science and in the inevitability of progress," was in stark contrast to the pessimistic views of the Puritan ethos, which itself inspired revolution. Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 628 (1984). For a contrast of the goals of the American and French revolutions and the legal means chosen to achieve them, see Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023 (1989).

models of public decisionmaking.[102] The alternative to utopianism need not be despair or even pessimism; it may be a guarded optimism.

Thus, much of the recent debate over whether the framers sought a government committed to Lockean liberalism or to the idea of civic republican virtue[103] seems to miss the obvious point that one might at least attempt to permit each to exist.[104] Faction might be tamed, but some degree of self-interest is inevitable, and perhaps even legitimate. The government, then, would attempt to incorporate both community welfare and individual choice; it would be both liberal and rational.[105] This commitment to rationality, coupled with the pragmatic recognition that self-interest and other non-rational elements are an inevitable part of society, is reflected in the structure of the government, as set out in the Constitution.

The passions of the people have their place in government, institutionally seen most clearly at the federal level in the House of Representatives.[106] Yet, these passions are to be tamed, first by the power of a Senate and President (who were initially intended to be somewhat removed from the role of direct representation, and therefore more able to reflect on the common good),[107] and then by the courts, a branch even more committed to reason

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102. Despite the significant differences noted by Henkin, *supra* note 101, especially on whether active or limited government is more efficacious, the similarities between the attitudes of French and American Enlightment post-revolutionary lawmakers are significant. *See* Vincent R. Johnson, *The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L. & COMP. L. REV. 1, 6-14 (1990). Surely the United States Constitution, with its stated goals of "form[ing] a more perfect union, establish[ing] Justice . . . promot[ing] the general welfare . . .", U.S. CONST. preamble, cannot be seen as a pessimistic document. Madison's comment in *The Federalist No. 51*: "Justice is the end of government" indicates that the means adopted by the framers were expected to lead to ends beyond tolerant coexistence itself. THE FEDERALIST No. 51 (James Madison).

103. *See generally* Richard H. Fallon, *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Symposium, *Classical Philosophy and the American Constitutional Order*, 66 CHI. KENT L. REV. 3 (1990).

104. An analysis of *The Federalist* shows that its authors did not discount the existence of reason as a motive for political action. At the same time, they were realistic enough to recognize the power of other motives such as passion and interest. *See* WHITE, *supra* note 99, at 102-28. Much of the Constitution, then, must be seen as an attempt "to check men of dubious virtue as well as . . . to encourage good and wise men." *Id.* at 128.

105. *Id.*

106. Gouverneur Morris characterized the role of the Senate as follows: The Senate was "'to check the precipitation, changeableness and excesses' of the House of Representatives." *Id.* at 96.

107. For many of the framers, balanced government meant representation of different classes: "Many framers envisioned creating a wealthy and aristocratic upper house capable of checking the leveling spirit of the popular chamber." WINTON V. SOLBERG, THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION XCVII (2d ed. 1990). But separation of powers ultimately took the form of different geographic constituencies, manner of elections, and terms of office, rather than class-based qualifications. *See* Edward J. Erler, *The Constitution*

as a trump over mere desire. The extent of reason's power to check preference will ebb and flow with the community's confidence in the idea of reason as a means to community welfare, but the normal political process will incorporate both a liberal recognition of the value of individual choices and the insistence that at some point those choices be justified in rational terms.

Perhaps the most underappreciated of all constitutional doctrines is the seemingly modest due process requirement that government acts bear a rational relationship to a legitimate government end.[108] To be sure, this requirement rarely serves to invalidate contemporary legislation,[109] but that does not make the requirement unimportant. The principle that government must justify itself by explaining what it seeks to do and why is, of course, a requirement that government be rational.[110] The cautious, even deferential way in which this requirement is applied by courts adds a liberal component to the test. The Supreme Court's decision in *Lochner v. New York*[111] may be seen as an example of a nonliberal rationalism. The Court assumed that reason could lead only to one conclusion, and that therefore a legislative decision contrary to the judges' own policy analysis was arbitrary.[112] Holmes and the other *Lochner* dissenters, on the other hand, surely did not repudiate the notion of reason.[113] But they saw that reason might lead in different directions, that conclusions might change, and that a rational process subject to change and open to argument was preferable to one resting on a closed set of indisputable propositions.[114]

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and the Separation of Powers, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 151 (1987).

108. In Nebbia v. New York, 291 U.S. 502 (1934), the Court stated, "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . . " *Id.* at 537.

109. A rare exception is Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

110. For an extensive discussion of the central role of means-ends analysis and the principle that "the government is forced to invoke some public value to justify its conduct," see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695 (1984). *But see* Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMM. 9 (1987) (challenging the overriding importance of rational means-end analysis.)

111. 198 U.S. 45 (1905).

112. *Id.* The Court inquired: "Is this a fair, reasonable, and appropriate exercise of the public power of the state, or is it an unreasonable, unnecessary, and arbitrary interference . . . ?" *Id.* at 56. It also stated that "[t]his [was] not a question of substituting the judgment of the court for that of the legislature." *Id.* at 56-57. The majority ultimately disposed of contrary evidence by stating: "We do not believe in the soundness of the views which uphold this law." *Id.* at 61.

113. All three opinions in *Lochner* use a "reasonableness" standard. Thus, Holmes dissented because "a reasonable man might think [the statute] a proper measure." *Id.* at 76 (Holmes, J., dissenting). Justice Harlan and his dissenting colleagues stated that the test was "whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real and substantial relation to [that end]." *Id.* at 69 (Harlan, J., dissenting).

114. According to Justice Harlan, "It is enough for the determination of this case, and it is enough for this Court to know, that the question is one about which there is room for debate and for an honest difference of opinion." *Id.* at 72 (Harlan, J., dissenting).

D. Reason and Tolerance

At the same time, the liberal commitment to limits on government will place some questions entirely beyond the sphere of even rational politics.[115] On these issues, tolerance may well be an end in itself. Permanent, intractable disagreement is likely, if not inevitable, but the existence of such conflict does not threaten the political community.[116] But in matters legitimately within the public sphere, tolerance is expected to promote rational dialogue, which will in turn lead to decisions promoting public welfare. How can we best recognize those exceptional issues properly beyond political debate? Attempts have been made to catalogue such issues based, for example, upon their importance to the individual,[117] but perhaps a better approach is to focus on the strengths and weaknesses of rational dialogue.

E. Reason and Non-Rational Beliefs

Even the most ardent advocate of rationality must concede that some questions simply cannot be successfully approached through rational means. This may lead one to dismiss such questions as insignificant or trivial,[118] but this conclusion is unnecessary. What is necessary is to recognize that such

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115. The classic sphere of tolerance in modern western democracies is in the area of religion. According to one commentator:

> The modern concept of tolerance developed out of the theory of religious toleration .... Religious struggles ... could not be resolved peacefully so long as the parties insisted that the state enforce their doctrines .... Defenders of toleration believed that political authority should be confined to the affairs of this world, and consequently were led to narrow the scope of politics.

JOHN L. SULLIVAN ET AL., POLITICAL TOLERANCE AND AMERICAN DEMOCRACY 3 (1982).

116. The liberal attempt to limit the spheres in which politics holds sway has the following implications:

> Acceptance of liberal democracy may presuppose an ability of people to work out most practical conflicts by some sort of reasoned process, but a liberal democrat's belief in rational capacities can fall far short of any assumption that all or most fundamental human problems have correct answers at which people can arrive by rational deliberation.

KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 23 (1988).

117. This type of analysis is seen in much of the long argument over which rights, if any, are entitled to special "substantive due process" protections. Thus, as Robert McCloskey has noted, the "demotion" of economic rights and the heightened scrutiny given to "personal rights" in recent decades is often supported by "a group of arguments based on judgments about the nature and relative importance of the rights concerned." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45.

118. It should be clear that I am using the terms "reason" and "rational" to contrast with concepts of faith or unchallengeable authority, rather than with "empiricism." The notion that all questions worth talking about (even religious questions) can be related to advancing human welfare in demonstrable ways is at the heart of contemporary humanism. *See* Eric C. Freed, Note, *Secular Humanism, The Establishment Clause and Public Education*, 61 N.Y.U. L. REV. 1149, 1153-56 (1986).

questions are inappropriate in a forum dedicated to rational discussion. This can be conceded even by those who, quite contrary to the thorough-going rationalist, believe that questions subject to rational analysis are less important than the questions which resist such analysis.

Perhaps the most significant set of nonrational questions are those concerning religion, especially those aspects of religion which transcend rules of ethical behavior.[119] Questions such as the nature of God, and the existence of heaven or hell, can be debated only by those who share a faith that provides them with enough in the way of common beliefs and language to understand each other.[120]

At least in theory, rational discussion can fruitfully take place among those with widely diverse belief systems. They need only share common human experiences, a common language, and an understanding of logic and other methods of testing propositions against reality. Of course, this may overstate the case. What we consider rational beliefs may rest to a greater extent than we realize on unstated, unchallenged nonrational beliefs.[121] But the constitutional system established by the framers seems to commit the nation to the belief that issues in the public sphere are to be settled by rational debate, and that such debate is possible among citizens and communities with diverse nonrational commitments, owing to the abilities which all share, at least potentially, as rational beings.[122]

F. The Liberal Commitment to Neutrality

The First Amendment, with its speech and press clauses on the one hand, and its religion clauses on the other, recognizes the importance of tolerance as both an end and a means. Some subjects are beyond the scope of public debate and with respect to these subjects, tolerance is required as an end in

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119. The extent to which religion has been concerned with obligations in this world as opposed to transcendent, other-worldly concerns has shifted over time. *See generally* Robert N. Bellah, *Religious Evolution*, 29 AM. SOC. REV. 358 (1964).

120. *See* GREENAWALT, *supra* note 116, at 55. He discusses the futility of attempting to convince someone to abandon a core religious belief on rational grounds. Persuasion requires some common underlying beliefs, rational or otherwise.

121. This is true too of values. This is the central point in the Critical Legal Studies attack on liberal theory. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 64-85 (1987).

122. According to Cass Sunstein:

> For the founders, republicanism connoted a form of democratic self-determination; a large degree of deliberation in government; political equality; and a belief that political outcomes should reflect a capacity to think about the public good. The framers emphatically rejected the notion that self-interest is the inevitable motivating force behind human behavior. They did not believe that reason was always the slave to the passions. They sought to create a deliberative democracy that was realistic about human motivation but that sought simultaneously to encourage and provide a place for virtue.

Cass R. Sunstein, *Republicanism, Rights: A Comment on Pangle*, 66 CHI.-KENT L. REV. 177, 178 (1990).

itself.[123] But most subjects are susceptible to rational debate, and will be legitimate subjects of government action.[124] Here, tolerance is an essential means to bring about the most enlightened resolution of these questions. Thus, in both of these contexts, the First Amendment requires the government not to be intolerant. But what is the scope of that commitment? Some of the more prominent attempts to identify the core value of the liberal state have focused on "neutrality."[125] Ronald Dworkin, for example, defines the liberal state as one which is neutral on the question of what constitutes the good life.[126] Thus, the individual is left free to seek his or her own conception of the good, subject only to regulation necessary to maximize the overall ability of all to approach that goal.[127] There is much to be said for this definition, but it can lead to serious problems if insufficient care is taken to explore what it means to be "neutral."

One understanding of the term would see neutrality as a constant agnosticism, perhaps even disinterest. According to this view, which is something of a caricature, both the liberal individual and the liberal state believe and care strongly about little in public life, except perhaps the principle of neutrality itself. The liberal individual may have strong private beliefs, but certainly refrains from imposing them on others, and even refrains from attempting to convince others of their validity. The liberal state, by definition having no private life, is denied even this outlet for strong substantive beliefs. This caricature of the liberal individual and the liberal state does not make either seem particularly attractive. Such a lack of commitment to anything beyond process seems bloodless and mechanical. But the caricature is just that. The actual belief system of the liberal individual is more complex, and gives us insight into the permissible range of beliefs of the liberal state.[128]

G. Liberal and Non-Liberal Beliefs

One can believe something in at least two ways. A belief may be held in a fundamental, permanent way, based quite consciously at least in part on

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123. For the most part, this is the tolerance called for by the religion clauses. *See supra* note 115.

124. John Sullivan and his colleagues make the distinction between religious toleration, meant to remove certain questions from public debate, and political tolerance, meant to stimulate public debate on public issues. Sullivan, *supra* note 115.

125. *See generally* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); RONALD DWORKIN, LIBERALISM IN PUBLIC AND PRIVATE MORALITY (Stuart Hampshire ed., 1978). For a vigorous argument against the proposition that neutrality is the essence of liberalism, see generally WILLIAM GALSTON, LIBERAL PURPOSES (1991).

126. DWORKIN, *supra* note 125, at 127.

127. These arguments tend to go back to the philosophy of John Stuart Mill, expressed in this way by Fred Berger: "Only to prevent harm to others may society interfere, and then only if that conduct directly harms others." FRED R. BERGER, HAPPINESS, JUSTICE AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 229 (1984).

128. *See* GALSTON, *supra* note 125.

non-rational factors.[129] Here the believer's commitment is beyond debate. Contrary views are not sought out; if encountered, they are ignored or dismissed as irrelevant or heretical. Such a belief is essentially nonliberal. But it is not the only type of commitment which merits the designation "belief."

Many beliefs are not irrevocable commitments, but are more provisional.[130] They are open to challenge, and in the face of convincing evidence, subject to change. The fact that something is open to challenge does not mean that it is not a belief. Nor does it mean that the belief is weak. Indeed, the belief may gain strength from its encounter with contending ideas. It does not mean that the belief is unimportant; unless and until abandoned, it may be a significant part of the believer's life, and may profoundly influence conduct. But if open to rational debate even a strong and significant belief or set of beliefs is entirely consistent with liberalism.

This point may best be illustrated by examining types of religious, rather than political, beliefs. Observers of American religion have noted that, at least in recent times, the most significant religious differences between believers have not necessarily been linked to denomination, but rather to the gulf between liberal and nonliberal approaches to questions of faith and morals.[131] Some approach religion as an open-ended "quest" for meaning; others as a commitment to a closed set of norms.[132] Some see great value in dialogue with the world and with very different religious traditions; others reject any attempt to dilute revealed truths or particular traditions.[133]

Opponents of liberal religious beliefs may see openness to dialogue and growth as at best curious, at worst an indication of the absence of faith.[134] But it seems clear that open, dialogic, dynamic belief systems can serve individuals in exactly the same way as more closed, static religious commitments. They can shape behavior, provide meaning and reassurance.[135] The liberal religionist is not without religion because he or she regards it as open to dialogue and possible amendment. Likewise, the legal or political liberal is not without beliefs because of a willingness to consider the possibility of change.

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129. *See* C. David Batson et al., *Social Desirability, Religious Orientation and Racial Prejudice*, 1 J. SCI. STUDY OF RELIGION 31, 37-40 (1978).

130. *Id.*

131. *See* ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 132-214 (1988). For a discussion of how this "liberal-conservative" religious dichotomy interacts with political views, see PETER L. BENSEN & DOROTHY L. WILLIAMS, RELIGION ON CAPITOL HILL: MYTHS AND REALITIES 107-39 (1982).

132. *See* Batson et al., *supra* note 129, at 32-37.

133. For a suggestion that this distinction may be relevant in applying the Establishment Clause of the First Amendment, see Daniel O. Conkle, *Religious Purpose, Inerrancy and the Establishment Clause*, 67 IND. L.J. 1, 8-15 (1991).

134. For a discussion of the revival of conservative American religion in recent decades, see WUTHNOW, *supra* note 131, at 173-214.

135. Thus, Bensen and Williams found that members of Congress took political positions which tended to correlate with the specific conceptions they had of religion. BENSEN & WILLIAMS, *supra* note 131, at 140-67.

Discussions of liberal or nonliberal attitudes often proceed as if individuals were likely to be either consistently liberal or nonliberal in their views. But perhaps most common is the individual who holds beliefs which fall into both categories. One might, for example, hold liberal views on social and political questions, but nonliberal views on questions of religion or aesthetics. On balance, we might describe such a person as liberal, both because we regard the areas of his or her liberalism more significant than other questions, and because although closed to challenge on some beliefs, he or she tolerates the existence of differing views. Thus, the liberal individual is likely to combine a wide range of beliefs which are subject to rational debate with some other beliefs not subject to such debate, and perhaps also a range of questions on which no beliefs are held at all. Is the same true of the liberal government envisioned by the Constitution?

To put it differently, must the liberal state envisioned by the Constitution be consistently "neutral" on questions of social values, as some contend?[136] The answer will depend on what is meant by neutrality, and also on the specific question at issue. If neutrality is defined as a consistent agnosticism, then it is required on only certain questions, that is, those placed beyond the proper scope of government action. The most obvious example is religion, singled out by the First Amendment for a special kind of government neutrality. This is clearly not surprising. Although most believers would deny that religious belief lacks any rational basis, most would also readily concede that religious commitment includes some nonrational elements.[137] To a certain extent, then, religious arguments will be meaningful and comprehensible only to those who share some basic beliefs.[138] If the fundamental commitment of the constitutional system is that public decisions will be made within a system of rational debate, one which is fully accessible to those who share no more then the ability of all persons to carry on such debate, then questions which demand or even permit resolution on the basis of some special faith or gnosis should not be proper subjects of government discourse.[139]

Beyond the explicit reference to religion in the First Amendment, there are other matters which require this sort of strong neutrality in order to preserve the processes of rational debate. The most obvious example is the question of how citizens should vote in future elections. Perhaps the most frequently noted example of an unconstitutional condition placed on government spending is a condition that explicitly favors the members of a single political party.[140] While commentators agree that such a restriction

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136. *See* sources cited *supra* note 125.

137. Even the most "optimistic . . . natural law" tradition, that of Aquinas and subsequent Roman Catholic thinkers, does not entirely eliminate the role of revelation and authority. *See* GREENAWALT, *supra* note 116, at 38-44.

138. Of course, this is not to say that all, or even most, moral arguments by religiously committed people are inaccessible to others. *See id.* at 69-76.

139. *See supra* notes 110, 121.

140. *See, e.g.*, Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 819 (1981); Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 622-

is forbidden, their explanations of why this is so are not always clear.[141] Thomas Emerson comes close when he states that government may only "speak" on government functions, and entrenching itself in power is not such a function.[142]

Regardless of how far short the electoral process may fall from the ideal of being a forum for rational debate, it remains the key mechanism available to spur critique, defense and possible change of government policy. It is one thing for individuals currently holding government posts to take partisan positions. Such activity is probably inevitable, and is perceived by the public as being the activity not of the state itself, but of individuals seeking endorsement of their own and their party's positions.[143] But when the law of the state entitles those in power to continue in power, then that law loses the openness to change that is at the core of the rational liberal commitment.

H. Liberalism as Openness to Dialogue

Thus, neutrality in the strong sense of a consistent refusal to take a position is required on issues not susceptible to public rational dialogue, and on questions where government would, by taking a position, undermine the operation of the process of rational dialogue by too closely aligning itself to maintenance of the status quo. But this type of neutrality is not required of government on a wide range of issues. Just as the liberal individual may hold and express, quite strongly, a wide range of particular beliefs, so may a government committed to liberal rationalism. However, these beliefs may not be insulated against rational refutation. When a belief is placed beyond rational critique, the believer has lost the right to claim that the belief is consistent with liberalism. But at the same time, liberalism does not require a belief to go unchallenged or criticism to stand unrefuted.[144]

Examples are not difficult to find. A liberal individual might conclude, for rational reasons, that teenage sexual activity is wrong. So might a liberal society.[145] The promotion of such a belief does not, in itself, violate the demands of liberalism. That line is crossed only if such promotion rests on nonrational grounds, such as religious claims not susceptible to discussion with nonbelievers, or if it takes the form of suppression of dissent or distortion of

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37 (1980); Sullivan, *supra* note 1, at 1495.

141. Professor Shiffrin states that "selective government subsidies designed to influence elections tend to undermine respect for the political system and depart from equality in ways that must be justified." Shiffrin, *supra* note 140, at 622. Professor Sullivan states that granting benefits "only to those who joined the incumbent party's ranks obviously would pressure constitutionally protected choices about political association." Sullivan, *supra* note 1, at 1495.

142. Emerson, *supra* note 140, at 836-38.

143. *See infra* note 168.

144. William Galston defends the proposition that civic education, promoting the core values of the liberal state is both possible and desirable. GALSTON, *supra* note 125, at 241-56.

145. *Id.* at 283-86. *See* Bowen v. Kendrick, 487 U.S. 589, 593-97 (1988) (discussing the Adolescent Family Life Act of 1981).

the process of rational discussion.[146] Likewise, it does not violate properly understood principles of liberal neutrality for the government to promote its belief that a controversial historical figure, such as Christopher Columbus[147] or Robert E. Lee,[148] should be regarded as a hero rather than a villain. But suppression of contrary views would violate that norm. The system must be open to the possibility that the government might change its mind on the question.[149]

I. The Liberal Individual and the Liberal State

Both the liberal individual and the liberal state, then, will qualify for that description not by the lack of beliefs or by an unwillingness to defend them, but rather by the fact that beliefs are held and defended through rational means and with a genuine willingness to change. This basic similarity does leave room for some significant differences. The first has already been noted. The individual, having both a private and a public life, may hold a range of views that are nonrational and maintained in a nonliberal way, and still fairly be described as liberal if these nonliberal views are limited to subjects which we concede are not subject to rational debate, that is, subjects properly out of the public sphere. The state, having no private life, enjoys no such sphere for the nonrational. Subjects not susceptible to rational dialogue are those on which the government must maintain consistent neutrality.

The second difference between the liberal individual and the liberal state is, of course, the obvious difference in the power wielded by the two. This places special burdens on the state to subject itself to more rigorous examination of the ways in which it advocates its position. In several contexts, courts have held that even potentially deceptive speech by individuals must be tolerated, lest valuable speech be chilled. Thus, individuals may in some cases disguise the source of their message[150] and their possible selfish motives. Generally, individual speakers have no obligation to present a balanced

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146. The issue in *Bowen* was not whether it was legitimate for the government to discourage adolescent sexual activity. The issue was whether "the statute violat[ed] the Religion Clause of the First Amendment." *Bowen*, 487 U.S. at 597.

147. The quincentenary of Columbus' voyage has set off a furious cultural debate over how the explorer should be regarded. *See* Tim Golden, *Columbus Landed, er Looted, uh—Rewrite!*, N.Y. TIMES, Oct. 6, 1991, § 2, at 1; Richard L. Kagan, *The Discovery of Columbus*, N.Y. TIMES, Oct. 6, 1991, § 2, at 3.

148. *See* ALAN T. NOLAN, LEE CONSIDERED: GENERAL ROBERT E. LEE AND CIVIL WAR HISTORY 3-8 (1991).

149. Community attitudes toward the status of historical figures can evolve over time. *See, e.g.*, John Noble Wilford, *Discovering Columbus*, N.Y. TIMES MAG., Aug. 11, 1991, at 25.

150. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-98 (1982) (invalidating a similar Ohio statute); Talley v. California, 362 U.S. 60, 63-63 (1960) (invalidating a law prohibiting distribution of anonymous handbills); NAACP v. Alabama, 357 U.S. 449, 460-66 (1957) (invalidating a statute requiring the disclosure of the membership list of a controversial political organization). But see Buckley v. Valeo, 424 U.S. 1, 60-84 (1976), for a clear indication that not all mandatory disclosure provisions are unconstitutional.

argument.[151] Even outright lies may have to be tolerated, at least in the political arena.[152]

But to give the government the same leeway when it states its position would be improper. The lapses of the individual from the liberal rational model are to be expected and are to be remedied by the system itself. But the government is not to be permitted such lapses. When it speaks, it must take special care to do so in a way that does not distort the process of rational dialogue. It is this requirement that will serve as the core for the analysis of the constitutionality of conditions on spending.

Thus, the liberal neutrality called for by the Constitution, while requiring the government to be strictly and consistently agnostic on a relatively narrow range of issues, permits it to take and advocate its own beliefs on a wide range of issues. It is recognized that there will be restrictions on the tactics and the form of advocacy consistent with the process of rational dialogue. And indeed, in a few cases one might go further and maintain that the government must advocate a belief. The rational liberal values of the Constitution itself are not, like most issues, subject to reversal, except through the extraordinary route of constitutional amendment.[153] The availability of a process of amendment is surely a crucial factor in assuring the liberality of the system as a whole. The Constitution does not absolutize itself. Thus, individuals may take positions denying the fundamental values of the Constitution and may seek to change them. But the government itself must adhere to constitutional values as long as they remain the basic charter giving the government its authority. So, for example, the government not only may, but must, advocate a belief in the fundamental equality of its citizens. It is not an option for the government to be agnostic on the question of whether one race is inferior to another, and of course, even less so for the government to agree with such a position.

To summarize, we began this section with the proposition that the question of coercion, commonly seen as the core inquiry in judging conditional spending programs, is best understood not as a question involving the amount of pressure brought to bear on the offeree, but rather as one asking whether the offer is itself improper. Government actions are judged by the standards of the Constitution, and it is to that document that we must turn to judge whether an offer is proper. When the concerns raised by the conditions placed on spending implicate the First Amendment, an offer will be improper if it conflicts with the role of the government in the rational liberal system envisioned by the Constitution, and given special protection by the First Amendment.

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151. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-58 (1974).

152. The Supreme Court has been quite hostile to defamation claims brought by political candidates for attacks made during campaigns. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272-77 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 295-301 (1971). *See also* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-41 (1961) (holding that deceptive political activity could not be the basis of an antitrust claim against a trade association).

153. U.S. CONST. art. V.

The First Amendment demands that the government maintain an attitude of liberal neutrality, but this does not mean that it must never endorse or express its opinion. Occasionally, this strong form of neutrality will be required, but this is so only on questions where resolution demands recourse to nonrational means, or on questions where government would, by taking even a provisional position, seriously distort the continued functioning of a government system open to critique and change. On a vast range of questions, however, this degree of neutrality is not required. Rather, the government may endorse and advocate beliefs, even beliefs which prefer one way of life over another. These beliefs must, however, be advocated in a liberal manner. That is, the government must engage as a participant in a dialogue in which it is genuinely open to other views. If it relies not on the persuasive force of rational argument, but rather on its power to manipulate the dialogue to insulate its position from refutation, it has acted improperly. With these general principles in mind, we return to the specific question of conditional spending. When will conditions placed on grantees threaten this type of neutrality?

IV. FIRST AMENDMENT LIMITS ON CONDITIONAL SPENDING: PROTECTING LIBERAL RATIONAL DIALOGUE

As discussed above, the "coercion" which will invalidate a condition placed on the grantee of a government spending program is best measured not by an inquiry into how much pressure is felt by the grantee, but whether there is something blameworthy about the offer.[154] There is nothing inherently blameworthy about government taking a position on questions of morals or values. Indeed, it is inevitable that the government, to some extent, will do so. And, as law becomes more and more the primary, if not the only, language of normative judgments shared by most of the community, such moral judgments are likely to increase in importance.[155]

Thus, suggestions that all government speech be subjected to the same tests for neutrality imposed by the Establishment Clause with regard to religion are unfounded.[156] However, it may be useful to borrow at least one concept from Establishment Clause analysis to aid in assessing whether the government has advocated its position by improper means. The most significant analytic tool to emerge in recent Establishment Clause cases is the

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154. *See supra* notes 86-114 and accompanying text.

155. Law may be the language of public discussion of morality but most people also recognize that law is not an ultimate value. The tension created by this is problematic. According to Robert N. Bellah,

> [i]n the face of religious pluralism and growing doubt about the intellectual cogency of traditional religions and philosophies, we are forced into making law our ultimate morality and religion. However, because law has been separated from its traditional moral and religious foundation, it cannot be viewed as our ultimate authority.

Robert N. Bellah, *AALS Law and Religion Panel: Law as Our Civil Religion*, 31 MERCER L. REV. 477, 483 (1980).

156. For the most explicit argument in favor of a reading of the First Amendment as "contain[ing] an implied prohibition against political establishment," see Kamenshine, *supra* note 6, at 1105-19.

concept of endorsement.[157] As developed by Justice O'Connor, this principle holds that government violates the Establishment Clause by conveying a message to non-believers that religious believers are, in some sense, privileged members of the political community.[158]

A. Endorsement: Religious Context

Most significant, for our purposes, is the importance which the endorsement test gives to the perceptions of the audience and its focus on just what it is that the government is saying through its acts.[159] A religious display on public property might run afoul of the Establishment Clause not only when it is actually sponsored by the government,[160] but also when the government creates the perception of sponsorship.[161] Conversely, eliminating religious speech from a public forum might convey a message of hostility to religious ideas,[162] even if it is done in a sincere effort to be neutral. While the type of perception which is troublesome will differ when it involves government speech on secular subjects, the insight that what a reasonable audience perceives may be just as important as what the speaker intends remains valid.

Similarly, the messages communicated by the government on non-religious subjects may be examined to see whether, in context, they communicate something inconsistent with the constitutional commitment to liberal rational dialogue. A commitment to rational dialogue is not threatened by the government expressing its own opinion on a wide range of public questions. It surely is threatened by government actively silencing dissenting voices. This much is widely recognized and accepted. But there are other more subtle ways than outright distortion, by which the government may distort the process of public debate. These methods are analogous to tactics adopted by private speakers, and when employed by private speakers, these tactics are often protected by the First Amendment, despite their ability to distort. This should not mean, however, that government should be permitted the same leeway. This is so not only because the government, as the "eight-hundred pound gorilla" of communication, has much greater power to distort debate

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157. *See* Donald L. Beschle, *The Conservative As Liberal: The Religion Clauses, Liberal Neutrality and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 175-88 (1987); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1052-59 (1986).

158. Lynch v. Donnelly, 465 U.S. 668, 687-89 (1983) (O'Connor, J., concurring).

159. *See id.* at 688 ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

160. *See, e.g.*, ACLU v. City of St. Charles, 622 F. Supp. 1542, 1543 (N.D. Ill. 1985), *aff'd*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986).

161. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 598-613 (1989) (invalidating an annual display of a creche, sponsored by the Roman Catholic Holy Name Society. The creche was exhibited in the lobby of the Allegheny County Courthouse).

162. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 270-75 (1981).

than almost any private speaker, but also because the Constitution itself directs its attention to defining the permissible range of government, not private activity. In general, government speech on value questions should be examined to determine whether the government has betrayed its commitment to liberal rational dialogue. Has it attempted to undermine or distort the process by sending a deceitful message? Specifically, there are at least two ways in which conditional spending programs may distort the process of rational debate. First, the government may deceive listeners about the source of a message, unduly adding to its legitimacy in the eyes of its recipient.[163] Second, the government may go beyond conveying its own message to falsely convey that no dissenting views exist, or at least that such views need not be taken seriously.[164]

Often, in political campaigns and elsewhere, the ability to disguise the source of a message may prove extremely useful. A candidate may want to disseminate negative information about an opponent while avoiding any backlash against "mudslinging."[165] Or, one might wish to create the illusion of support from independent, unbiased observers, rather than have the message discounted as self-serving.[166] The First Amendment has been held to protect the ability of private speakers to mask the source of their message, short of outright misrepresentation.[167] But should government have the same leeway?

B. Private v. Government Distortions

The government's disproportionate power to communicate its opinions is at least partially curbed by the natural skepticism, perhaps even cynicism, which greets government messages clearly labeled as such.[168] Whatever qualms we may have about distortions by private speakers, these qualms yield to a concern that such speakers may be silenced if they are required to disclose their sources.[169] The government is hardly likely to be silenced by a more rigorous requirement to label its own communication honestly. If the government may not only advocate its own position, but bolster it by

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163. *See supra* notes 110-117 and accompanying text.

164. *See supra* notes 117-143 and accompanying text.

165. *See* Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991). A suit was brought against a political operative for breach of a promise of confidentiality. *Id.* at 2516. The defendant leaked damaging information concerning a rival candidate to a newspaper. *Id.* When the source of the story was revealed, there was a backlash against the source. *Id.*

166. Thus, in Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 130 (1961), the self-interested railroads campaigned against legislation favorable to trucking interests appearing to represent "spontaneously expressed views of independent persons and civic groups."

167. *See supra* note 94.

168. "[V]oters in [an] experienced democracy quickly learn to discount many political statements made in the context of an election." Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 584 (1980).

169. *See* Brown v. Socialist Workers, 459 U.S. 87, 91-98 (1982); NAACP v. Alabama, 357 U.S. 449, 458-60 (1958).

deceptively making it appear to come from another source, this deception distorts rational debate, and threatens First Amendment values.

C. *Distortions in* Rust

There could be no better example than the case of the family planning clinics in *Rust*.[170] Let us assume that *Roe v. Wade*,[171] while holding that the government may not criminalize abortion, did not require the government to refrain from expressing any opinion on whether women should choose abortion or childbirth.[172] This is no more inconsistent than the holding that the government may urge its citizens to respect the United States flag but may not criminalize flag desecration.[173] The government may express its opinion in at least two different ways. First, full-time government employees, clearly disclosing their status, might counsel against abortion and in favor of alternatives. The message likely to be received is not merely that "abortion is the wrong choice," but that "your government thinks that abortion is the wrong choice."[174] As such, the message is accurate, and the expression of such an opinion contravenes no constitutional command.

But in *Rust*, the government is permitted to go further. The government exerts financial pressure on personnel and organizations perceived as independent of the government, to deliver its message.[175] The message has been transformed to become "Dr. *X* (or clinic *X*) thinks that abortion is the wrong choice." This message involves two distortions. The message may be simply false: the counselor or institution delivering the government's message may not agree with it. And the message also unduly strengthens the normative judgment on abortion because the listener may believe it comes from a source free to disagree with the government. The listener, quite

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170. *See supra* notes 72-85 and accompanying text.

171. 410 U.S. 113 (1973).

172. Of course, this has not been universally accepted, but seems to be the prevailing view. Thus, it was held that *Roe* did not prevent a state from making "a value judgment favoring childbirth over abortion," so long as no "obstacle" was placed in the way of a woman who sought an abortion. Maher v. Roe, 432 U.S. 464, 474 (1977). While some of the abortion cases do suggest that the state "may not adopt one theory of when life begins" to persuade a woman to forgo abortion, City of Akron v. Akron Cr. for Reproductive Health, Inc., 462 U.S. 416, 444 (1983) (striking down "informed consent" procedure), it seems extremely unlikely that after Webster v. Reproductive Health Services, 492 U.S. 490 (1989), persuasion short of coercion will be held improper. See especially, Chief Justice Rehnquist's discussion of the preamble of the Missouri statute. *Id.* at 504-07. Of course, to the extent that "informed consent" requirements are deceptive in the ways discussed in this Article, they should be seen to pose constitutional problems.

173. *See* United States v. Eichmann, 496 U.S. 310, 313-18 (1990); Texas v. Johnson, 491 U.S. 397, 410-22 (1989). These cases surely do not suggest that federal statutes encouraging respect for the flag, but coercing no one, are unconstitutional. *See* 36 U.S.C. §§ 170-187 (1988).

174. In the same way a public religious display might send not only an unadorned religious message, but also a message that the government endorses that statement. *See supra* notes 100-03 and accompanying text.

175. *See Rust*, 111 S. Ct. at 1764-66.

possibly already aware that the government prefers childbirth to abortion, now believes that this "private," independent and knowledgeable actor concurs.

D. The Art-Funding Cases

The same sort of analysis may be made in cases involving government funding of art. Surely, the government may convey its own messages through the use of art. Few would seriously contend that in commissioning public art, such as the Vietnam Veteran's Memorial or a statue of a historic figure, the government may not choose to convey a message of respect for the subject.[176] While this seems a rather innocuous conclusion, the fact is that such decisions entail controversial messages. Was Vietnam a noble cause? Was George Armstrong Custer, or even Christopher Columbus, a hero?[177] Questions such as these are hotly debated, but the government's participation in the debate need not unduly threaten the dialogue.

This is especially so when the full message is accurately received by the hearer. A public monument to Columbus does not merely state, "Columbus was a hero," but, in the context in which it is displayed, states, "Your government believes that Columbus was a hero." This latter message will be accurately perceived, and weighed in the ongoing debate. The individual may accept or reject the government's contention, but in any event, the source of the message will be apparent. On the other hand, when an artist who has received NEA funding, often through an intermediary organization,[178] produces a work and displays it at a museum, gallery or theater, the context now suggests that the message is entirely that of the artist. An attempt by the government to shape the message now goes well beyond the government announcing its own endorsement of a position. It appropriates the endorsement of the message by the artist, and incorporates it into the overall message heard by the listener.

A second important way in which the government can distort public discussion is by creating the illusion that dissenting voices do not exist. Of course, if this is achieved by active suppression of private voices, it violates clear constitutional standards.[179] But the same effect might be achieved, at least in part, through the manipulation of relationships or environments in which the observer expects to hear a voice independent of the government. The Constitution clearly envisions an environment in which not only the individual, but some intermediate institutions, may maintain beliefs inconsistent with those of the government, and seek to change society's prevalent beliefs. While these intermediate institutions may not be beyond all

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176. *See generally* 36 U.S.C. §§ 121-138 (1988) (providing for the American Battle Monuments Commission).

177. *See supra* notes 148-50.

178. For a discussion of the NEA grantmaking procedures, see Kresse, *supra* note 57, at 261-68.

179. This is, of course, basic constitutional law. *See generally*, TRIBE, *supra* note 86, at 785-849. Tribe stresses the difference between "government's addition of its own voice from government's silencing of others." *Id.* at 804-14.

government control, at some point such control may subvert the role of the institution as an independent source of values. Thus, the Tenth Amendment protects states in their essential roles.[180] The First Amendment protects churches, as well as individuals, from undue interference.[181] Families, likewise, receive a degree of constitutional protection.[182] Widespread disagreement as to how far constitutional protection extends in each of these cases does not negate the core principle that alternative sources of values are to be protected.

E. Protection of Relationships

Relationships, as well as more formal institutions, may also demand protection as counterweights to the voice of government.[183] The most obvious example is the attorney-client relationship. Can there be any doubt that a statute would be found unconstitutional if it required public defenders to refrain from informing their clients of certain legal strategies or constitutional rights legitimately available to them? Although the government funds the attorney, any attempt to control his or her independent judgment is obviously improper. But this is not because the government itself must be indifferent as to whether the defendants invoke certain privileges. Both the defendant and the public at large appropriately perceive the prosecutors as non-neutral. But for the overall constitutional system to work, defense counsel must retain their independence. Constraining that independent voice by requiring it to echo the position of the government distorts the process by which the individual defendant chooses to exercise or waive her rights. Such a limit does much more than tell the defendant that the government prefers her to waive her rights. It conveys the deceptive message that even her own counsel, one who places paramount value on the defendant's welfare, concurs.

Similarly, what makes *Rust* troubling is not that the government communicates a preference for women to choose not to undergo abortion.[184] It is troubling because the government has disturbed the process by which the choice is made. Medical professionals are restricted in the course of performing their traditional role, a role in which their patients legitimately expect them to present all available medical options.[185] At least since

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180. Of course, there is significant disagreement over the precise scope of those essential roles, and the extent to which the amendment is amenable to judicial enforcement. *Compare* National League of Cities v. Usery, 426 U.S. 833 (1976) *with* Garcia v. San Antonio Metro. Transp. Auth., 469 U.S. 528 (1985).

181. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-25 (1976).

182. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 498-506 (1977); Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972).

183. *See generally* Kenneth L. Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

184. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1764-66 (1991).

185. See principle 3 of the Patient's Bill of Rights adopted by the American Hospital Association, which reads in part:

> The patient has the right to receive from his physician information necessary to give informed consent prior to the start of any procedure and/or treatment . . . . Where

Cruzan,[186] it must be conceded that medical choices have some degree of constitutional protection;[187] the doctor-patient relationship takes on some of the same constitutional dimensions of the lawyer-client relationship. Examples may be drawn from outside the context of abortion.

Current constitutional doctrine would not require the government to fund particular types of expensive medical treatment.[188] Surely, a doctor employed by the government may convey the message to patients that certain treatments will not be funded. Indeed, the doctor might be compelled to honestly present less expensive options to the patient. But what if the doctor were forbidden even to discuss the existence of the more expensive treatment, and the fact that it might be available elsewhere? Here, the government has gone well beyond conveying its own message. It has inappropriately hidden the existence of alternative views. Similarly, consider an attempt to prohibit government-employed doctors from discussing with terminal patients or their families the option of refusing or discontinuing treatment (or conversely, the option of choosing to continue treatment in cases seen as hopeless).[189] Surely, in these contexts, the absence of government obligation to fund a privately chosen medical procedure, and the power of the government to convey its own message of disapproval do not validate government efforts to distort the process by which the individual makes the choice. The government may not deceptively lead the individual to assume that no alternatives are available.

> medically significant alternatives for care or treatment exist, or when the patient requests information concerning medical alternatives, the patient has the right to such information.

AMERICAN HOSP. ASS'N, A PATIENT'S BILL OF RIGHTS, *reprinted in* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 336 (1983).

186. Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) (upheld Missouri's use of the standard of "clear and convincing evidence" to establish the desire of an incompetent patient for termination of medical treatment). The case also strongly suggested that most Justices would accord some level of constitutional protection to competent patients in their medical decisionmaking.

187. The Court, by a vote of 5-4, held constitutional Missouri's requirement that clear and convincing evidence be produced to sustain the conclusion that withdrawal of life-sustaining treatment was consistent with the wishes of an incompetent patient. However, the majority conceded: "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at 2851.

188. The right to abortion does not include a right to have the state fund an abortion. Harris v. McRae, 448 U.S. 297 (1980). In general, there is no recognized constitutional right to state funding of important social programs. *See generally* San Antonio Sch. Dist. v. Rodriquez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

189. Current federal law is quite to the contrary. Under the Patient Self-Determination Act of 1990, all federally-funded health facilities must inform patients of their right to either accept or refuse treatment. *See* Kelly C. Mulholland, *Protecting the Right to Die: The Patient Self-Determination Act of 1990*, 28 HARV. J. ON LEGIS. 609, 616-25 (1991).

F. Maintaining a Commitment to Openness

We need not choose between requiring the government to maintain strict neutrality on social issues, on the one hand, and permitting unlimited government action to further preferred positions, on the other. Instead, the First Amendment should be interpreted as requiring the government to keep the system open. The proposition that dissent may not be punished simply because it is dissent is of prime importance. But additionally, it should be recognized that the government's power over the process by which decisions are made creates a responsibility that the government present its own views without deceiving the audience as to the source of those views, or as to the presence of alternative positions.

Where the government funds the activities of counselors and these counselors provide information to clients who reasonably believe that the counselors are committed to their welfare and autonomy, attempts to restrict that commitment by requiring crucial information to be withheld are deceptive. The case of the government-subsidized artist is somewhat less compelling, but may also qualify as impermissibly deceptive. The audience does not have the same degree of need for the artist's work as the client does for the services of the lawyer or health-care professional. Still, there is a certain degree of reliance here, an expectation that the artist is conveying his or her true feelings.

If the government, then, chooses to subsidize a range of art that the public perceives as representing the voice of the artists rather than that of the government, content restrictions meant to repress certain messages may subtly send the deceptive message that these beliefs simply are not part of the public debate. A program of government sponsorship of art may be roughly analogous to the creation of a "designated public forum" in traditional First Amendment analysis.[190] In these cases, while the government had no obligation to open the forum in the first place, once it does so, it may not restrict access on the basis of the content of the message.[191] Thus, it breaks no new ground to insist that when government resources are committed to facilitate dissemination of private views, the system may not be structured to exclude officially disapproved positions. This should be so whether the resource is a venue or a dollar.

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190. *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-46 (1983).

191. *Id.* at 95. ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."). In a variety of First Amendment contexts, it is clear that the compelling state interest asserted must be distinct from simple disagreement with the message. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech "directed to inciting or producing imminent lawless action"); United States v. O'Brien, 391 U.S. 367, 376-82 (1968) (symbolic speech with non-communicative aspects); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (words which "inflict injury or tend to incite immediate breach of the peace").

G. Public Forum Analogy

Analogies to more traditional public forum situations are instructive. Take the classic example of a public park.[192] Surely the government may express itself in this forum. When it does so in the usual ways, either through speeches by public officials, or through the use of temporary displays or permanent monuments clearly perceived as representing the government's own speech, no threat to First Amendment values is present. But what if the government were to fund certain private displays, and withhold funding for others, based upon the viewpoints represented?[193] Even where the park remains open to viewpoints contrary to the government, the subsidization is obviously troubling. The government here has distorted public debate in two ways. First, it has disguised the source of its own message; the message will be perceived as coming entirely from a private, independent voice. Second, the effect of the program will be to maximize the exposure of endorsed views and minimize the exposure of alternatives. The audience is led to believe that alternative views are marginal and that endorsed views have more support outside of government itself than may be actually the case.

H. Public Libraries and Museums

The case of government subsidies to artists might also be compared to the cases of public libraries or museums. Surely, the creation of a public library or museum is itself a tribute to the commitment of the government to rational liberal dialogue. That is so largely because the library is perceived as something other than merely a source of government's own views and the museum as something other than a repository of works extolling government. An acquisition policy for either institution which seeks to exclude alternative viewpoints distorts the mission of the institution. And again, the problem is not the availability or presence of the government's own view, but the manipulation of the environment to exclude or unduly depreciate alternative views.

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192. Limits on government control of speech which takes place on at least some kinds of public property have been recognized for decades. Public parks have been one of the places most often seen as protected forums. *See* Hague v. C.I.O., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

193. Even within nonpublic forums, where government may regulate with sensitivity to content, it must not be "an effort to suppress expression merely because public officials oppose the speaker's views." *Perry*, 460 U.S. at 46.

I. Public Education

Surely there is no area in which the question of government as speaker and regulator of messages is so prominent as in public education.[194] Yet, due to the decentralized nature of school policymaking in the United States, little has been said about the legitimacy of content-sensitive restrictions placed on federal funds used for public education. More and more, however, discussions of educational policy include some types of national standards;[195] perhaps the most frequently mentioned linkage here is between federal aid and some types of control over curriculum choices.[196] If a precedent is established through relatively non-controversial requirements such as a minimum curricular commitment to science and mathematics, it is not implausible that conditions might expand into more controversial areas. Suppose that federal funds to support the teaching of biological sciences were conditioned upon recipients avoiding the subject of human sexuality, or at least certain aspects of that topic? Suppose that a condition of receiving money for social science programs was that any positive reference to socialism be avoided, or even that socialist ideas be presented as unambiguously wrong?[197] The list of such examples could go on.

These types of restrictions have been imposed as direct mandates by state governments. Academic discussion of these state mandates has clustered around two opposing positions. Some vigorously defend the right of the government to use the public schools to foster generally held public values.[198] At the other extreme, some insist on something approaching complete value-neutrality, perhaps within some "equal time" framework.[199]

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194. *See* Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of 'Bending' History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987); Shiffrin, *supra* note 140, at 647-53; Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983); Mark G. Yudof, *When Governments Speak: Toward a Theory of Governmental Expression and the First Amendment*, 57 TEX. L. REV. 863, 874-91 (1979).

195. Former Secretary of Education Lauro Cavazos, while praising the concept of local school autonomy, stresses the importance of "accountability": "[T]he Department of Education is exploring ways to link positive results to increased flexibility in the use of federal funds. In other words, grantees of a program will be given more freedom in using those funds if they achieve better results with their students." Lauro C. Cavazos, *Achieving Our National Education Goals: Overarching Strategies*, 14 HARV. J.L. & PUB. POL'Y 355, 364 (1991).

196. *See, e.g.*, Robert J. Goodwin, *The Crisis in Public Education and a Constitutional Rationale for Federal Intervention*, DET. C.L. REV. 937, 938-50 (1988).

197. These are not entirely hypothetical examples. *See* Kamenshine, *supra* note 6, at 1135-36.

198. *See, e.g.*, Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1335-57 (1976); Ernest Van Den Haag, *Academic Freedom in the United States*, 28 LAW & CONTEMP. PROB. 515, 516 (1963) (arguing that the concept does not apply to primary and secondary education).

199. *See, e.g.*, Kamenshine, *supra* note 6, at 1015-19; Sheldon H. Nahmod, *Controversy in the Classroom; The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L.

Neither of these approaches is fully consistent with the obligations of a government committed to rational liberalism. The government may maintain and express beliefs, but only within the framework of rational liberalism, that is, with a recognition that alternative voices exist. The government must be willing to engage those voices in discussion, and accept the possibility that current beliefs may change.

Public education should avoid both indoctrination and complete skepticism. Community beliefs, on subjects appropriate for rational secular debate, should not merely be recited and memorized, but discussed and explored.[200] This principle will surely not be as easy to implement as either of its two more determinate alternatives. The fact that time and resources are limited means that certain questions have to be addressed. When are alternatives sufficiently significant to warrant discussion? How much time should each alternative deserve? But these questions, however difficult, are not entirely new to the legal system.

In Establishment Clause cases, the Supreme Court has held it impermissible for a state either to ban the teaching of evolutionary theory,[201] or to require the presentation of creationist theories generally rejected by science.[202] In cases addressing policies set by public school or community libraries, the Court has held that while the First Amendment does not require the acquisition of any particular book, it may well prevent the removal of books already acquired from the shelves due to objection to their content.[203] While these cases have received their share of criticism,[204] they do seem to reflect at least a roughly accurate intuition with respect to the obligations of the government as teacher.

The cases on evolution and creationism may be seen to prohibit different types of deception in public education. To deprive students of awareness of generally accepted scientific theories because these theories are offensive to much of the community seems inconsistent with First Amendment values even

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REV. 1032, 1042-50 (1971).

200. One commentator has stated:

> [The] right to know approach countermands the view that school boards have the authority to inculcate the young. If students have a right to receive information, school boards have an obligation to provide them with information that may significantly undermine official efforts to inculcate the young with particular values, ideas, beliefs, attitudes and dispositions.

van Geel, *supra* note 194, at 213.

201. Epperson v. Arkansas, 393 U.S. 97, 102-03 (1968).

202. Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987).

203. Board of Educ. v. Pico, 457 U.S. 854, 863-72 (1982).

204. For an overview of the history of the evolution-creationist debates since the 1920s, see Judith A. Villareal, Note, *God and Darwin in the Classroom: The Creation-Evolution Controversy*, 64 CHI.-KENT. L. REV. 335, 339-49 (1988). *See also* James S. Hamre, *The Creationist-Evolutionist Debate and the Public Schools*, 33 J. CHURCH & STATE 765, 768-81 (1991). On the subject of school libraries, see generally Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527 (1984).

where such suppression is not motivated by religious concerns.[205] The rational liberal individual, as well as the rational liberal society, while free to debate, contest and even ultimately reject prevailing scientific thought does not hide from it. The creationism dispute is somewhat more complex. If taken, as it is by some,[206] to preclude criticism of mainstream evolutionary theory, then the Court's decision does not genuinely promote First Amendment values. But a careful reading of the case indicates that the Court saw itself as again stepping in to correct a distortion of the debate.[207] This time, the distortion took the form not of exclusion of an idea, but rather of a requirement that one position be allocated much more attention and respect than the position can command in the free market of ideas.[208]

It would hardly be realistic to require detailed judicial oversight of the precise amount of attention which contending ideas deserve. Deference should be given to decisions which appear to reflect a good faith effort to present and evaluate issues openly and fairly. But occasionally, as in the cases involving the evolution-creationism question, a decision will be so inconsistent with such an effort that judicial intervention may be appropriate. In much the same way that the question of what message government is seen to endorse has become

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205. Perhaps the most prominent example was the insistence of Soviet leaders that scientific conclusions be consistent with Marxist thought. Lenin

> "pointed out that the crisis in physics could be overcome by mastering the science of dialectical materialism. This provided a sure way for physics to surmount every kind of crisis and develop further." As a result, it is supposed to be the obligation of Soviet physicists to take the dialectic as their guide not only in their approach to politics and philosophy, but also to physics, itself.

DON K. PRICE, THE SCIENTIFIC ESTATE 8 (1965) (quoting S.I. VAVILOV, LENIN AND THE PHILOSOPHICAL PROBLEMS OF MODERN PHYSICS 12, 32 (1953)).

206. The dissenters in *Aguillard* find it plausible that Louisiana's Balanced Treatment Act was not intended to indoctrinate, but to make students

> free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life. . . . The people of Louisiana . . . are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools. . . .

Aguillard, 482 U.S. at 631, 634 (Scalia, J., dissenting).

207. "The Act actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation science, even if teachers determine that such curriculum results in less effective and comprehensive science instruction." *Id.* at 586 n.6. For a scientist's views on *Aguillard*, see STEPHEN J. GOULD, JUSTICE SCALIA'S MISUNDERSTANDING IN BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY 448-60 (1991).

208. Professor Gottlieb discusses at some length the difficult question of whether an issue or a particular view is entitled to recognition within a school curriculum, and, if so, how much attention it deserves. He does this by analogizing to the FCC's "fairness doctrine," Gottlieb, *supra* note 194, at 553-73. "Offering arguments generally regarded as weak by historians 'equal time' with more widely endorsed positions may distort public debate and give students a false impression that all or most questions are simply unanswerable." *Id.* at 568.

central to the resolution of Establishment Clause cases,[209] so might the question of endorsement control here. But rather than asking whether the government has endorsed one side of a question or another (which is properly the subject of secular public debate), the question will be whether the government has impermissibly endorsed indoctrination or deception over rational argument.

As in Establishment Clause cases, the question of endorsement does not lend itself to the development of specific rules, but in particular instances, application of the test is certainly within the competence of courts.[210] Consider the question of book selection by public or school libraries. Judge Jon Newman has noted that while the decision to remove a book from the shelves has the same obvious effect as the decision not to acquire the book in the first place, on another level the decisions send quite different messages.[211] A decision not to acquire a particular book can so easily be, and appear to be, a consequence of benign motives such as limited resources, that without much more evidence it does not send a message that the ideas contained in the book should be suppressed.[212] On the other hand, unless done for reasons such as lack of shelf space, the act of discarding a book, especially in response to outside pressure, sends precisely that message. We see, then, that current law, which avoids bright-line rules on library policy but which subjects acquisition policies to less scrutiny than decisions to remove books is entirely correct. Through its library policy, as well as through its other activities, the government must avoid endorsement of the notion that the proper response to controversial ideas is to suppress them rather than to engage and perhaps refute them.

V. CONCLUSION

Conditions placed upon government funds raise First Amendment concerns and discussions of the validity of these conditions have suffered from a failure to differentiate the kinds of neutrality required of a government committed to liberal and rational values. Unlike religion, questions of secular values do not demand that government refrain from endorsing or advocating one particular position. Rather, the question is whether government has used illiberal means to secure agreement with those positions. Such methods, including not only coercion, but also deception and the exclusion of alternative views from public dialogue, conflict with the core values underlying the First Amendment.

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209. *See supra* notes 100-04 and accompanying text.

210. That outcomes might be uncertain is not necessarily a fatal flaw. Oliver Wendell Holmes, responding to objections that his "clear and present danger" approach to First Amendment issues was indeterminate stated that that "is an objection to pretty much the whole body of the law, which for thirty years I have made my brethren smile by insisting to be everywhere a matter of degree." Letter from Oliver Wendell Holmes to Harold Laski, *reprinted in* 1 HOLMES-LASKI LETTERS 152-53 (M. Howe ed., 1963).

211. Board of Educ. v. Pico, 638 F.2d 404, 435-36 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982) (Newman, concurring).

212. *Id.*

Thus, restrictions on the content of government-assisted art, on communication between clients and government-supported counselors, on the content of public school curricula and extracurricular activities and the policies of public school and community libraries all require the same type of analysis. Aside from the narrow range of issues on which the government may not speak, such as religion, has government openly and honestly expressed its view? Has it acted deceptively by disguising its own voice so that it is perceived to be someone else's? Has it structured a relationship or an environment, properly thought of as a forum for open discussion, so that significant voices will be excluded and listeners will be led to believe not merely that alternative voices are wrong, but that they are not even worthy of being heard?