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First Amendment - What Content Restrictions Can Congress Place on NEA Grants?

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At Issue

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New York artist Karen Finley became briefly famous last year as the recipient of a National Endowment for the Humanities grant for work that includes smearing her nude body with chocolate and uttering statements like "God is death."

Enough, say conservatives, who believe the government has no business subsidizing what they consider offensive art. Former Assistant Attorney General William Bradford Reynolds is more moderate, arguing that Congress can impose restrictions on NEA funding, but only subject to constitutional limits.

The real problem, says Rodney A. Smolla, a law professor at the College of William and Mary, is knowing where to stop. Smolla fears a chilling effect could result from legislators acting as art critics.

A Hot Potato for Congress

BY WILLIAM BRADFORD REYNOLDS

As we move this year into a new round of budget talks, the debate on federal appropriations to fund artists whose work some consider indecent is bound to resurface.

With a daunting deficit gap, billions needed to pay for the Desert Storm operation, an S&L bailout fiasco that grows worse by the minute, and sympathy apparently building on the Hill to subsidize the D.C. government to the tune of some $100 million, we can expect some to question whether the National Endowment for the Humanities should receive any federal dollars this year.

After all, creative artistry has never been know to spring from federal subsidies; nor has it been stifled by the lack of government largesse. Moreover, defunding NEA altogether raises no First Amendment concerns.

Nonetheless, a total cut-off of federal funds seems unlikely. Congress probably will vote to continue a government subsidy for the arts, but in a reduced amount.

That, too, presents no First Amendment difficulties, as seems clear from the Supreme Court's decision not long ago in *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983).

Such a funding reduction will mean that some NEA grants cannot be renewed. Even so, the terminated recipients remain free to express themselves artistically, every bit as uninhibited by government regulations as those artists who never received an NEA subsidy.

1st Amendment Boundaries

This does not suggest that the NEA can be wholly indifferent to the First Amendment. A grant of federal money made to advance one religious belief over others would likely run afoul of the establishment clause, just as an NEA award driven by an overt hostility to a particular religion introduces similar constitutional problems under the free exercise clause.

While the funding of artwork that portrays offensively prejudicial messages reflecting racial or religious bias has free speech protection, openly discriminatory award decisions bottomed on race, gender or ethnic background are constitutionally suspect.

To refine constitutional guidelines even further, Congress confidently can direct the NEA not to use any of its grant money to fund "obscene" art so long as it makes clear that the obscenity prohibition is tied to the Supreme Court's decision on obscenity in *Miller v. California*, 413 U.S. 15 (1973).

There, the Court announced that works that appeal to the prurient interests of the average person, depict in a patently offensive manner sexual organs or acts, and lack serious literary, artistic, political or scientific value enjoy no First Amendment protection.

Similarly, child pornography can be congressionally excluded from NEA grant awards, since it is constitutionally proscribed in *Ferber v. New York*, 458 U.S. 747 (1982).

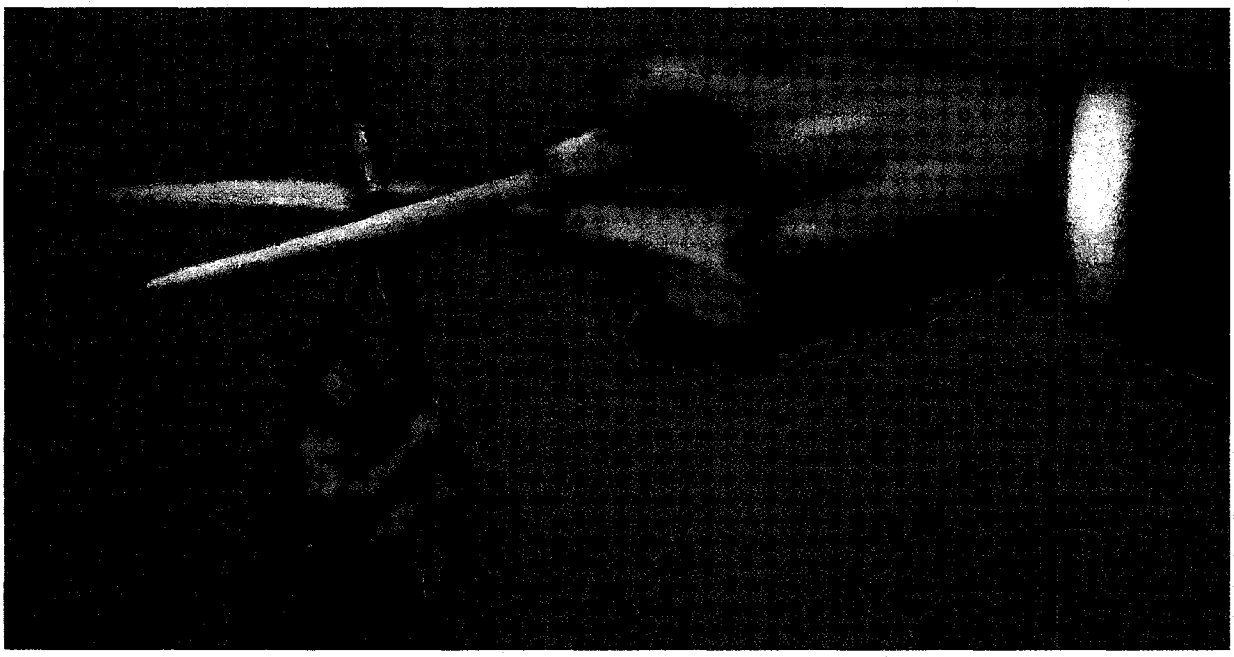
Somewhat less clear is what funding constraints can be imposed on art that is generally considered to be "indecent."

In most instances, indecent expression (that which does not conform with accepted standards of morality) escapes government condemnation out of an abiding deference to the First Amendment.

Where, however, the vulgar utterances are used in a public forum—on radio or television, for example—during hours when young children are likely to be in the audience, the privilege would be decidedly less.

While it would appear to be constitutionally imprudent for Congress to impose restrictions on the subsidizing of indecent art, certainly it could direct the NEA to shy away from funding art programs and performances regarded as indecent if they are aimed at, or likely to reach, youthful audiences.

To suggest such legislative guidance for grant awards by the NEA threatens neither artistic creativity nor First Amendment values. The failure to insist on such constraints leaves both vulnerable. ■



Block That Agenda

BY RODNEY A. SMOLLA

Much of the recent attack on the National Endowment for the Arts proceeds from the premise that the government may attach any conditions it pleases on artistic funding, because it is merely engaging in decisions over how to spend scarce resources. A refusal to fund art, the argument goes, is not to censor it. There may be a constitutional right to paint an offensive painting, but no constitutional right to paint it with public funds.

An analogy is drawn to decisions in other areas of constitutional law, such as abortion, where the Supreme Court has distinguished between negative restrictions on the exercise of a right and affirmative obligations to fund its exercise.

In the context of arts funding, this argument is specious. It is nothing more than an attempt to resurrect the long-discredited "right-privilege" distinction— that the artist's receipt of public funds is a mere "privilege." Under this view the government is in the same position as any private benefactor.

For over 40 years, however, the Supreme Court has rejected this view. In *Perry v. Sindermann,* 408 U.S. 593 (1972), it held that while the government may deny benefits for any number of reasons, decisions that infringe on constitutionally protected rights—especially free speech—are impermissible.

The principle articulated in *Perry* is often misunderstood. It does not mean that government may never attach any content-based conditions to the receipt of grant funds. Evaluations of artistic merit are inevitable. The real puzzle is how to determine what content-based restrictions are to be permitted, and what not.

One should first dispose of a pet argument of the NEA's detractors, who make much of the fact that government should not be forced to fund obscene art. But this point is irrelevant—of course there is no First Amendment obligation to fund obscenity, any more than there is a First Amendment obligation to fund speech presenting a clear and present danger of violence.

And virtually everyone would agree that restrictions that violate equal protection principles—distinctions based on the identity of speakers—cannot be valid.

There is no obligation to create an NEA at all, but we could never tolerate an NEA that gave grants to whites but not blacks, or Catholics but not Jews, or Democrats but not Republicans.

An Equality Principle

But the First Amendment has an equality principle that spins on its own gyroscope, separate and distinct from the equal protection clause, that also forbids discrimination based on the speaker's message. The Supreme Court has repeatedly held that "viewpoint discrimination" is unconstitutional, even when government is merely doling out public funds, and not exercising direct censorship.

And so the debate has been honed to a dispute over what is meant by "viewpoint discrimination." The dispute is narrow, but everything hangs on it.

The "conservative" interpretation treats it as akin to the concept of "purposeful discrimination." Just as proof of intent is necessary to support an equal protection claim of race or sex discrimination, there must be proof of intent by officials to suppress a particular idea in order to support a First Amendment claim of viewpoint discrimination.

This view fails to provide adequate protection for freedom of speech, however, because it does not ferret out surreptitious and subtle forms of discrimination. The better interpretation puts the onus on the government to justify any content-based classification.

Because we should constantly fear viewpoint discrimination masquerading as neutrality, content-based regulation of speech should be regarded as presumptively suspect. We should be particularly suspicious when political bodies attempt to micro-manage speech decisions that have traditionally been left to the sound discretion of professionals in the field. ■

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