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Some Constitutional Implications of Denying NEA Subsidies to Arts Projects Under the Yates Compromise

by

KAREN FAABORG*

As a general rule, government subsidies of speech activities have no constitutional implications, and courts have been reluctant to interfere with government discretion in administering direct and indirect subsidy programs.1 The rationale behind this rule is that there is no right to public support of private expression, and no liberty or property interest in a government grant; this principle has been applied to support programs for the arts.2 The recently promulgated funding bill for the National Endowment on the Arts forces a reevaluation of this principle because it bars federal funds for arts projects which are "obscene."3 This Essay raises two constitutional grounds on which the new legislation might be successfully challenged: (1) it politicizes the grant process by inserting a government official as censor, and (2) it allows subject matter discrimination to occur without the strict scrutiny safeguards designed to avoid illicit prior restraints and the chilling of first amendment rights.

The Yates Compromise requires the Chairperson of the National Endowment for the Arts (NEA) to monitor all awards to arts projects and to withhold funding from any judged to be obscene.4 Obscenity is defined in the legislation as "including but not limited to, depictions of

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4. Id.
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."

Because the Chairperson is an administrative appointee, this requirement politicizes the grantmaking process, which until now was controlled by decisionmaking panels comprised of citizens familiar with the arts.

David Shiffrin, a prominent legal scholar, has elucidated the constitutional hazards implicit in such a scheme by drawing an analogy to broadcasting and educational areas. In both of these areas, centralized control has been rejected by the courts as violating the first amendment. The broadcasting system is completely decentralized and is in the hands of literally hundreds of licensees. If the Federal Communications Commission (FCC) were to substitute its decision for those of the licensees, the purpose of the first amendment as the guardian of an "uninhibited marketplace of ideas" would be abrogated. Similarly, the principle of academic freedom liberates teachers from the "pall of orthodoxy" which centralized control engenders. As Shiffrin points out, the important feature in both systems, beyond the requirement for multiple decisionmakers, is the fact that these decisionmakers are nonpolitical private citizens. The insertion of the NEA chairperson into the decisionmaking processes of the hundreds of private citizens who comprise the panels which allocate grant monies is subject to the same constitutional principles.

The decisionmaking panels at the NEA engage continuously in content-based discrimination, most of which is constitutional and entirely valid. Prior to the Yates Compromise, content discrimination was limited to determining whether the project exhibited substantial artistic and cultural significance and excellence. Content neutrality covers different kinds of neutrality, including viewpoint neutrality and subject matter neutrality, in addition to quality neutrality. Viewpoint neutrality requires that the decision maker reflect no bias regarding the opinions ex-

5. Id.
10. See Red Lion, 394 U.S. at 390.
12. Shiffrin, supra note 8, at 646.
pressed by the artist on matters of public concern. Subject matter neutrality makes a similar demand with regard to materials or topics treated by the artist. Quality neutrality would require no bias in the quality of the artistic product itself.

Both viewpoint and subject matter neutrality are required in the NEA decisionmaking process, whereas, quality neutrality is not necessary. The empowering legislation, the National Foundation on the Arts and the Humanities Act, charges the NEA with fostering the excellence of the arts in the United States. Clearly, the NEA has the right to engage in quality-based discrimination because funds are limited.

In order to ensure that viewpoint or subject matter considerations are not made under the guise of artistic quality decisions, it is essential to give the entire responsibility for granting subsidies to nonpolitical art and cultural experts. Viewpoint neutrality is always required; this is the very essence of first amendment protection of differing political views. Subject matter neutrality is examined with strict scrutiny in order to ensure that the differentiation serves a compelling state interest.

The Yates Compromise inserts subject matter differentiation into the grantmaking process. For example, under the new legislation, in deciding whether to fund a theater project, the NEA is required to monitor the project for any subject matter which could be considered obscene. If the project could be considered obscene, the NEA must withhold funding. It is more likely, however, that the theater-producing organization will exercise self-censorship and cut out any potentially offensive plays rather than lose the grant. Under conventional first amendment analysis, such subject matter distinctions are presumptively invalid.

The Yates Compromise also forces the NEA to exercise a prior restraint on the various arts projects it subsidizes. In the analogous area of public forum law, such a prior restraint is invalid without proper procedural safeguards. The settled rule is from Freedman v. Maryland: a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." In Southeastern Promotions, Ltd. v. Conrad, Justice Blackmun recites the "deeply etched" principle that "a free society

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18. Id. § 4.09[D], at 4-83.
21. Id. at 58.
prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. Justice Blackmun adopts the Freedman safeguards for theatrical productions:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor.

Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo.

Third, a prompt final judicial determination must be assured.

The Yates Compromise offers no such procedural safeguards. Rather, it puts all the power for distinguishing obscene from non-obscene subject matter into the hands of elected or appointed officials.

A more recent case dealing with the public forum-theater, Cinevision Corp. v. City of Burbank, summarizes the constitutional problems inherent in the Yates Compromise:

When decisions about what forms of expression will be permitted or which individuals will be allowed to express themselves in a public forum are made by a political body . . . those decisions must be scrutinized most carefully—if only because such a body is at all times, by its very nature, the object of political pressures. Regrettably, at times the will of the majority may for the moment run contrary to the protections that the first amendment affords political and other controversial forms of expression.

In the opinion, Judge Reinhardt went on to explain that a professional museum director's or concert promoter's decision regarding exhibits or performance selections would have a better chance of surviving first amendment scrutiny than a similar decision made by elected or appointed officials. Clearly, the Yates Compromise is not on firm constitutional ground under a public forum analysis.

Unfortunately, however, there is reason to believe that the Yates Compromise would be upheld if it were challenged before today's United States Supreme Court. In 1987, Justice Scalia, joined by Justice Rehnquist, wrote a dissenting opinion which seemed to indicate that he would support unfettered government involvement in the grantmaking process. The case, Arkansas Writers' Project, Inc. v. Ragland, did not provide a natural setting for what became a lengthy diatribe by the dissenters; the majority had held that a state sales tax on general interest magazines, which exempts newspapers and religious, professional, trade, and sports journals violates the first amendment's guarantee of freedom.

24. 745 F.2d 560 (9th Cir. 1984).
25. Id. at 575.
26. Id. at 575-76.
of speech because it distinguishes among publications on the basis of content.

Justice Scalia argued that tax exemptions are a form of subsidy and that a government decision to subsidize some, but not all speech, is "not subject to strict scrutiny." The shocking aspect of Scalia's dissent is his use of artistic examples; Scalia referred to the Kennedy Center's authorization to present classical music, opera, drama, dance, and poetry; and the Center's right to exclude lectures and political speeches as examples of subject matter distinction that do not require strict scrutiny. Because he offered no analysis, Scalia left open the possibility that he believes the decision to subsidize some but not all subject matter in the arts does not demand strict scrutiny. Rehnquist's joining in this dissent is reminiscent of his remarkably similar dissent many years ago in Southeastern Promotions v. Conrad, a public-forum case. Both Scalia's and Rehnquist's dissenting opinions indicate that the Yates Compromise may have a friendly audience should it ever be tested before the Supreme Court.

Even more unfortunately, the only case on point to serve as precedent in such a hearing is Advocates for the Arts v. Thomson, which held that the refusal of the Governor and Council of New Hampshire to approve a grant from the Commission on the Arts to a literary magazine, on the grounds that it had published a poem which contained language and imagery that some might find offensive, did not violate the first or fourteenth amendment rights of the plaintiff. Although this holding flies in the face of the constitutional principles that have been articulated in this Essay, and in spite of the fact that it has been roundly repudiated by Professor Shiffrin and others, it nonetheless provides a foothold for those who would support the new legislation.

29. Id. at 1731 (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 544 (1983)).
30. Id. at 1732.
31. 420 U.S. at 571-72.
32. 532 F.2d 792 (1st Cir. 1976), cert. denied, 429 U.S. 894 (1976).
33. Id. at 798.
34. See Shiffrin, supra note 8, at 646.