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

William Bradford Reynolds

Rodney A. Smolla

Copyright c 1991 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

https://scholarship.law.wm.edu/popular_media/72
Amendment difficulties, as seems renewed. Even so, the termi-

Congress probably will vote to continue

mean that some NEA grants cannot

but in a reduced amount.

Taxation Without Representation,

federal subsidies; nor has it been

federal funds seems unlikely.

a government subsidy for the arts,

altogether raises no First

clear from the

largesse. Moreover, defunding NEA

ment concerns.

en largest. However, defunding NEA
altogether raises no First Amend-
ment concerns.

Nonetheless, a total cut-off of
federal funds seems unlikely. Con-
gress 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 Hagan v.
Taxation Without Representation,

Such a funding reduction will
mean that some NEA grants cannot
be renewed. Even so, the termi-
nated recipients remain free to ex-
press 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 constitu-
tional problems under the free exer-
cise clause.

While the funding of artwork
that portrays offensively prejudicial
messages reflecting racial or relig-
ious bias has free speech protection,
openly discriminatory award deci-
sions bottomed on race, gender or
ethnic background are constitution-
ally suspect.

To refine constitutional guide-
lines even further, Congress confi-
dently 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 deci-
sion on obscenity in Miller v. Cali-

There, the Court announced
that works that appeal to the pruri-
ent interests of the average person,
depicted in a patently offensive man-
ner sexual organs or acts, and lack
serious literary, artistic, political or
scientific value enjoy no First Amend-
ment protection.

Similarly, child pornography
congressionally excluded from
NEA grant awards, since it is con-
stitutionally proscribed in Ferber v.

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

In most instances, indecent ex-
pression (that which does not con-
form with accepted standards of
morality) escapes government con-
demnation out of an abiding defer-
ence 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 Con-
gress to impose restrictions on the
subsidizing of indecent art, cer-
tainly it could direct the NEA to shy
away from funding art programs
and performances regarded as inde-
cent if they are aimed at, or likely to
reach, youthful audiences.

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

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.

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.

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.