

Government Restrictions on Funding -

A Look at the Law on Content-Based Regulation and the Doctrine of Unconstitutional Conditions in the Context of Government Funding of the Arts

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*"The First Amendment means that the Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>1</sup>*

*"[E]ven though a person has no right to a valuable government benefit and even though the government may deny the benefit for a number of reasons there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech."<sup>2</sup>*

A review of recent efforts by Congress, through appropriation and reauthorization legislation<sup>3</sup>, to restrict the National Endowment for the Arts' (hereinafter "NEA") funding of certain works of art, followed by the NEA's implementation of procedures consistent with such legislation, requires consideration of the scope of the government's power to place restrictions on

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<sup>1</sup>Opinion of Justice Black, Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

<sup>2</sup>Perry v. Sindermann, 408 U.S. 593, 597 (1972).

<sup>3</sup>The NEA was created in 1965 by Pub. L. No. 89-209 § 5, 79 Stat. 845, 846-49 (1965) (codified as amended at 20 U.S.C. §§ 951-968). Since then, it has generally been subject to reauthorization every five years and appropriation annually. For a summary of the origins or history of the Endowment, see, e.g., Note, Standards for Federal Funding of the Arts: Free Expression and Political Control, 103 Harv. L. Rev. 1969 (1990); Note, The National Endowment for the Arts: A Search for an Equitable Grant-making Process, 74 Geo. L.J. 1521 (1986).

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funding. This paper focuses on the scope of that power, in the context of NEA and Congressional actions with regard to arts funding, first looking at the government's limited ability to impose content-based restrictions and then at the doctrine of unconstitutional conditions.

Part I provides a backdrop by briefly describing the actions taken by Congress and the NEA this past year and the First Amendment issues raised by these actions. Part II briefly focuses on the general case law on the government's power to impose content-based regulations and how this case law relates to the NEA's restrictions. Part III focuses on the imposition of content-based restrictions as a condition of government funding and whether this creates an unconstitutional condition.

Much has been written on the history and theories regarding the doctrine of unconstitutional conditions, as will be noted later. It is not the intent of this author to create once again such a historical analysis. Rather, it is the intent of this paper to briefly survey the present law and scholarship. This is not an area of the law where there are absolutes; consequently, more questions are raised than answered. For a start, these questions include: Is there a fundamental distinction between government inaction and government action once it has entered the arena through the conferrence of a benefit? What standard of review is the government subject to when it imposes content-based restrictions? Is the standard of review different where the restriction is imposed as a condition of funding? Does the doctrine of unconstitutional conditions protect against the imposition of content-based restrictions on NEA funding of art?

I. Congressional Restrictions on National Endowment for the Arts Funding of the Arts

A. Legislative and Administrative Chronology

Last year, in its 1990 Appropriations Act for the NEA, Congress enacted legislation prohibiting the funds of the NEA (and the National Endowment for the Humanities) from being used to produce "obscene" art.<sup>4</sup> That statute provides, in pertinent part:

None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121 § 304, 103 Stat. 741 (1989).

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<sup>4</sup>This was not the first time Congress considered such a restriction. In 1985, Congress considered funding prohibitions on the basis of "obscenity". See, e.g., H.R. Rep. No. 274, 99th Cong., 1st Sess., at 26 (1988) *reprinted in* 1988 U. S. Code Cong. & Admin. News 1072 (hearing on funding of "obscene" proposals; rejected amendment that would have limited funding of projects that in "experts' view would be 'patently offensive to the average person and lack serious literary or artistic merit'").

Note that Congress has also contemplated funding prohibitions on the basis of such factors as the use of disparaging ethnic images. See The Grant Making Process of the National Endowment for the Arts: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 98th Cong., 2d Sess. (1984) (amendment proposed by Rep. Biaggi).

The 1990 appropriation legislation also called for the creation of an Independent Commission to review the NEA grant-making procedures, its panel system and standards for grant-making, including in the criteria for grant-making, a consideration of the standard for obscenity set forth in Miller v. California, 413 U.S. 15, 24 (1973).<sup>5</sup>

Following the enactment of this law, the NEA included the restrictive language quoted above in its "General Information and Guidance for Fellowship and Individual Project Grant Recipients" and in its "General Terms and Conditions for Organizational Grant Recipients". The NEA requires all grant recipients to sign a form certifying that the recipient will abide by all of the terms and conditions set forth in these documents. Additionally, the NEA issued a "Statement of Policy and Guidance for the Implementation of Section 304 of the Department of the Interior and Related Agencies Appropriations Act of 1990", which the adopts the definition of obscenity set forth in Miller, Id. at 24, and

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<sup>5</sup>This standard, which you probably now know by rote, merits citing as it is central to the efforts of the government to place restrictions on certain types of art. The definition is:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

This standard is not referred to as the Miller standard in the mandate creating the Commission, but is paraphrased therein. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304 (b)(4)(D), 103 Stat. 741, 742 (1989) (to be codified at 20 U.S.C. § 954). The Commission was also mandated to consider whether the standard for publicly funded art should be different than the standard for privately funded art. Id. § 304 (c)(1)(B).

asserts that the restrictive language in the Terms and Conditions also shall be understood to embody this definition of obscenity. This statement also provides that the NEA will review all grant applications and will deny grants for projects that the NEA believes violate Section 304.

During 1989 and 1990, the NEA was involved in public controversy over its funding of certain works of art and exhibitions, including Piss Christ (a photograph of a plastic crucifix submerged in urine); the Robert Mapplethorpe retrospective, The Perfect Moment (containing five photographs with homoerotic themes and two with frontal nudity of minors), which was canceled by the Corcoran Gallery of Art in Washington, D.C. and which subsequently became the cause for an indictment of the Cincinnati Art Center and its Director on obscenity charges when the exhibition traveled there;<sup>6</sup> and the Witnesses: Against Our Vanishing exhibition at Artists Space in New York, (which contained art work accompanied by a catalogue which was critical of public officials, including Senator Jesse Helms, for being insensitive to AIDS victims). The NEA initially rescinded its funding of Witnesses: Against Our Vanishing but then reconsidered and restored the grant.<sup>7</sup>

On September 11, 1990 the Independent Commission submitted "A Report to

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<sup>6</sup>The Center was found not guilty, after a jury trial. See N.Y. Times, October 6, 1990, at 1, col. 1.

<sup>7</sup>For a further discussion of these incidents and the legal issues which they raise, see Rohde, Art of the State: Congress and Censorship of the National Endowment for the Arts, 12 Hastings Comm/Ent L.J. 353 (Spring 1990).

Congress on the National Endowment for the Arts" in which it, inter alia, declared its finding "that the standard for publicly funded art must go beyond the standard for privately funded art" (p. 57). The Commission, elaborating on this point, said that public support required going beyond considerations of artistic merit to "take into account the conditions that traditionally govern the use of public money" (p. 57). The Commission reaffirmed that the NEA's guiding principal must be artistic merit but also suggested that it "has a responsibility to serve the public interest and promote the general welfare" (p. 58). The Commission further recommended that the NEA reform its grant-making procedures to vest sole authority in the Chairperson, (p. 63), and revise the peer-panel system, including the Chairperson's review of the number and scope of the panelists (pp. 65-68, 71-77).

Additionally, the Independent Commission Report presented the "Consensus Statement" of a legal task force<sup>8</sup> asked to address the legal and constitutional issues involved in funding art. This Consensus Statement concludes, in brief summary, that while there is no constitutional obligation to fund the arts, if federal funds are used for this purpose "constitutional limitations ... may come into play" (p. 85); for example, it cannot do so in a way that is aimed at dangerous ideas, (p. 85-86). The task force also concluded that the NEA "is an inappropriate tribunal for the legal determination of obscenity for either civil or

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<sup>8</sup>The task force was comprised of Floyd Abrams of Cahill, Gordon and Reindel; Professor Michael McConnell of the University of Chicago Law School; Professor Henry Moynihan of Columbia University Law School; Theodore Olson of Gibson, Dunn & Crutcher; Dean Geoffrey Stone of the University of Chicago Law School, and Professor Kathleen Sullivan of Harvard Law School.

criminal liability" (p. 87), and recommended that the NEA rescind its requirement that grantees certify that the work they produce will not be obscene, (p. 88).<sup>9</sup> It also recommended against the imposition of specific restrictions on the content of works as "[c]ontent based restrictions may raise serious constitutional issues ... " (p. 89).

On October 27, 1990, Congress reauthorized the NEA for a three-year period, amending the original authorization of 1965, 20 U.S.C. § 954, to prohibit the use of NEA funds for works determined to be obscene "in a final judgment of a court of record and of competent jurisdiction." National Foundation on the Arts and the Humanities Act of 1965 (October 27, 1990) (to be codified as amended at 20 U.S.C. § 952(3)(j)). The new law also provides that no grant shall be made except upon application in accordance with regulations issued and procedures established by the Chairperson, which shall ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.* at § 954(5)(d) (emphasis added).

The reauthorization legislation provides for the repayment of grants used for works determined to be obscene, with such repayment to be by the artist, but if the artist does not repay, the Chairperson may require the granting organization (where applicable) to repay.

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<sup>9</sup>The Statement noted that some members of the task force believe that this requirement is unconstitutional and that all believe it unwise. It also noted that the requirement was under legal challenge. (See infra note 12.)

Additionally, the artist and/or organization is also ineligible for another grant for three years after repayment.

Lastly, the reauthorization legislation provides for changes in the panel system and places final decisionmaking with the Chairperson more firmly than previous legislation.

B. Introductory Review of Legal Issues Raised by the 1990 Appropriation, the NEA's Administrative Action, and the Recently-Passed Reauthorization Legislation

The restrictive language in the 1990 Appropriations Act and the NEA's implementing procedures have both uniformly been criticized as unconstitutional on a number of grounds, including that, in vesting the determination of obscenity with the NEA, they create a prior restraint on protected materials or a "chilling effect"; that, in going beyond regulating obscenity as defined in Miller, they provide a viewpoint or content-based restriction in violation of the First Amendment;<sup>10</sup> and

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<sup>10</sup>See, e.g., Floyd Abrams, Restrictions on Grant Making and the First Amendment (memorandum, August 23, 1989, prepared for Volunteer Lawyers for the Arts); A Resolution on the Reauthorization of the National Endowment for the Arts adopted by The American Bar Association's House of Delegates at the annual meeting in August 1990 (recommending that the NEA be reauthorized without restriction); letter of Professor Henry Moynihan to the Independent Commission, dated August 2, 1990. See also, Note, Standards for Federal Funding of the Arts, supra p. 1 at 1980-1986 (1990) and Faaborg, Some Constitutional Implications of Denying NEA Subsidies to Arts Projects Under the Yates Compromise, 12 Hastings Comm/Ent L.J. 397 (Spring 1990).



that, they are vague.<sup>11</sup> Similarly, as discussed above, the constitutionality of the NEA's certification process, as it applies to certification that works are not obscene, has also been challenged as a prior restraint.<sup>12</sup>

The legislation passed on October 27, 1990 to reauthorize the NEA, appears to eliminate the overly broad definitions of the 1990 Appropriations Act by defining "deemed to be obscene" as that found to be obscene by a judicial determination. However, the provisions of the new law, which direct the Chairperson to issue rules and regulations to ensure that the criteria for grantmaking includes taking into consideration "general standards of decency" and which provide more authority to the Chairperson with respect to grant decisions, may cause the legislation or the regulations issued to be rendered unconstitutional as drafted or as applied.<sup>13</sup> Additionally, it is also possible that restrictions similar to those passed last year will resurface in annual appropriations legislation, providing the same legal grounds for challenge to the legislation as were raised last year.

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<sup>11</sup>See, e.g., Rohde, supra p. 5, n. 7, at 383-386.

<sup>12</sup>At least one case has been initiated challenging the 1990 law and the NEA certification process requiring a grantee to certify that work produced will not be obscene. New School for Social Research v. Frohnmayer, 90 Civ. 3510, (S.D.N.Y. 19-).

<sup>13</sup>An initial reading of the legislation and discussions with others have led me to conclude that the legislation may also be subject to challenge: a) with regard to the requirement of repayment by a granting organization, and b) on the grounds that the penalty is draconian compared to that generally imposed for illegal actions of government contractors, etc.

While a complete review of legal issues which such legislative and administrative actions raise, particularly the question of whether the legislation and NEA procedure create a prior restraint or chilling effect on free speech, is beyond the purview of this paper, certain legal premises relating to free speech and obscenity need to be briefly set forth to provide a context for the discussion of the limited scope of content-based restrictions and the doctrine of unconstitutional conditions which are the focus of this paper.

One must begin with the basic premise that while art is a category of speech protected by the First Amendment,<sup>14</sup> obscene material is not. Miller, 413 U.S. at 23. Pornography or sexually explicit material is protected expression until proven otherwise under applicable law. Jenkins v. Georgia, 418 U.S. 153, 161 (1974). The First Amendment does not offer absolute freedom for all types of speech. The most famous limitation of the right is Justice Holmes' observation that one cannot falsely yell fire in a crowded theater. Schenk v. United States, 249 U.S. 47, 52 (1919). Additionally, the government may limit speech which is defamatory, fraudulent, or damaging to national security. Sobel, First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist, 41 Vand. L. Rev. 517, 524 (1988). To protect against censorship of protected materials, the Supreme Court has historically rejected forms of prior

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<sup>14</sup>See, e.g., Note, Standards for Federal Funding of the Arts, *supra* p. 1, at 1980; but see Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27 (1971), wherein he states that only political expression is protected by the First Amendment.

restraint.<sup>15</sup> It has also articulated procedural safeguards that place the burden of proof that material is unprotected on the censor and that requires a process which provides for immediate judicial determination. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).<sup>16</sup> These basic premises, all of which relate to the First Amendment guarantee that "Congress shall make no law...abridging freedom of speech..." provide the underpinnings for a review of the law on content-based restrictions, and the doctrine of unconstitutional conditions.

## II. The NEA Restrictions and the General Prohibition Against Content-Based Regulations

*"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."<sup>17</sup>*

*"[W]hen regulation is based on the content of speech, government action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove of the speaker's views."<sup>18</sup>*

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<sup>15</sup>See, e.g., Rohde, supra p. 5, n. 7, at 378-382.

<sup>16</sup>The recent decision in Skywalker Records Inc. v. Navarro, 90-6220 Civ-Jag (S.D. Fla. June 6, 1990) (LEXIS, Genfed library, Dist. file) contains a good discussion on prior restraint, noting that, "[a] prior restraint can be generally defined as any condition imposed by the government on the publication of speech." The court continued that, "...it is the courts and not nonjudicial officials who must decide whether a specific work is obscene."

<sup>17</sup>West Virginia Board of Education v. Barnett, 319 U.S. 625, 642 (1942), reaffirmed in Board of Education v. Pico, 457 U.S. 853, 870 (1982).

<sup>18</sup>Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 535 (1980) (citing Niemotho v. Maryland, 340 U.S. 268, 282 (1951)).

A. Summary of The Law

As a general rule, the government may not restrict expression based on the content or viewpoint of the material. Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California, 475 U.S. 1 (1986). Moreover, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Consolidated Edison, 447 U.S. at 537.

In order for the government to impose a regulation which impairs an individual's First Amendment rights, the government must show that the regulation serves a compelling state interest. Elrod v. Burns, 427 U.S. 347, 362 (1976). A regulation based on the content of speech is subject to strict scrutiny. Consolidated Edison, 447 U.S. at 536. "Laws of this sort are presumptively unconstitutional, but not conclusively so." See Sobel, supra p. 10, at 530. Such a regulation must be justified by a substantial showing of need. Texas v. Johnson, 109 S. Ct. 2533, 2540 (1989) (citing Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd sub nom, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)).

Where "speech" and "nonspeech" elements are combined, the Supreme Court has applied a more lenient standard to government regulation of the nonspeech elements. Such a regulation must meet the following three-

prong test: that it further an important or substantial governmental interest; that the governmental interest is unrelated to the suppression of free expression; and that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, 377, reh'g denied, 393 U.S. 900 (1968).

Generally, restrictions have been condoned where they are "content-neutral" time, place and manner restrictions, provided that they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 193 (1984)), (upholding New York City's guidelines to control the volume level in Central Park's bandshell concerts). See also Hefron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981), (upholding a state fair restriction on distribution of pamphlets in order to maintain orderly movement of crowds).

However, where the government has attempted to justify time, place, and manner restrictions on the likely communication impact, such restrictions have consistently been held unconstitutional on their face, as a content-based restriction. See Boos v. Barry, 485 U.S. 312 (1988), a case involving a restriction against signs critical of foreign

governments within 500 feet of embassies, wherein the Court held that, "...[t]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself", and is subject to "the most exacting scrutiny". Id. at 321 (emphasis added). Applying this holding of Boos in its flag-burning decision in Texas v. Johnson, 109 S. Ct. 2533 (1989), the Court found that Johnson's political expression was restricted because of its content, rather than for content-neutral reasons as asserted by the state, and thus subject to the strictest scrutiny. Id. at 2543. Rejecting the state's argument that "its interest in preserving the flag as a symbol of nationhood and national unity" survives this test, the Court, citing a long list of authorities, stated, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Id. at 2544.

Where the speech involved was not political expression as in Boos, but rather the regulation of adult movie theaters, the Court seems to have blurred the distinction between "content-neutral" and content-based speech regulation. See Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), in which the Court found that a zoning ordinance which restricted adult theatres within 1000 feet of residential buildings, or a church, park or school was, by its terms designed to prevent crime and to protect the quality of neighborhood life and not designed to suppress the expression of unpopular views, and was thus "completely consistent with our definition of 'content neutral' speech." Id. at 47. The Court

relied on its decision in Young v. American Mini Theatres, 427 U.S. 50 (1976) that, "at least with respect to businesses that purvey sexually explicit materials<sup>19</sup>..."[i]t is th[e] secondary effect which zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." Id. at 47.<sup>20</sup>

The Court has also allowed certain restrictions by public school officials aimed at expression by students. In this area, the Court has grappled with two competing principles: the requirement, on the one hand, that matters of education be exercised in a manner which is consistent with the First Amendment, Board of Education v. Pico, 457 U.S. at 864; and on the other hand, the need for school authorities to prescribe and control conduct, Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969), and to promote civic virtues. Ambach v. Norwick, 441 U.S. 68, 80 (1979). Thus the Court has upheld a school's imposition

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<sup>19</sup>The Court also quoted American Mini Theatres as follows, "[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude, than the interest in untrammelled political debate..." 475 U.S. at 49, n. 2.

<sup>20</sup>In Renton, dissenting Justices Brennan and Marshall did not accept the Court's finding that the regulation was content-neutral. The dissent found that the regulation discriminated on its face against certain forms of speech, and that while the Court "frequently has upheld under-inclusive classifications on the sound theory that the legislature may deal with one part of a problem without addressing all of it ... [t]his presumption of statutory validity ... however, has less force when a classification turns on the subject matter of expression." 475 U.S. at 58 (citing Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955)). The dissent concluded that the regulation was unconstitutional as the city had not shown facts sufficient to justify the burden placed on constitutionally protected expression or that the regulation provided for reasonable alternative avenues of expression. Id. at 62-63.

of sanctions against a student for his use of lewd and indecent language, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), but has held that a public school cannot compel a student to salute the flag, West Virginia Bd. of Education v. Barnette, 391 U.S. 625 (1942); cannot expel students for wearing political arm bands, Tinker; and cannot control access to or suppression of ideas through removal of books from a school library. Board of Educ. v. Pico, 457 U.S. 853 (1982).

The Court has also upheld restrictions on the content of a broadcast, noting that of all forms of communication, it has the most limited First Amendment protection. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978), in which, upon subsequent review of program content, the Court upheld the FCC's sanction of a licensee engaged in broadcasting a twelve-minute monologue entitled "Filthy Words", under 18 U.S.C. § 1464, a regulation forbidding "any obscene, indecent, or profane language." Noting that such a regulation might lead to self-censorship of "patently offensive references to excretory and sexual organs and activities", the Court said that "[w]hile some of these references may be protected, they surely lie at the periphery of the First Amendment concern." Id. at 743. The Court, in reviewing the content-based nature of the restriction, also noted that the law is not absolute, citing Schenck v. United States, 249 U.S. 47, 52 (1919) that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id.



at 745. On the one hand, the Court said that "the fact that society may find speech offensive is not sufficient reason for suppressing it". Id. at 746. On the other, it said that, "Filthy Words" 's, "place in the hierarchy of First Amendment values, was aptly sketched by Justice Murphy, [in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)] when he said: 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may derived from them is clearly outweighed by the social interest in order and morality.'" Id. at 746. So, while the Court concluded that these works were not entirely outside the protection of the First Amendment, (citing Cohen v. California, 403 U.S. 15 (1971) wherein the Court rejected the state's attempt to prosecute Cohen for disturbing the peace for wearing a "Fuck the Draft" jacket), Id. at 726, it also concluded that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen ... in the privacy of the home, where the individual's right to be left alone plainly outweigh the First Amendment rights of an intruder." Id. at 726.<sup>21</sup>

While acknowledging its holding, in Pacifica Foundation, that "speech that is 'vulgar', 'offensive', and 'shocking' is not entitled to absolute constitutional protection under all circumstances," the Court

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<sup>21</sup>Two additional points made by the Court in the Pacifica Foundation case merit repeating. First the Court stated that broadcasting is subject to different regulation with regard to the First Amendment because it is frequently accessible to children. Id. at 748. Second, the Court recognized the distinction between broadcasting or televising and other forms of communication by noting that while a nudist magazine may be protected by the First Amendment, televising nudes might raise serious questions. Id. at n. 16.

declined to extend it to an advertising parody of a public figure in Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1987) so as to remove the parody from First Amendment protection to provide a recovery for the tort of intentional infliction of emotional distress.

B. Application of the Law on Content-Based Restrictions to the NEA Restrictions

The summary provided above, while not exhaustive, provides an overview of the Court's consistent holdings with respect to the government's ability to impose content-neutral and content-based restrictions.

Leaving aside for a moment the question of whether the imposition of NEA restrictions as a condition of funding increases the government's ability to impose such restrictions, let us consider how this decisional law would apply to a direct imposition of restrictions on art -- for example, if the government were to restrict the public display of art or sale of magazines containing art: a) by prohibiting art which was representational, unless it were landscapes, or by prohibiting art which contains the color blue; or b) by prohibiting the display of art or sale of magazines containing art which is obscene, or obscene, indecent or homoerotic. Let us look at each of these examples separately, also considering possible time, place or manner restrictions on such displays.

Looking first at a regulation which prohibits the display of non-landscape representational art or art which contains the color blue,

based on current case law, such a restriction would clearly be considered to be content-based, and would be presumed unconstitutional in the absence of a compelling state interest to justify the restriction. It would, in the opinion of this writer, be hard to imagine any justification for such a restriction, let alone one which could pass judicial scrutiny. In fact, it would seem that any attempt at such a regulation would be suspect as aiming to suppress protected speech -- the non-landscape restriction as an attempt to regulate works which contain nudity but are not obscene, the color blue restriction as an attempt to suppress art which by color was either violent or political, and both for preferring the exercise of one artist's First Amendment freedom over another's.

Turning to the second example, of a regulation which prohibits the display of art which is obscene, such a regulation might be considered by the courts not to be content-based since obscenity is not protected speech. Such a conclusion would require the courts to overcome several hurdles. First, it is questionable whether, as a matter of law, art can ever be deemed to be obscene; rather, this seems an oxymoron since obscenity is defined in Miller as, "lacking serious literary, artistic, political or scientific value". See Wolff, Restricted Images: What Can Museums Exhibit? Nudity and the New Reach of the Law, ALI-ABA, Legal Problems in Museum Administration (March 1990); and Note, Standards for Federal Funding, supra, p. 1, n. 3, at 1978. Second, a regulation prohibiting the display of obscene materials could only be justified, and not subject to challenge as creating a prior restraint or infringing

protected speech, if the statute were narrowly drawn to only affect materials judicially determined to be obscene,<sup>22</sup> and such a prohibition would then seem unnecessary as redundant under most state obscenity laws.<sup>23</sup>

If the regulation were drafted, as in the final example, to prohibit obscene, homoerotic, or indecent art, it is quite possible that the Court would find that the phrase "obscene, homoerotic or indecent" was limited to the regulation of obscenity. See the discussion of the term "indecent" in FCC v. Pacifica Foundation, 438 U.S. at 739, wherein the Court noted that it had previously read the phrase "obscene, lewd, lascivious, indecent, filthy or vile" in statutes to intend only to regulate obscenity, reading into it the limits of Miller v. California to assure the statute's constitutionality. Id. at 739. While in Pacifica Foundation, the Court upheld the right to regulate a broader definition of indecency, as not requiring a showing of "prurient appeal," in a broadcast context, it seems unlikely that the Court would do so in a non-broadcast context.

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<sup>22</sup>See discussion on determination of obscenity and prior restraint, supra p. 10-11. See also, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 570 (1975), wherein the Supreme Court held that a decision to refuse to schedule a production in a municipal auditorium on the grounds of obscenity constituted a prior restraint.

<sup>23</sup>Nearly every state prohibits the sale or distribution of obscene materials. Alaska lacks any restriction and Maine, Montana and West Virginia ban sale or distribution to minors, with no provision regarding adults. South Dakota provides access to adults, but prohibits distribution to minors. See Leng, Comparison Evidence in Obscenity Trials, 15 U. Mich. J.L. Ref. 45, 45-46 (1981).

On the other hand, if the Court were to find that "indecent" or "homeroetic" were broader than "obscene," then indecent or homeroetic art would be protected speech. See the discussion, supra p. 16-17, on the Court's discussion of "obscene, indecent, profane language" in Pacifica Foundation and earlier cases, which indicate that absent a broadcast use, the Court would not suppress offensive speech. Consequently, such a regulation would be content-based and would be subject to the same scrutiny as an anti-color blue statute -- the government would be required to show a compelling need for such a regulation. It seems doubtful that a court would be satisfied by an attempt by the government to justify such a regulation because of the public interest in morality or the family, or on the basis of a public nuisance, given the direct affront to speech, unless the government had empirical data of cause and effect, the existence of which seems unlikely.

If, rather than a wholesale limit on display, the government were to attempt a time, place, or manner restriction, aimed at obscene or "sexually explicit" art, or art containing the color blue, then it would have to be shown that the regulation was unrelated to content and narrowly drawn to serve a significant public interest. While the case law indicates that such a regulation might be justified to prohibit display of obscene or homeroetic art in a school or location where there was access by minors, or to preclude display on television, it is doubtful that the government would be able to justify such a regulation for blue art or a broader regulation without the Court finding that such

a regulation was content-based, not content-neutral. Query whether the Court would apply the test in Renton to allow a special location of such art even if it had a secondary effect on speech, or whether such a regulation would run afoul of the Court's prohibition on prior restraint and required judicial delineation of obscenity. See Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir.), cert. denied 474 U.S. 1007 (1985), where a college art professor included a sexually graphic stained glass in a faculty exhibition and the college relocated the work to a less conspicuous place; the court held that "the concept of freedom of expression ought not be pushed to doctrinaire extremes" and that the college, in relocating the art, did not infringe upon the professor's rights. Id. at 631.

In conclusion, an attempt by the government to directly prohibit the display of art because of its content, whether because it contains the color blue or because it is obscene, homoerotic or indecent, would conflict with the First Amendment rights of the artist, and unless a narrowly drawn time, place or manner restriction, as just discussed, would be unconstitutional. Assuming this, the question remains as to whether the government would be subject to a lesser standard if it sought to impose such a restriction on use of funds, instead of a direct restriction.

### III. Restrictions on NEA Funding of Art as an Unconstitutional Condition

*"The Constitution empowers Congress to 'lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.' Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives.'"*<sup>24</sup>

*"I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a State has absolute arbitrary power."*<sup>25</sup>

*"[E]ven where the Constitution prohibits coercive governmental interference with specific individual rights, it 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'"*<sup>26</sup>

#### A. The Case Law

While the doctrine of unconstitutional conditions--that the government cannot condition a benefit on the surrender of constitutional rights--has been long recognized, it has not been consistently applied, and legal scholars offer differing opinions with regard to its scope and utility.<sup>27</sup> Much has been written on the historical evolution of the

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<sup>24</sup>South Dakota v. Dole, 483 U.S. 203, at 206 (1986) (citing, *inter alia*, Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

<sup>25</sup>Western Union Tel. Co. v. Kansas, 216 U.S. 1, p. 54 (1910) (Holmes, J., dissenting).

<sup>26</sup>Lyng v. Automobile Workers, 485 U.S. 360, 369 (1987) (citing Harris v. McRae, 448 U.S. 297, 318 (1980)).

<sup>27</sup>In addition to Kreimer and Sullivan, *infra* n. 28, see, e.g., Epstein, Forward: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4 (1988); Epstein, Unconstitutional Conditions and Bargaining Breakdown, 26 San Diego L. Rev. 189 (1989); Sullivan, Distribution

doctrine.<sup>28</sup> Richard Epstein notes that while the early structure of the unconstitutional condition problem generally arose in the context of cases involving commerce and economic liberty [during the period of the Lochner court], with the decline in constitutional protection of economic liberties came the protection of preferred freedoms, fundamental rights, and suspect classifications which redirected the focus of the doctrine. Epstein, Bargaining Breakdown, *supra* p. 23, n. 27, at 203-207. This paper by topic concentrates on the preferred freedom of freedom of speech, and thus generally focuses on cases on the doctrine of unconstitutional conditions as applied to the First Amendment.

#### 1. Historical Underpinnings - the Rights-Privilege Distinction

Two early decisions merit discussion because they demonstrate the early lack of limitation on the scope of government conditions. In McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), Justice Holmes (then a judge of the Massachusetts Supreme Judicial Court), in rejecting a policeman's challenge to his dismissal for violating a regulation, pronounced his very frequently

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of Liberty, 26 San Diego L. Rev. 327 (1989); Sullivan, Federal Regulation of Charitable Solicitation: Conditions on Tax-Exempt Status, a paper prepared for conference on "Charitable Solicitation: Is There a Problem?" at New York University Program on Philanthropy and the Law (October 12-13, 1990).

<sup>28</sup>Recent overviews include Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984); Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415 (1989); and Wald, Government Benefits: A New Look at an Old Gift Horse, 65 N.Y.U. L. Rev. 247 (1990). For additional, earlier scholarship, see articles cited in Kreimer, *supra* at n. 1.



quoted, "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." Id. at 517.

This view was echoed in Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934), in which the Court held that a state university requirement that a student complete a military science course requirement did not violate a citizen's constitutional rights on religious grounds as the citizen had the choice between adherence to religion and access to higher education. Id. at 262 (cited by Wald, supra p. 24, n. 28, at n. 25).

The rationale for these early cases was that there is a distinction between a right and a privilege, a distinction which was discredited in Speiser v. Randall, 357 U.S. 513 (1958), wherein the Court found that a denial of a tax exemption because of a refusal to take an oath of allegiance could not be upheld on the grounds that a tax exemption was a privilege. This was followed by the Court's clear rejection of the privilege distinction in Graham v. Richardson, 403 U.S. 365, 374 (1970) (citing inter alia, Goldberg v. Kelly, 397 U.S. 254, 262 (1970)).<sup>29</sup>

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<sup>29</sup>See also, Van Alstyne, The Demise of the Right-Privilege Distinctions in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

## 2. Recent Case Law

Since Speiser, the Court's decisions in the area of the conditioning of benefits on funding has been a hodgepodge. There does not seem to be a consistent theory for when a condition can or can not be imposed, or a consistency in the standard of review applied. Cases generally seem to run along two lines: those cases which hold that a decision not to subsidize the exercise of a fundamental right does not infringe that right, and those that recognize that the government cannot coerce certain behavior or impose an unconstitutional condition on the receipt of a benefit.<sup>30</sup>

### a. Failure to fund a fundamental right does not infringe that right.

In a long line of cases, the Court has held that a failure to fund the exercise of a fundamental right does not infringe that right, Cammarano v. United States, 358 U.S. 498 (1959) (denial of business expense deduction for lobbying). See also, Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1982) (denial of tax exemption to an organization engaged in substantial lobbying activities) (hereinafter "TWR") wherein the Court stated that "in these cases, as in Cammarano, Congress has not infringed any First

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<sup>30</sup>The Court, for the purposes of these cases, does not distinguish between appropriations and tax exemptions or deductions. See, e.g., TWR, 461 U.S. 540 (1982). Nor do they distinguish between such a subsidy and the right to government employment, which will also be discussed.

Amendment rights or regulated any First Amendment activity." Id. at 546. The Court said, "We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." Id. at 546 (citing Cammarano, 358 U.S. at 515 (Douglas, J., concurring)). In Maier v. Rae, 432 U.S. 464 (1976) (state provision of medical care for childbirth but not for abortion), the Court stated, "There is a basic difference between direct interference with protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 475. See also, Lyng v. Automobile Workers (denial of food stamp program to strikers).

In these cases, the Court has held that the legislative decision, is not subject to strict scrutiny because it does not infringe the exercise of a fundamental right. See, e.g., TWR, 461 U.S. at 549. The state is not required to show a compelling interest for its policy choice, see, e.g., Maier, 432 U.S. at 464; rather, the appropriate standard to apply is whether the statutory classification is rationally related to a legitimate government interest. The Court has stressed that with this standard, legislative classifications are "presumed" to be valid. See, e.g., Lyng, 485 U.S. at 370.<sup>31</sup>

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<sup>31</sup>Note, TWR suggests that this standard would be different "if Congress were to discriminate invidiously in its subsidies in such a way as to "aim at the suppression of dangerous ideas". Id. at 548 (citing Cammarano, supra, at 513, quoting Speiser, 357 U.S. at 519.

Similarly, in a federal aid case, South Dakota v. Dole, 483 U.S. 203 (1986), the Court upheld the federal government's conditioning of funding to the states for highways on the states' enactment of a minimum drinking age of twenty-one. Acknowledging that the constitution imposes limits on federal spending power, the Court said that this is "not a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly" but only a bar on the federal government inducing the state to engage in unconstitutional activities. Id. at 210.<sup>32</sup>

b. Governmental condition found to be unconstitutional.

In other cases, the Court has found restrictions to be unconstitutional.<sup>33</sup> For example, in FCC v. League of Women Voters, 468 U.S. 364 (1984), the Court struck down an editorial ban on noncommercial (federally funded) educational broadcasting stations on the grounds that the government's interest in such a ban was not sufficiently substantial, and that the ban did not serve in

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<sup>32</sup>See, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984) (involving the Fifth Amendment), wherein the Court held that a regulation denying federal funding to those who did not register for the draft, and requiring all applicants for funds to certify that they had registered, was not an unconstitutional bill of attainder, stating that, "the sanction is the mere denial of a noncontractual governmental benefit." Id. at 853 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)). The Court noted that this did not fall within the historical meaning of a forbidden legislative punishment since in this case the applicants could become eligible by registering for the draft and thus the statute "leaves open perpetually the possibility of qualifying for aid." Id. at 841.

<sup>33</sup>See discussion by Sullivan in Federal Regulations, supra p. 23, n. 27, at 8.

a limited manner so as to justify the First Amendment abridgment.<sup>34</sup> The Court rejected the government's reliance on TWR, distinguishing its holding on the grounds that in TWR the charity could segregate its lobbying and non-lobbying activities according to source of funding, but that in League of Women Voters, a noncommercial station which receives only one percent of its overall income from the government would be barred absolutely from all editorializing, and could not use wholly private funds for that purpose.<sup>35</sup>

In Rankin v. McPherson, 438 U.S. 378 (1987), the Court held that a discharge of a clerical worker (in a constable's office), for remarking to a co-worker, after hearing about an attempt on the President's life, "If they go for him again, I hope they get him," violated her First Amendment right to freedom of expression. Articulating the current standard for determining whether the dismissal of the public employee was proper, the Court stated that it requires "a balance between the interests of the [employee], as a

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<sup>34</sup>Noting that as broadcast regulations require restraints not imposed by other media, the Court did not require a showing of "compelling state interest", but rather that the restriction is narrowly tailored to further a substantial government interest.

<sup>35</sup>Note that the Court also distinguished its decision in FCC v. Pacifica Foundation on the grounds that there the government interest in removing the risk that children would be exposed to offensive expression was sufficiently substantial. The Court said, "In this case, by contrast, we are faced not with indecent expression, but rather with expression that is at the core of First Amendment protections, and no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial 'nuisance' of the kind addressed in FCC v. Pacifica Foundation." 468 U.S. at 380, n. 13.

citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 383 (citing Pickering v. Board of Education, 391 U.S. 563, 568 (1968)).<sup>36</sup> The Court indicated that this standard recognizes the constraints of the First Amendment and the potency of a threat of loss of employment as a means of inhibiting speech. Id. at 378. This standard certainly had come a long way from the thinking in McAuliffe v. Mayor of New Bedford.

Consequently, in Rutan v. Republican Party of Illinois, 110 S. Ct. 2729 (1990), reh'g denied, 59 U.S.L.W. 3198 (1990), a case involving a government hiring policy based on political patronage, which the Court noted was "tantamount to coerced belief," (citing Buckley v. Valeo, 424 U.S. 1, 19 (1976)), the Court held that employment decisions may not constitutionally be based on party affiliation. In so deciding, the Court stated that restrictions on freedom of association or speech were subject to strict scrutiny, Id. at 2735, n. 4, and that "[f]or ... the government [to] deny a benefit because of his ... constitutionally protected speech or associations...would allow the government to 'produce a result which [it] could not

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<sup>36</sup>A series of early cases held that since there was no constitutional right to a job there could be no objection to firing. See, e.g., Bailey v. Richardson, 182 F.2d 46, 59 (D.C. 1950) aff'd per curiam 341 U.S. 918 (1951); Adler v. Board of Education, 342 U.S. 485 (1952). This was rejected in an opinion by Justice Marshall while he was sitting on the Second Circuit, in Keyishan v. Board of Regents, 345 F.2d 236, 239 (2d Cir 1965), aff'd 385 U.S. 589 (1967) and Keyishan has since become universally accepted; Rutan, 110 S. Ct. at 2729.

command directly.'" Id. at 2736 (citing Speiser, 357 U.S. at 526).<sup>37</sup> See also, Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1986), where the Court found that a sales tax which was placed on general interest magazines but not on newspapers, religious, professional trade or sports journals, violated the First Amendment. The Court found that the classification, even though there was no evidence of censorship motive, was suspect because it was content related, and it applied a compelling state interest standard of review. But see the dissenting opinion of Justice Scalia, citing TWR, which questioned the use of the strict scrutiny standard of review in both this and an earlier newspaper use-tax decision, Minneapolis Star & Tribune Co. v. Minnesota Comm'r. of Revenue, 460 U.S. 575 (1983), because these were subsidy cases. 481 U.S. at 236.

c. Recent Decisions Concerning Content-Based Conditions Prohibiting Counseling on Abortion

The two lines of case law described above are perhaps responsible for the conflicting opinions of the First and Second Circuits with regard to the constitutionality of regulations promulgated by the Department of Health and Human Services under a Title X section, Section 1009, 42 U.S.C. § 300a-6, which prohibits the use of funds

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<sup>37</sup>The Court noted that its decision was not inconsistent with its earlier decision in United Public Workers v. Mitchell, 330 U.S. 751 (1947), wherein a closely divided Court found that the interest in maintaining political neutrality justified an abridgment of the employees' rights. 110 S. Ct. at 2742. But see Scalia's dissent in Rutan, at 2747-2748.

in programs in which abortion is a method of family planning. The regulations prohibit abortion counseling and referral and require that such activities be maintained separately from federally-funded activities. This issue is presently before the Supreme Court in New York v. Sullivan, \_\_\_ U.S. \_\_\_.

The First Circuit, in a decision of a panel, in Commonwealth of Massachusetts v. Bowen, 873 F. 2d 1528 (1989), a decision which has since been withdrawn pending rehearing, found that the regulation was a content-based restriction unsupported by a compelling government interest, (1989 U.S. App. LEXIS 14535 [\*58]). The court distinguished IWR, noting that its "holding did not endorse funding decisions calculated to suppress specific ideas." Id. at [\*57]. The court also noted that the separation requirements of funded and nonfunded activities which were possible in IWR as purely paperwork, would not be merely paperwork here and would not meet constitutional scrutiny.<sup>38</sup>

Contrary to this, the Second Circuit, in New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), appeal pending, \_\_\_ U.S. \_\_\_, citing Cammarano and Maher, concurred in the holding of those cases that the "government has no constitutional obligation to subsidize an

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<sup>38</sup>A similar decision was reached in Planned Parenthood Federation of America v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988), wherein the court found that the regulations constituted a violation of a woman's Fifth Amendment liberty, and her First Amendment right to receive information to enable her to exercise her Fifth Amendment right, as well as the doctor's First Amendment right to disseminate information. The court specifically held that regulations favoring childbirth over abortion do not survive strict scrutiny.



activity merely because the activity is constitutionally protected." Id. at 410. The court also relied upon the Supreme Court's decision in DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 109 S. Ct. 998 (1989) for the premise that the Due Process Clauses do not impose any affirmative right to government aid, "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Id. at 411 (citing DeShaney, 109 S. Ct. at 1003). The Second Circuit concluded that as long as there is no "affirmative legal obstacle" created by the governmental denial of money, "the practical effect of such a denial on the availability of such services is constitutionally irrelevant." Id. at 411. The court noted that individuals that are employed by Title X projects can say what they wish outside the project. Lastly, the court held that the regulations do not discriminate on the basis of viewpoint information as discussion on the provision of material on the pros and cons of abortion is not authorized or required.<sup>39</sup>

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<sup>39</sup>For a similar result see Gay Men's Health Crisis v. Sullivan, 733 F. Supp. 619 (S.D.N.Y. 1989), involving a constitutional challenge to restrictions upon the use of federal funds for AIDS education set forth in the 1988 appropriation for the Center for Disease Control, in a "Helms' amendment" which prohibited funds from being used "to encourage, directly, homosexual activities." Labor, Health and Human Services Appropriations Act for Fiscal Year 1988. Pub. L. No. 100-102. In 1989 the amendment still placed restrictions on funding for programs which "promote or encourage, directly sexual activity, homosexual or heterosexual." The Center for Disease Control issued regulations consistent with this that also required that materials not be offensive. The District Court, citing a long line of cases, concluded that "conditional government subsidies designed to further a legitimate governmental interest are permissible so long as they are rationally related to a legitimate governmental objective," Id. at 636 (citing Lyng, 108 S. Ct. at 1192). The court found that while the regulations served the stated legitimate governmental purpose of garnering public support and reaching certain target audiences, the court questioned how the offensiveness

d. Case Law on Restrictions on Funding of the Arts

To date, there is only one decision directly on point, Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976) cert. denied, 429 U.S. 894 (1976), wherein the court rejected the argument that the refusal to fund a grant for a literary magazine, on the grounds that the magazine had previously published an offensive poem, was impermissibly content-based. The court stated that

[P]ublic funding of the arts seeks 'not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge' artistic expression .... A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based on the 'subject matter or content' ... for the very assumption of public funding of the arts is that decisions will be made according to literary or artistic worth ....

Id. at 795. The First Circuit did not find that the lack of content neutrality gave rise to a constitutional infringement. It did concede, however, that a different conclusion would be reached if the grant allocation were based on an applicant's political views. Id. at 798, n. 8.

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restriction related to this purpose and said that perhaps discovery, ordered earlier in the decision, would shed light on this.

B. Application of the Existing Law on the Doctrine of Unconstitutional Conditions to NEA Restrictions

It is difficult to discern today how the Supreme Court would rule on the constitutionality of an "indecentcy" restriction on art funding or on other restrictions such as those enacted last year, if reenacted. While many First Amendment scholars and other legal theorists have argued that such regulations would be unconstitutional as content-based restrictions, their arguments assume a strict scrutiny review and do not take into account that the doctrine of unconstitutional conditions has not been consistently applied.

The Court's decision would likely depend on whether the Court decided to follow one or the other of the two lines of cases discussed above. If the Court applied the reasoning of TWR and Selective Service, it would uphold such a restriction as not infringing the artist's fundamental rights. The decision would perhaps include the premise that the artist is not precluded from creating any work he/she wishes, but that the artist cannot use federal funding to do so.<sup>40</sup>

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<sup>40</sup>It should be noted that Kreimer, with some prescience, cites three NEA hypotheticals. In summary, he notes that the government could fund Guys and Dolls over Hair, but perhaps could not subsidize all shows except Hair, Kreimer, supra p. 24, n. 28, at 1352; that funding only Republican painters would violate the First Amendment, Id. at 1374; and that funding cubist painters and not pointillists would appear permissible, Id. at 1374-5. This writer would avow that the third suggested regulation may be as equally content-based as the second, and questions Kreimer's distinction, unless the latter determination was made on the merits of particular works. Hence, one should not confuse the right to determine merit, which is by definition subjective, as discussed in Advocates for the Arts v. Thompson, with a regulation which distinguishes on the basis of content.

On the other hand, the Court could apply the rationale of Rankin and Rutan and determine that because speech is involved, a strict scrutiny standard must be applied. Presumably, the restrictions would be reviewed to determine whether they were content-based or content-neutral, and if content-based, whether there was a compelling state interest in the restriction. It is difficult to imagine that the Court would be persuaded that public interest in the family or morality justified the restrictions, or that any other governmental justification would pass such scrutiny.

Alternatively, the Court might use such as case as a vehicle for revising its approach to the doctrine of unconstitutional conditions, and adopt a strict scrutiny review whenever fundamental or preferred rights are involved. This approach would be consistent with suggestions by scholars to establish a new and meaningful theory behind the doctrine of unconstitutional conditions, a theory which would command more consistent results than present theories.<sup>41</sup> While scholars differ as

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<sup>41</sup>The key theories now articulated as the underpinning for the doctrine are coercion or exploitation, germaneness or purpose analysis, and inalienable rights. See Sullivan, Distribution of Liberty, *supra* p. 23, n. 27, at 327-330, and Kreimer, *supra* p. 24, n. 28, at 1327-1340, 1378-1391.

Coercion assumes a "baseline" against which the government's action is assessed to determine whether the individual is better or worse off. Scholars generally discredit the coercion theory: Kreimer because the baseline is difficult to identify, *Id.* at 1352; Epstein because the theory is not functional, in that it is difficult to distinguish between consent and coercion, Bargaining Breakdown, *supra* p. 23, n. 27, at 203; and Sullivan because the baseline "cannot be tracked," Distribution of Liberty, *supra* p. 23, n. 27, at 328.

Germaneness, or purpose analysis, assumes that a condition which serves a legitimate state purpose is acceptable, but that a non-germane one would not. Sullivan and Kreimer both point out the definitional problems with germaneness or purpose analysis. Sullivan, Distribution of Liberty, *supra* p. 23, n.27, at 329 and Kreimer, *supra* p. 23, n. 28, at 1337-1340.

to theories, all suggested theories apply a strict scrutiny test.

For example, Sullivan proposes a theory for the unconstitutional condition doctrine based on the government's inability to alienate rights as a matter of distribution. It is her view that preferred rights serve three distributive functions: checking the power of the state; requiring neutrality as to rights holders; and preventing a caste system of rights holders. She argues that, particularly where government has taken services out of private hands, it has an obligation not to create right-pressuring conditions, and that this should be checked by a balancing of power and freedom. In her view, a governmental condition should be unconstitutional if it has an overt, foreseeable consequence on personal freedom. Where any constitutional rights are involved, she would extend strict scrutiny rather than the current court practice of only applying a strict standard of review where the effect of the government condition is a "penalty" which goes beyond the particular activity regulated, or where the condition approaches a core violation of the First Amendment by preferring some viewpoints or subject matters to others. See Sullivan, Federal Regulation, supra p. 23, n. 27, at 16-18. Consequently, she disagrees with the Second Circuit decision in New York v. Sullivan, 889 F.2d 401 (2d Cir. 1999), and would by extension of this analysis also disagree with the Supreme Court's decisions in TWR and other cases where strict

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The inalienable rights theory assumes that the government cannot buy certain rights, even if such rights were alienable to private individuals. This theory raises many of the same questions as the coercion theory, see Kreimer, supra p. 24, n. 28 at 1391, and Sullivan, Distribution of Liberty, supra p. 23, n. 27, at 330.

scrutiny was not applied. See Sullivan, Unconstitutional Conditions, supra p. 24, n. 28 and Distribution of Liberty, supra p. 23, n. 27.

Judge Patricia Wald worries that "the Supreme Court ... has dealt with this issue in mechanical, even casual ways that cumulatively could diminish significantly our constitutional protections from arbitrary or even malevolent government action or inaction. Wald, supra p. 24, n. 28, at 251. She suggests that an analysis of these issues should apply an equal protection approach under which "every constitutional right carries within it an equal protection norm and that any governmental program that limits or conditions benefits when a constitutional right is exercised creates a suspect category that must be justified under a heightened standard of review. The state should have to show that the denial of benefits to people who exercise constitutional rights is substantially related to [an] important purpose[] of the benefit program itself." Id. at 256.

Wald uses Selective Serv. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1983), as an example of the way her approach would work. Pointing out the danger of using power to grant or withhold a benefit to coerce behavior, Judge Wald suggests that if the Court's attention were focused on whether or not there was a substantial justification for conditioning student loans on surrender of their Fifth Amendment rights, perhaps there would be a different result, and at least there would be heightened scrutiny. Thus, it would seem that Judge Wald would concur with the Court's decision in FCC v. League of Women Voters, and the

other cases discussed under section III.A.2.b. above, and would disagree with the decisions in which the Court found that conditions on funding or a tax benefit, as outlined under section III.A.2.a. above, were not subject to strict scrutiny.

Epstein argues that the doctrine of unconstitutional conditions protects against situations where the government monopolizes an area and/or against "bargaining breakdown ... when the state is pitted against large numbers of separate and uncoordinated individuals." See Epstein, Bargaining Breakdown, supra p. 23, n. 27, at 197. The doctrine represents the sound limitation on public discretion. He concurs with Wald and Sullivan that government conditions require strict scrutiny.<sup>42</sup>

In conclusion, recent scholarship suggests that the Court has not consistently applied a sufficiently strict appropriate standard of review to government conditions which affect preferred rights. The question remains as to whether it will do so.

Presumably, the Court's decision this term in New York v. Sullivan will shed some light on how the Court would decide the issue of NEA restrictions. Hopefully, the Court's decision will recognize that the doctrine of unconstitutional conditions has an important role in the

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<sup>42</sup>Epstein does not distinguish with regard to property, economics, speech or liberty. See Epstein, Bargaining Breakdown, supra p. 23, n. 27 at 104. He argues for a solution of limited government discretion where the pressures on government to exercise its discretion unconstitutionally would be small.

protection of constitutional rights, and requires the Court to look further than the Second Circuit did at the impact of the government's restrictions upon individual rights.



August 2, 1990

Mr. John Brademas and Mr. Leonard Garment  
Chairpersons  
Independent Commission  
441 F Street, N.W., Room 305  
Washington, D.C. 20001

Dear Mr. Brademas and Mr. Garment:

You asked my advice with respect to one aspect of the Independent Commission's task, namely whether the constitutional standard for publicly funded art should be different from that for privately funded art, and, if so, what consequences follow. I cannot hope to respond to your inquiry in the full detail that such a complex inquiry warrants. Nonetheless, I can state some general conclusions, which, I should add, are open to revision should further reflection convince me that I am in error. Unlike private sponsors, public funding of the arts must satisfy constitutional requirements. In practical terms, this means that otherwise qualified art proposals cannot be rejected on the basis that the proposal would give offense (however defined) to some religious, racial or ethnic group or because of its sexual explicitness.

The standards governing public and private funding of the arts are necessarily different. The Constitution requires that, like the exercise of all other governmental powers, government spending must aim to promote the public good, and government spending is, of course, constrained by constitutional provisions such as the Bill of Rights. E.g., United States v. Lovett, 328 U.S. 303 (1946) (exclusionary appropriation provision constitutes bill of attainder). Thus, Congress could not authorize any funding program that systematically aimed to vilify or denigrate minorities or religious beliefs. Private parties funding the arts are under no such constraints.

What constitutes spending for the "public welfare" rests almost entirely in the hands of Congress. This means Congress can exclude whole categories of art from funding. For example, Congress could decide to exclude live performances from public funding. No one disputes that Congress possesses the widest latitude to pick and choose and to draw lines. Nonetheless, as has been observed, "[t]he spending power is ... not unlimited." South Dakota v. Dole, 483 U.S. 203, 207 (1987). "[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." Perry v. Sindermann, 408 U.S. 593, 597 (1972).

More specifically, numerous decisions recognize that the first amendment forbids Congress to "discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas'", Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983). One can argue that, realistically, denial of governmental funding can never amount to "suppression," but that argument would simply empty Regan's language of all meaning. Regan's language should be understood to forbid unjustified viewpoint discrimination, and thus Regan is illustrative of a principle that is fully applicable to all forms of government benefits and entitlements. E.g., United States v. Kokindo, 110 S. Ct. \_\_ (1990).

2.

The first amendment limitation on grants of governmental benefits (no unjustified viewpoint discrimination) is easy to state, and in some areas, such as when the government makes a forum available for speech, relatively easy to apply. But in the area of governmental monetary grants, the limiting provision is likely to have considerably less real bite. Congress has a wide choice of what to fund and how, and inevitably the result will be to exclude some viewpoints seeking public support. But at some point, no matter how much deference is accorded to Congressional judgment and discretion, a court will be able

to state with confidence that a line has been crossed, and that Congress has suppressed unpopular ideas. This is important in connection with governmental "thou shalt nots" designed to exclude "offensive" art.

Offensive speech is perceived by the listener with emotions that can run from feelings of distaste to feelings of assault. But, except in special circumstances such as the workplace, Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-66 (1986), governmental efforts at directly prohibiting such speech have failed to pass constitutional muster. E.g. United States v. Eichman, 110 S. Ct. \_\_\_ (1990) (flag burning); Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988) ("outrageousness" of speech is not a valid basis for restriction). One cannot write with certainty on the extent to which Congress may decline to fund what it cannot forbid. The Supreme Court decisions dealing with government benefits, subsidies and entitlements are not altogether harmonious. Future courts may read them somewhat differently from the way I do, and thus be more reluctant than I to find forbidden Congressional viewpoint discrimination.<sup>1</sup>

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<sup>1</sup> See, for example, New York v. Sullivan, 889 F2d 401 (2 Cir. 1989), cert. granted, 110 S. Ct. \_\_\_ (1990) (prohibition of abortion counselling by federally funded family planning clinics). DKT Memorial Fund v. Agency for Int'l. Dev., 887 F2d 275 (D.C. Cir. 1989) (abortion related restrictions on use of funds by international population planning program). See also Wald, Government Benefits: A New Look at an Old Giffhorse, 65 NYU L. Rev. 247, 253-55 (1990).

Nonetheless, in my opinion the existing body of decisions leads me to conclude that "offensiveness," however defined, is not now a valid criterion.

A. The foregoing conclusion seems especially clear in the case of religion. To bar subsidies to an otherwise qualified proposal because one or more religious groups would find the art offensive would accord religion an impermissible veto and create an excessive entanglement between government and religion contrary to the neutrality required by the establishment clause.<sup>2</sup> Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). See also Board of Education v. Mergens, 110 S. Ct. 2356, 2372 (1990) ("crucial difference" between governmental and private speech endorsing religion even though private persons use public property.)

B. I do not believe that grants can be denied to any person because a government official believes that an otherwise qualified proposal will (or is intended to) vilify or denigrate any race or group.<sup>3</sup> I assume that Congress could subsidize (by grant, or use of a public auditorium) art that is intended to show the great contributions racial and other minorities have made to American life. Perhaps all

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<sup>2</sup> Of course, if the proposal submitted did nothing more than vilify or denigrate and thus possessed no other quality, it would not qualify for funding because it would be outside the categories established by 20 U.S.C. § 954(c).

<sup>3</sup> Given the structure of the NEA's panel system, I doubt whether any such proposals are likely to be thought of sufficient artistic merit to qualify.

public funding could be restricted to that category alone. But proposals to exclude racially and ethnically offensive art, like those submitted by Representatives Henry and Rohrabacher, are not so structured: they are designed to exclude any proposal -- otherwise qualifying -- if it possesses the prohibited characteristic of offensiveness.

I do not believe such categorical prohibitions to be valid. I recognize that the contrary argument would insist that the Supreme Court's 5-4 decision in Beauharnais v. Illinois 343 U.S. 250 (1952), sustaining the "group libel" concept is appropriate, at least in the public funding context. The argument could concede that Beauharnais has been eroded in the regulatory context,<sup>4</sup> but claim that the public is under no obligation to fund projects that result in group libel. In my opinion, this argument should be rejected.

I believe that prohibitions against offensive speech -- racial, ethnic or other group oriented categories -- are not valid criteria in the funding context. This is not because I believe that art itself is ideologically neutral. Historically, art has always been involved in and responsive

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<sup>4</sup> E.g. Eichman, supra, 110 S. Ct. at \_\_\_. ("We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets . . . .") See also Hustler Magazine v. Falwell, supra, and American Booksellers Ass'n., Inc. v. Hudnut, 771 F2d. 323 (7 Cir. 1985), aff'd. 475 U.S. 1001 (1986).

to the conditions of the day, and one can assume that many artists will have an ideological agenda. But we do not have state art. Like the speaker who lectures at a public auditorium, the artist who receives government funds is not thereby transformed into a public employee and the artist's product is not transformed into governmental speech.

Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Our tradition has been to recognize private autonomy in decisions that the artist makes with respect to his or her work, and the government has no sufficient interest in discarding that tradition in order to insulate groups from the offense they might take from the artist's exercise of speech. This principle arises not because of concern for the artist, but because of our concerns about the appropriate role of government. Our constitutional tradition rests on a distrust of government efforts to structure the content of speech of private persons. The artist's speech is aimed at the general public. The government shows no disrespect to any group when it declines to authorize government officials to undertake the dangerous task of determining whether an artist's speech will or will not be offensive to any group and what an artist did or did not intend. See Hustler Magazine v. Falwell, supra, 108 S. Ct. at 882.<sup>5</sup> ("'Outrageousness' in the area of

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<sup>5</sup> Moreover, in the grant context, the extent to which final authority could be given to an administrative official to make such a content-laden determination is open to doubt. FW/PBS v. City of Dallas, 110 S. Ct. 596 (1990). The restrictions on obscenity

political and social discourse has an inherent subjectiveness about it ....") And while a decision not to make available a public auditorium or to fund an art proposal does not have the same drastic consequences as a decision to impose direct prohibitions, the effect can be serious in terms not only of its monetary consequences but also because of the message that denial of funding (or of any other benefit) sends.

C. I do not believe that exclusion of funding for any art proposal because it is "indecent" or contains (non-obscene) patently offensive sexual or excretory features is valid. Restrictions of this character cannot be defended as viewpoint neutral, that is, comparable to "the artist may propose what topics with what messages he or she desires, but in so doing may not use the medium of watercolor". Any such claim would wholly misapprehend the relationship between form and content in art, and would also invite considerable viewpoint restriction. Moreover, there is simply no governmental interest in protecting public sensibilities comparable to that involved in FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (broadcasting), or in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) (secondary schools). The context of public art differs from broadcasting or secondary schools, and as Pacifica states, context is crucial. See also Sable Communications of

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imposed by Public Law 101-121, 101 Congress, raise this issue sharply.



California, Inc. v. F.C.C., 109 S. Ct. 2829 (1989). Nor do I believe that such an exclusion can be justified as a method of implementing a criterion of "the widest public appeal." A blanket prohibition on this category of art is far too clumsy a tool for what will inevitably entail viewpoint discrimination, even if widest public appeal constituted the only basis for funding grant proposals.

3.

I believe that, as it currently stands, the NEA statute is adequate, and thus no changes should be made. I know this view may be politically unpopular, and indeed that it does not help those persons of good will who seek some tolerable compromise. Still I think that, as a matter of principle, it is important to resist this attempt to subject the relatively autonomous art world to the discipline and intolerance of majoritarian politics. That, after all, is all that is at stake in this current controversy over the NEA.

Sincerely yours,



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**ASSOCIATION OF THE BAR OF  
THE CITY OF NEW YORK  
REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

**RESOLVED**, that the American Bar Association support five year reauthorization of the National Endowment for the Arts with no restrictions on the content, the subject matter, message or idea of what the Endowment may fund.

## EXECUTIVE SUMMARY

### 1. Summary of the recommendation.

That the ABA support reauthorization of the National Endowment for the Arts for five years with no restrictions on the content, the subject matter, message or idea of what the Endowment may fund.

### 2. Summary of the supporting report.

The United States Congress is currently considering whether to reauthorize the National Endowment for the Arts (the "NEA") and if so, whether to amend the National Foundation on the Arts and the Humanities Act of 1965 (20 U.S.C. 954(a)) by imposing certain restrictions on the content of artistic projects which might be eligible for funding.

This report recommends the reauthorization of the NEA and strongly opposes any amendment that would impose restrictions on the content, the subject matter, message or idea of what the Endowment may fund. The imposition of such criteria on the grantmaking process raises grave constitutional concerns.

The Supreme Court has repeatedly held that the First Amendment prohibits congressional action aimed at the suppression of a particular idea or message. Content based restrictions interjected into the grantmaking process represent an impermissible attempt by Congress to restrict First Amendment rights through a federal funding program. Of course, Congress has the power to abolish an agency such as the NEA through the deprivation of all funds; however, it cannot constitutionally direct an agency to engage in actions which bar systematically the opportunity to receive a government benefit because of the particular subject matter or viewpoint of an artist's expression. Speiser v. Randall, 357 U.S. 513 (1958); Consolidated Edison Co. v. Public Service Commission, 447, U.S. 530 (1980).

Content restrictions as proposed in various amendments raise additional constitutional concerns of prior restraint, vagueness and overbreadth.

Certain amendments with the hope of curing the most obvious constitutional infirmities, have proposed that funding restrictions extend only to materials that the NEA Chairman determines to be obscene (material unprotected by the First Amendment) under the three prong obscenity test prescribed by the Supreme Court in Miller v. California, 413 U.S. 15

(1973). The Miller test is an inadequate and inappropriate standard as a check on federal funding of the arts and is fraught with legal as well as practical difficulties.

Some proponents of the Miller standard have argued that it is of no concern because anything funded by the NEA by definition would fail the third prong of Miller. Even if this were the end result, other harms flow from the incorporation of Miller. Because of the inherent difficulties of Miller, incorporation of the Miller standard has caused confusion in the public, given legitimacy to definitions of obscenity which go beyond Miller and prohibit use of all sexual and erotic imagery, and stifled protected artistic expression. (Hoffman, Recorded Transcript of Panel, "The Thought Police Are Out There", College Art Association Annual Meeting, New York, February, 1990; See also Vance, Art in America, April, 1990)

Moreover, the Association remains concerned that the imposition of this standard by an administrative agency without adequate procedural safeguards raises constitutional problems under the due process clause. The Coleman-Gundersen Amendment or any variant thereof too readily lends itself to the creation of a system of prior restraints and informal censorship sourced in impermissible content based judgments predicated on ideology. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965). The United States Supreme Court has repeatedly held that rigorous procedural safeguards must be employed before government may destroy or block the exhibition of expressive materials. Fort Wayne Books, Inc., Petitioner v. Indiana 57 LW 4180, 489 U.S. \_\_\_ (1989).

Amendments proposing content restrictions on grants funded by the NEA are in direct conflict with the original report language adopted and accompanying the authorizing legislation that established the NEA and the NEH in 1965. In the report, Congress recognized that reviewing grant proposals on artistic merit alone is often difficult in a highly charged political environment and tried to guard against such political intrusion into the process.

The original report language stated:

... "The committee wishes to make clear that conformity for its own sake is not to be encouraged and that no undue preference should be given to any particular style or school of thought. Nor is innovation for its own sake to be favored. The standard should be artistic and humanistic excellence."

To carry out this work, Congress endorsed a system of peer review. This process has effectuated a proper balance between artistic freedom of expression and our government's goal of funding projects and productions which have substantial

artistic and cultural significance, giving emphasis to American creativity and cultural diversity and the maintenance and encouragement of professional excellence.

Accordingly, Congress may not condition the receipt of a grant from the NEA on the suppression of speech in the form of artistic expression. HR 4825 merits strong support.

Respectfully Submitted,

Conrad K. Harper  
President  
The Association of the  
Bar of the City of New York

## REPORT

### I. Background

In 1965, Congress enacted the National Foundation on the Arts and Humanities Act of 1965 20 U.S.C. 951-957 establishing the National Endowment for the Arts ("NEA") and the National Endowment for the Humanities ("NEH"). The act declared that "encouragement and support of national progress and scholarship in the humanities and the arts...was an appropriate matter" for federal action, that a "high civilization" demanded broad cultural awareness, and that citizens needed "wisdom and vision" for democratic participation. As President Lyndon Johnson said upon signing the enabling legislation into law:

"We fully recognize that no government can call artistic excellence into existence. It must flow from the quality of the society and the good fortune of the nation. Nor should any government seek to restrict the freedom of the artist to pursue his goals in his own way. Freedom is an essential condition for the artist, and in proportion if freedom is diminished so is the prospect of artistic achievement."

The effort to insulate the NEA from political pressure was evident throughout the Act and in the implementation of the peer review system.

Between 1965 and 1988, the NEA reviewed approximately 302,000 grant applications and funded approximately 85,000 grants. Instances in which grants of either NEA or NEH supported projects have aroused protest are rare. For example, the NEA estimates that fewer than 20 out of NEA's 85,000 grants have been controversial.

On July 26, 1989, the Senate, approved by voice vote an amendment to the NEA appropriations bill, introduced by Senator Jesse Helms (the "Helms Amendment"). The Helms Amendment prohibited use of appropriated funds to "promote, disseminate, or produce obscene or indecent materials" or "material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion." The measure would also bar grants for artwork that "denigrates, debases or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age or national origin." [135 Cong. Rec. Section 8806 (daily ed. July 26, 1989)]

In October, 1989, the House-Senate Conference Committee passed a diluted version of the Helms Amendment. The compromise restrictions stated:

None of the funds authorized to be appropriated

for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

In addition, the Report of the Conference called for the creation of a temporary Independent Commission to review the NEA's "grant making procedures, including those of its panel system" and to consider "whether the standard for publicly funded art should be different than the standard for privately funded art", including content restrictions based on obscenity.

From 1965 until the enactment of these restrictions, none of the NEA applications contained any dictates concerning acceptable subject matter; nor did the "Review Criteria" contain any conditions on the content or viewpoint of the proposed works or provide for such content based review on completion.

The NEA's subsequent "Statement of Policy and Guidance" defines "obscene" for purposes of carrying out the Endowment's responsibilities under section 304 of the Department of Interior and Related Agencies Appropriations Act of 1990 (FY 1990) as the legal definition of obscenity established by the Supreme Court in Miller v. California, 413 U.S. 15 (1973).

The NEA is subject to periodic reauthorization and will expire October 1, 1990, unless it is reauthorized this year. Congress is currently considering whether to reauthorize the NEA and if so, whether to amend the National Foundation on the Arts and the Humanities Act of 1965 (20 U.S.C. 954(a)) by imposing certain restrictions on the content of artistic projects which might be eligible for funding.

The Chairman of the Postsecondary Education Subcommittee on Education and Labor, Representative Pat Williams, introduced President Bush's bill HR 4825, which proposed a five year reauthorization of the National Endowment for the Arts and Humanities with no restrictions on grant content and no other significant changes, in the House on May 15, 1990. The Committee on Education and Labor voted June 19 to report HR 4825 for action by the full House. Basically, with only technical modification, the bill has gone to the floor as proposed by the President. Twenty-six Amendments have been submitted to the House Rules Committee. Of these, the Coleman-Gunderson Amendment is apparently

gaining support. Representative Williams has also offered an amendment in the nature of a substitute. In the Senate, the Education, Arts and Humanities Subcommittee voted on June 13 to send the Senate version of the President's proposal (S 2724) to the full Labor and Human Resources Committee without amendments. S 2724 will be considered in September by the full Senate. The House Appropriations Subcommittee on the Interior is considering FY 1991 funding for the NEA, National Endowment for the Humanities and Institute of Museum Services ("IMS"). It is likely at the time of this writing that anti-obscenity language similar to that in FY 1990 may be proposed for consideration by this Subcommittee.

## II. Legal Analysis

### A. Introduction.

The content based restrictions which Congress is currently considering in the context of reauthorization are twofold: those which impose restrictions on funding obscenity and in addition include restrictions on funding "indecent" or "offensive" artistic expression and those which, in an attempt to circumvent First Amendment issues, limit restrictions to the legal definition of "obscenity" established by the Supreme Court in Miller v. California, 413 U.S. 15 (1973).

The NEA should be reauthorized unfettered by any restrictions on the content, the subject matter, message or idea of what the Endowment may fund. The imposition of such criteria on the grantmaking process raises grave constitutional concerns implicating the First Amendment and the Fifth Amendment of the United States Constitution.

### B. Content restrictions which regulate artistic expression protected by the First Amendment.

The Supreme Court has repeatedly held that the First Amendment prohibits congressional action aimed at the suppression of a particular idea or message. In Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), the Supreme Court prohibited government from picking and choosing which points of view could be heard.

There is an equality status in the field of ideas and government must afford all points of view an equal opportunity to be heard. Id. at 96.

Content based restrictions interjected into the grantmaking process represent an impermissible attempt by Congress to restrict First Amendment rights through a federal funding program. Of course, Congress has the power to abolish an agency such as the NEA through the deprivation of all funds; however, it cannot constitutionally



direct an agency to engage in actions which bar systematically the opportunity to receive a government benefit because of the particular subject matter or viewpoint of an artist's expression. In short, Congress cannot withhold an artist's benefits because of the "indecent" or derogatory subject matter of his/her speech.

Speiser v. Randall, 357 U.S. 513 (1958) is the seminal case prohibiting the government from conditioning a benefit upon the sacrifice of free speech. This case struck down a California law that required a taxpayer to swear a loyalty oath to the United States as a condition for property tax exemption.

More recently in FCC v. League of Women Voters, 468 U.S. 364, 407 (1984), the Supreme Court struck down a congressional attempt to condition funding of public television upon an agreement not to express editorial opinion. The court emphasized that Congress had attempted to regulate the content of speech. In that case Chief Justice Rehnquist stated that any government "conditions to its largess" must not be "primarily aimed at the suppression of dangerous ideas." [FCC v. League of Women Voters, supra, (dissenting opinion).]

Restrictions of this kind are impermissibly vague and overbroad in the constitutional sense; no person could objectively apply such criteria as "offends" or "denigrates" "race" or "culture". The uncertain meaning of such language is particularly harmful when First Amendment rights are implicated. Content based restrictions which prohibit funding for both obscene and indecent or offensive materials are overbroad. Offensive and indecent materials are protected by the First Amendment. (Cohen v. California, 403 U.S. 15, 25 (1971); Sable Communications v. FCC, 109 S. Ct. 2829, 2836 (1989).

Content based restrictions interjected into the creative process directly and axiomatically chill free expression. Such restrictions which deny funding in advance of creation of work are a prior restraint which is a form of censorship and inevitably produce a chilling effect on the exercise of First Amendment rights. If any such restrictions are held out by the federal government as prerequisites to federal support, they necessarily enter into the decisions an artist must make in approaching his/her work. And given the leadership role desired by past Administrations and past Congresses for the NEA, such conditions would extend even into work that was privately funded. Considering the fact that virtually all grants have a private matching requirement, any presence (regardless of how small) of federal money increases self-censorship and caution by every artist or arts organization that is eligible for federal support.

Amendments proposing content restrictions on grants funded by the NEA are also in direct conflict with the original report language adopted and accompanying the authorizing legislation that

established the NEA and the NEH in 1965. In that report, Congress recognized that reviewing grant proposals on artistic merit alone is often difficult in a highly charged political environment and tried to guard against such political intrusion into the process.

The original report language stated:

"It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. One of the artist's and the humanist's great values to society is the mirror of self examination which they raise so that society can become aware of its shortcomings as well as its strength... The committee wishes to make clear that conformity for its own sake is not to be encouraged and that no undue preference should be given to any particular style or school of thought. Nor is innovation for its own sake to be favored. The standard should be artistic and humanistic excellence."

C. Funding restrictions limited to obscenity as defined by Miller.

The "compromise" language of FY 1990 and amendments such as proposed by Representatives Coleman and Gunderson and Representative Williams were drafted in part to ameliorate the overt constitutional infirmities of the Helms Amendment by limiting the impact of the restrictions to constitutionally unprotected speech, to wit, obscenity. The effort to do so is fraught with difficulties. What is "obscene" and without the protection of the constitutional right of free speech is one of the most difficult areas of constitutional law.

Given the pre-eminent importance of the First Amendment, the Supreme Court has struggled for years to develop a satisfactory definition of obscenity. In 1973, the Court reformulated its test of obscenity in a series of decisions, the principal of which was Miller v. California, 413 U.S. 15 (1973). Most notably, Miller abandoned the requirement that the material be "utterly without redeeming social value" and held that the test should be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work depicts or describes, in a patently offensive way, "sexual conduct" specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Both the first and second prong of the test--appeal to prurient interest and patent offensiveness--are issues of fact for the jury to determine applying "contemporary community standards." Pope v. Illinois, 481 U.S. 497 (1987). The third prong--literary, artistic...value--depends on whether a "reasonable person" would find such value in the material, taken as a whole. This standard is presumably a national standard. Id. The Miller formula was

devised to ensure that state obscenity laws not be allowed to level the literary and artistic expression to even the majority view. And, of course, the Miller standards apply equally to any federal legislation.

D. Legal and practical difficulties of Miller.

The Miller test is an inadequate and inappropriate standard as a check on federal funding of the arts and is fraught with legal, as well as practical difficulties.

Supreme Court decisions since Miller have revealed continuing confusion over obscenity's definition. Any regulations based on Miller are bound to suffer from interpretive ambiguity and difficulty of implementation. Who is the relevant community--the arts professionals at the Endowment or the community where the work is performed? How is the Endowment staff to ascertain local community standards? Miller requires that the "sexual conduct" in question be "specifically defined by the applicable state law." No reference to applicable state law appeared in the FY 1990 appropriation language. The Coleman-Gunderson amendment, which significantly restructures the Endowment by inter alia providing 60% of program grant funds to the states, provides that in dispersing federal funds, states must adhere to the same obscenity standards as the NEA. Are the NEA standards to be applied on a national basis or statewide? Is federal law to preempt state obscenity standards?

Some proponents of the Miller standard have argued that it is of no concern because anything funded by the NEA by definition would fail the third prong of Miller. Even if this were the end result, other harms flow from the incorporation of Miller. Because of the inherent difficulties of Miller, incorporation of the Miller standard has caused confusion in the public, given legitimacy to definitions of obscenity which go beyond Miller to prohibit use of all sexual and erotic imagery, and stifled protected artistic expression. (Hoffman, Recorded Transcript of Panel, "The Thought Police Are Out There", College Art Association Annual Meeting, New York, February, 1990; See also Vance, Art in America, April, 1990)

For example, the Coleman-Gunderson Amendment sets a standard for funding defined by Miller, but also requires that the NEA Chairman give assurances to Congress based on subjective and vague criteria which would deny funds for the use of works which are not "sensitive to the nature of public sponsorship" and "to the cultural heritage of the United States, its religious traditions" --constitutionally protected speech. Thus, there is a danger that despite the existence of Miller as a check on the expansiveness of obscenity standards, this amendment and others will in practice lead to a broadening of the Miller definition of obscenity. Both artists and the NEA may seek to avoid conflict by rejecting

artists and the NEA may seek to avoid conflict by rejecting controversial subjects. As Rep. Williams has stated, including the words of Miller in the NEA's legislation produces a "chilling effect" and "lets the genie of censorship out." [Testimony, June 6, 1990, House Subcommittee on Postsecondary Education.]

Moreover, the concern exists that the imposition of the Miller standard by an administrative agency without adequate procedural safeguards raises constitutional problems under the Fifth Amendment due process clause. The Coleman-Gunderson Amendment and any variant thereof too readily lends itself to the creation of a system of prior restraints and informal censorship sourced in impermissible content based judgments predicated on ideology. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965).

The United States Supreme Court has repeatedly held that rigorous procedural safeguards must be employed before government may destroy or block the exhibition of expressive materials. Freedman v. Maryland, 380 U.S. 51 (1965); Fort Wayne Books, Inc., Petitioner v. Indiana 57 LW 4180, 489 U.S. \_\_\_\_ (1989). Such procedural safeguards are arguably lacking in the Coleman-Gunderson Amendment.

An administrative determination of obscenity which would penalize a grantee by the cut off of previously authorized funds because the work is deemed obscene by the Endowment, arguably constitutes an impermissible prior restraint in violation of the due process requirements of the Fifth Amendment.

In Fort Wayne Books supra., the Supreme Court rejected any ex parte pre-trial seizure order which on the basis of probable cause would permit the seizure of expressive materials in the context of a prosecution under an Indiana state RICO statute which had made obscenity one of the predicate offenses.

"The fact that the respondent's motion for seizure was couched as one under the Indiana RICO law--instead of being brought under the substantive obscenity statute--is unavailing. As far back as the decision in Near v. Minnesota ex rel. Olson, 283 U.S. 697, 720-721 (1931), this Court has recognized that the way in which a restraint on speech is "characterized" under State law is of little consequence. See also Schad v. Mount Ephraim, 452 U.S. 61, 67-68 (981); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-555 (1975). For example, in Vance v. Universal Amusement Co., 445 U.S. 309 (1980) (per curiam), we struck down a prior restraint placed on the exhibitions of films under a Texas "public nuisance" statute, finding its failure to comply with our prior case law in this area was a fatal defect. Cf. also Arcara v. Cloud Books, Inc., 478 U.S., at 708 (O'Connor, Jr., concurring) (noting that if a "city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent

books...the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review"). While we accept the Indiana Supreme Court's finding that Indiana's RICO law is not "pretextual" as applied to obscenity offenses; it is true that the State cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'"

### III. Conclusion

The inhibition of freedom of expression engendered by restrictions on content does not further any important or compelling government interest. It is, as Justice Frankfurter stated, "another case of burning up the house to roast the pig." Butler v. Michigan 352 U.S. 380, 383 (1957). See also Sable Communication v. FCC, 492 U.S. \_\_\_\_ (1989) (57 Law Week 4920).

Reviewing grant proposals on artistic merit alone is often difficult in a highly charged political environment. There are always those who for political reasons will attempt to impose their own social, economic or religious views on others. Despite this inherent tension, the Endowment has been successful in reviewing grant proposals on artistic merit alone. In the original enabling legislation creating the Arts and Humanities Endowments, Congress tried to guard against political intrusion into the process. Peer panels (separate from government employees) review an applicant's career and past work in determining whether to fund a proposal. In almost no instance has the Endowment retroactively attempted to censor a project or program after its completion to decide whether it was entitled to receive the previously allocated grant.

The Chairman of the NEA, John Frohnmayer, fellow lawyer, and a member of the American Bar Association, testified on March 29, 1990 before Congress. He stated that:

"The Endowment's success has been in its process...The Endowment has created and sustained a climate encouraging freedom of thought, imagination and inquiry by bringing citizens who are experts in the arts to judge the applications. The Endowment has not created an 'Academy'. It has not decreed a single acceptable aesthetic. Rather it has reflected the wide diversity of our society. These panels function much like a jury in our justice system. Panels are from five to fifteen individuals of widely diverse cultural, geographic, ethnic, and stylistic backgrounds. They argue, they debate, they confer, and in the end, they decide which applications are the most deserving, the criteria always being quality and merit...The system is far from perfect. It often results in compromises and sometimes may even be wrong. But it is the best system that the English and American

jurisprudential heritage has been able to devise."

It is distressing that in this period of highly praised democratic movements in Eastern Europe and the Soviet Union, further restrictions are sought to be imposed on the First Amendment rights of United States citizens.

In view of the foregoing, we urge that Congress not condition the receipt of a grant from the NEA on the suppression of speech in the form of artistic expression. HR 4825 merits support and any amendment which would place restrictions on the content of work funded should be rejected in principle.

Respectfully Submitted,

Conrad K. Harper  
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The Association of the  
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