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The National Endowment for the Humanities: Control of Funding Versus Academic Freedom

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NOTES

The National Endowment for The Humanities: Control of Funding Versus Academic Freedom

I. INTRODUCTION

In 1989 government funding for the arts through the National Endowment for the Arts (NEA)[1] came under fire. Conservative groups vigorously attacked two controversial exhibits that received funding from the NEA.[2] As a remedy for this supposedly inappropriate funding, con-

1. The National Endowment for the Arts is an independent agency of the federal government charged with awarding grants to projects on the basis of significant artistic merit. 20 U.S.C. § 954 (a), (c)(1)-(2) (1988).

2. The works of Andres Serrano and Robert Mapplethorpe generated these controversies. *See infra* notes 83-90 and accompanying text for a discussion of these works; *see also* Vince Pas-

servative groups lobbied Congress strenuously either to dismantle the NEA or to limit its funding on the basis of content.[3] The arts community responded with a vigorous campaign decrying such limits as an affront to artistic freedom and First Amendment rights.[4] Congress placed the NEA, its funding procedures, and its record under close scrutiny when the agency applied in 1989 for its 1990 reappropriation.[5]

As a result of this scrutiny, Congress enacted in 1989 a set of content-based limitations on projects that the NEA and its parallel organization, the National Endowment for the Humanities (NEH), could fund.[6] Under these limitations, both endowments could not fund obscene art, including homoerotic art and art depicting individuals engaged in sexual conduct.[7] Congress further instructed the NEA that the two institutions that sponsored the controversial art projects could receive no further grants without prior congressional approval.[8] While some championed the 1989 law as a victory for artists in light of the more restrictive limitations discussed by Congress, others felt that even these lesser limitations violated the First Amendment.[9]

Congress revisited both the NEA and the NEH in 1990, this time in the form of a reauthorization of these endowments. While Congress removed some of the restrictive language in the 1989 law,[10] it estab-

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saro, *Funds for the Enfeebled — The NEA Wrangle: A No-Win Situation for Artists*, HARPER'S MAGAZINE, Dec. 1990, at 60, 65 (noting the participation of two conservative activists, Revs. Pat Robertson and Donald Wildmon, in beginning the debate over NEA funded projects).

3. Senator Jesse Helms introduced legislation prohibiting the funding of art that would be offensive to almost any segment of the public. *See infra* notes 92 to 93 and accompanying text.

4. *See* Nicols Fox, *NEA Under Seige: Artwork Sparks Congressional Challenge to Agency's Reauthorization*, NEW ART EXAMINER, Summer 1989, at 18-23.

5. *See* George Hager, *Every Voter's a Critic on Arts Funding: Moral Outrage Against Federally Subsidized Exhibits Puts NEA's Congressional Sponsors on the Spot*, 47 CONG. Q. WKLY. REP. 2174, 2174 (1989).

6. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 1989 U.S.C.C.A.N. (103 Stat.) 701, 741-42.

7. The statute 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 [NEA] or the [NEH] 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.

Id. at § 304(a); *see infra* note 97 (setting forth the test for obscenity enunciated in Miller v. California, 413 U.S. 15 (1973)).

8. *Id.* tit. II, at 738.

9. *See, e.g.*, Karen Faaborg, *Some Constitutional Implications of Denying NEA Subsidies to Arts Projects Under the Yates Compromise*, 12 HASTINGS COMM. & ENT. L.J. 397 (1990); Stephen F. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HASTINGS COMM. & ENT. L.J. 353 (1990); Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969 (1990).

10. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, §§ 103, 107,

lished entirely new procedures for grant making by the NEA related to obscenity.[11] Congress also removed the limitations placed on the NEH grant making procedures by the 1989 law and imposed no new obscenity limitations on the NEH.[12]

Controversy surrounding the NEA is not new. Several times during its history Congress has focused its attention on the procedures and records of the Endowment, and has imposed or removed various restrictions and oversight procedures in the wake of controversy.[13] Congressional action in 1989 shows a willingness by its members to see the NEA and the NEH as indistinguishable and, therefore, not subject to different concerns.[14] As such, Congress imposed the same restrictions on both endowments in 1989. Although the 1990 legislation lifted earlier restrictions, new demands for restrictive content-based limitations may arise as a result of some future controversy. Because the NEA received a new set of limitations in the 1990 law, Congress obviously believes that it can continue to place restrictions on grants awarded by these endowments.

While commentators have addressed the effect of content-based limitations on the NEA,[15] the potential effect of such limitations on the NEH has been overlooked. Because the NEH focuses primarily on scholarship, funding limitations raise special concerns under the First Amendment.[16] This Note argues that content-based limitations on government funding of scholarship should receive strict scrutiny from the courts because of the necessity of maintaining academic freedom.[17] Since strict scrutiny imposes a significant burden on the government to show that such limitations are constitutional,[18] very few limitations would overcome that burden.

Part II of this Note begins with a discussion of the history of the National Foundation for the Arts and Humanities, then reviews the way Congress regulates the endowments. Part III discusses two doctrines in First Amendment law, unconstitutional conditions and academic freedom. Part IV discusses how these two doctrines apply to the NEH funding process and work together to mandate strict scrutiny analysis for NEH grants in the face of content-based limitations. This

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104 Stat. 1961, 1963, 1969 (1990); *see infra* part II.D. for a discussion of these amendments.

11. *Id.* at § 103(h). *See infra* notes 119-26 and accompanying text.

12. *Id.* § 103(b) (applying obscenity restrictions to the NEA only).

13. *See infra* notes 42-46 and accompanying text.

14. This Note argues that the NEH is subject to unique concerns. *See infra* part III. These unique concerns require differential treatment for the NEH.

15. *See supra* note 9 and accompanying text.

16. *See infra* part III.A.

17. *See infra* part III.B.

18. *See infra* part IV.

Note concludes by arguing that this high level of protection should shield the NEH from extensive content-based regulation.

II. The National Foundation for the Arts and Humanities

A. History of the Foundation

Traditionally, artists and scholars in the United States have relied on the private sector for support.[19] Such support has come primarily from two sources, wealthy individuals who commissioned and collected art, and universities and other organizations that subsidized and maintained journals and scholars.[20] This system of reliance on private patronage traces its roots to ancient times.[21] Reliance on market forces, however, dictated that only art and scholarship that was popular with mainstream America received support.[22]

The arts and humanities received little government support prior to 1965.[23] Although President Roosevelt created a Federal Arts Project during the New Deal to subsidize artists, the project sought to address unemployment rather than to foster artistic achievement for its own sake.[24] The subsidies stopped when unemployment was no longer a paramount concern and the United States faced new problems.[25] Other attempts to provide government support were never enacted.[26]

Noting the success of the National Science Foundation in supporting scientific research, scholars and artists called for similar support for

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19. *See* Kathleen D. McCarthy, *American Cultural Philanthropy: Past, Present, and Future*, 471 Annals 13, 14-15 (1984).

20. *Id.* at 15-16. McCarthy also notes that private charitable foundations, such as the Carnegie Foundation, supported art and cultural projects. Their support, however, was limited in amount and scope. *Id.* at 17-18. Corporations did not become a significant source of funding until the 1970s. *Id.* at 21.

21. Some of Western culture's greatest accomplishments were the result of a private commission by a wealthy patron.

22. McCarthy focuses on the democratic nature of certain forms of popular art. For example, she notes that "rustic" actors often performed Shakespeare in makeshift theaters. McCarthy also notes that these were profit-making ventures and that all those who could afford to pay the entrance fee could gain admittance. McCarthy, *supra* note 19, at 14.

23. *See, e.g.*, Kenneth Goody, *Arts Funding: Growth and Change Between 1963 and 1983*, 471 Annals 144, 146 (1984) (stating that before 1965, support for the arts from federal and state governments "most certainly have been low").

24. Dick Netzer, The Subsidized Muse: Public Support for the Arts in the United States 54 (1978). The government, of course, has subsidized some art. For example, Congress in 1817 commissioned Revolutionary War scenes to hang in the Capitol. Even earlier, the Library of Congress collected art and music under its authority to assemble materials for the use of Congress. For a chronology of federal arts funding, see *Evolution of Federal Arts Funding*, Cong. Dig., Jan. 1991, at 3.

25. Netzer, *supra* note 24, at 54.

26. Such efforts included bills introduced by Senator Claude Pepper in 1938 and by Senator Jacob Javits in the 1940s. Neither bill became law. Marie Tessier, *Public Support for the Arts From the WPA to the NEA*, 1 Cong. Q. Editorial Res. Rep. 308, 308-09 (1990).

their work.[27] They argued that while technology received direct government support, the arts and humanities suffered as a result of declining private support.[28] The arts and humanities deserved direct government support, they argued, because technological advances created more leisure time, which Americans could spend on the arts and humanities.[29] Furthermore, scholars and artists feared that technology would come to dominate American life.[30]

These advocates of a humanities organization lobbied Congress to recognize that government sponsorship of the arts and humanities could enrich American cultural and scholarly life.[31] In 1965, the advocates achieved their goal. Congress created the National Foundation on the Arts and the Humanities (the Foundation),[32] an organization dedicated to unleashing and encouraging creative talent in the United States. Congress, thus, determined that the government had a proper role in encouraging creativity in the United States,[33] and foresaw that the Foundation could take a leading role in the advancement of art and scholarship.[34]

The Foundation was established as an independent agency of the federal government that receives an appropriation authorized by Congress.[35] Periodically, Congress considers the entire agency in a more extensive review called a reauthorization. Through its two branches, the NEA and the NEH, the Foundation distributes its appropriation money by awarding grants to those projects that have substantial merit.[36] The

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27. LIVINGSTON BIDDLE, OUR GOVERNMENT AND THE ARTS: A PERSPECTIVE FROM THE INSIDE 59-61 (1988) (discussing a report by a group of scholars calling for federal aid to the humanities).

28. Goody, *supra* note 23, at 145.

29. *See* BIDDLE, *supra* note 27, at 76-77.

30. *Id.*

31. For a history of this lobbying see *id.* at 3-55.

32. 20 U.S.C. § 953 (1988).

33. *Id.* § 951(1).

34. *Id.* § 951(2).

35. *See* 20 U.S.C. § 960 (1988) (detailing the annual appropriation for the endowments). In addition to the flat sum of the appropriation, the endowments also receive federal matching funds in an amount equal to the bequests, donations, and devises to the endowments. *Id.* § 960(a)(2).

In 1990, Congress appropriated $147,000,000 to the NEA and $143,750,000 to the NEH for use in 1991 and 1992. Act of Nov. 5, 1990, Pub. L. No. 101-512, tit. 2, 104 Stat. 1915, 1956 (1990). Estimates that compare the level of arts and humanities funding in the United States with other countries vary. One 1985 study found that United States citizens pay $3 per capita in direct government support, and $13 including tax expenditures. In comparison, Canadians spent $32, the West Germans $27, the British $10, the Italians $14, the Dutch $29, and the Swedes $35. J. MARK DAVIDSON SCHUSTER, SUPPORTING THE ARTS: AN INTERNATIONAL COMPARATIVE STUDY 45 (1985).

36. "[A]rtistic 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 . . . ." Section 103(b), 104 Stat. at 1963 (to be codified at 20 U.S.C. § 954(d)(1)). This statement of the criteria modifies an earlier statement which emphasized only artistic merit. 20 U.S.C. § 954(d)(1) (1988) (amended 1990).

NEA funds art, and the NEH funds scholarship. Other organizations are part of the Foundation, but these function mainly as support organizations for the two endowments.[37]

The birth and the ensuing history of the NEA and NEH, however, are not represented solely by the original congressional purposes. In the debates surrounding the creation of the endowments, several problematic issues arose.[38] For whatever reason, early dissent manifested itself in the first reauthorization of the NEA in 1968, when many House Republicans voted against reauthorization.[39]

These concerns largely have been answered in the years following the creation of the Foundation.[40] The question of the proper extent of congressional oversight over the Foundation, however, remains unsettled. This question dominated the initial debates over the Foundation. Some congressional members felt that the Foundation needed complete independence from government interference, while others felt that it should reside within an existing government bureaucracy to provide greater accountability.[41]

Over the years, congressional members have continued to express

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37. These organizations include the National Council on the Arts, the National Council on the Humanities, and the Federal Council on the Arts and Humanities. The role of the two national councils is discussed *infra* at notes 74 to 76 and accompanying text. The Federal Council on the Arts and Humanities is an advisory committee. 20 U.S.C. § 958(c) (1988).

38. First, dissenters questioned the constitutionality of grants of public funds to arts and humanities practitioners. Second, artists and some members of Congress feared that artists would come under the control of the government. Third, some argued that the endowments would redistribute wealth improperly from low-income taxpayers to high-income taxpayers. Fourth, dissenters felt that if the private market would not support the arts and scholarship, the government should not disturb the market with a direct subsidy. Lecture by Arthur Schlesinger, Jr., National Academy of Sciences (Apr. 13, 1988), *reprinted as America, the Arts, and the Future: The First Nancy Hanks Lecture on the Arts and Public Policy, in* THE FUTURE OF THE ARTS 3, 4 (David B. Pankratz & Valerid B. Morris eds. 1990). Schlesinger catalogues the four issues and calls them "misleading, overwrought, or simply wrong." *Id.* at 4. *See* discussion *infra* note 40 for Schlesinger's answers to each of the issues.

39. The House Republicans voted 2 to 1 not to reauthorize the NEA.

40. Schlesinger, *supra* note 38, at 4. Schlesinger argues that the constitutional questions surrounding the endowments are irrelevant today because no one has presented a serious constitutional challenge to them. Schlesinger also believes that Congress had power to create the endowments under the General Welfare Clause. He cites George Washington and others who extolled the value of the humanities and the arts to support his proposition. *Id.*

Schlesinger dismisses the fear of government interference in arts and scholarship by stating that none has occurred. *Id.* at 5. The Mapplethorpe and Serrano controversies, however, weaken this assertion. Schlesinger similarly dismisses the argument that a subsidy equals a transfer of wealth by stating that the arts and humanities are beneficial to all segments of society. *Id.* Finally, Schlesinger equates the endowments with schools and hospitals, which also receive subsidies, to dismiss the argument that the arts and humanities can survive in a free market. He asserts that the endowments provide a function as vital as the other institutions, and, like them, need a subsidy to exist. *Id.*

41. *See* BIDDLE, *supra* note 27, at 81-82.

their concerns over the NEA's proper level of accountability in light of several grants awarded to controversial projects. In 1973, a controversy arose over an NEA grant to Erica Jong, author of the book, *The Fear of Flying*.[42] This novel shocked many Americans with its use of sexually explicit language and situations. This controversy led to a questioning of NEA procedures in congressional debate.[43]

Public attacks on government subsidies to the arts have forced Congress to revisit the endowments on several occasions. For example, a controversy arose over a New York City production of the opera *Rigoletto*.[44] Italian-Americans complained that the production was derogatory and presented stereotypes of Italians. The resulting congressional action included a proposal by Representative Mario Biaggi to restrict funding of racially offensive material.[45] When the NEA funded an artist to drop leaflets from an airplane to create a living sculpture, Senator William Proxmire awarded the agency his famous Golden Fleece award.[46] While Congress enacted no content-based legislation as a result of these controversies, Congress sent a clear message to the NEA: Avoid art projects which may offend constituents.

In spite of congressional dissent and a history of controversial funding decisions, the endowments have advanced the arts and scholarship in the United States. At the time the NEA was established, 10 choruses, 110 symphony orchestras, 37 dance companies, 56 nonprofit theaters, and 27 opera companies existed in the United States. Today, our country boasts 80 choruses, 230 symphony orchestras, more than 250 dance companies, over 420 nonprofit theaters, and 120 opera companies.[47] One observer has likened this increase in artistic activity under the NEA to a cultural renaissance.[48]

Similarly, the NEH has advanced scholarship in America. While

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42. *See id.* at 316; Rohde, *supra* note 9, at 361-62. In the same year, the NEA received further criticism due to a one word poem which appeared in a NEA funded literary anthology. *Id.* at 361.

43. For example, Rep. Robert Bauman criticized the NEA for funding the production of a "horny novel." 121 CONG. REC. 19,145 (1955).

44. *See The Grant Making Process of the National Endowment for the Arts: Hearing Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 98th Cong., 2d. Sess. (1984) [hereinafter *Endowment Hearing*]. *See generally* Enrique R. Carrasco, Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521 (1986) (analyzing the controversy over the *Rigoletto* production and the subsequent congressional reaction).

45. Representative Biaggi's proposal would have prohibited funding to any "ethnic or racially offensive material." *Endowment Hearing*, *supra* note 44, at 2. (statement of Rep. Biaggi).

46. Senator Proxmire awarded the Golden Fleece to governmental projects which he felt wasted taxpayers' money.

47. Passaro, *supra* note 2, at 61.

48. *Id.* (stating that "the NEA rightly sees itself as having been a catalyst over the past two decades for the creation of a very large system of public and private arts patronage").

data on scholarship activity is not documented as accurately as data on artistic activity, at least one significant statistic indicates similar growth in the humanities. One of the NEH's functions has been to fund scholarly journals and publications.[49] The number of such publications exploded in the period following the creation of the NEH. Other NEH successes include the Civil War documentary series, produced by Ken Burns, which received broad critical and popular acclaim. The Foundation has achieved these successes in an environment free from direct political control[50] over the content of funded projects. Continued success depends on maintaining freedom in funding decisions. In the case of the NEH, in particular, political interference in funding decisions will hinder the essential goal of promoting scholarship. The essential goal of scholarship should be the quest for the truth in a particular subject area.[51]

B. NEH Procedure Prior to 1989

In funding scholarship, the NEH focuses on subjects as diverse as religion, history, art history and criticism, languages, philosophy, literature, and ethics, among others.[52] To receive NEH funding, a project should advance scholarship and research in a humanities subject, improve humanities education, or promote understanding and interest in the humanities among Americans.[53] The NEH, as a matter of policy, will not fund certain projects. For example, recipients generally may not use grants to pursue an academic degree, to promulgate political or ideological propaganda, or to create original works of art.[54]

Once a scholar determines that a particular project falls within the

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49. The NEH's Division of Public Programs funds scholarly projects which appear in public fora. *See infra* text accompanying note 58. As a result of such funding, *The International Directory of Little Magazines and Small Presses* has grown from a mere pamphlet in 1965 to a thick and extensive manual. The Reverend Timothy Healy, president of the New York Public Library and past president of Georgetown University, called the NEH the best subsidizer of scholarly journals. *Hearing on the Rights of Artists and Scholars to Freedom of Expression and the Rights of Taxpayers to Determine the Use of Public Funds: Hearing before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. 53-54 (1989) [hereinafter *Hearings on Rights*].

50. The process traditionally followed by the endowments, and the nature of political control over their funding decisions, are described *infra* part II.B.

51. The quest for the truth in scholarship has been subject to the doctrine of academic freedom, which guarantees scholars the right to study theories and ideas, no matter how controversial or unpopular. See *infra* part III.B. for a discussion of the doctrine. While most cases discuss how academic freedom relates to universities only, this Note argues that the similar nature of the NEH, in funding scholarships, requires similar protection.

52. 20 U.S.C. § 952(a)(1988).

53. NATIONAL ENDOWMENT FOR THE HUMANITIES, OVERVIEW OF ENDOWMENT PROGRAMS 5 (1991).

54. *Id.* at 5-6.

scope of the NEH, he must submit an application to one of five divisions or two offices at the Endowment. The five divisions of the NEH are: Education Programs, Fellowships and Seminars, Public Programs, Research Programs, and State Programs.[55] Through the Division of Education Programs, the NEH makes grants to such educational institutions as grade schools, high schools, and colleges in order to improve the quality of humanities instruction.[56] The Division of Fellowships and Seminars provides grants mostly to college level professors to study and research humanities subjects for fixed periods of time.[57] The Division of Public Programs makes grants to scholarly projects that make the humanities available to the general public. These are projects that will be presented to the public on television and radio, in museum exhibits, or in some other public forum.[58] The Division of Research Programs supports extended and complex research, preparation of texts, and organization of reference materials.[59] The Division of State Programs supports state humanities councils.[60]

The NEH also makes grants through two offices. The Office of Challenge Grants works to encourage private investment in the humanities by pledging to add federal dollars to private donations to educational institutions.[61] These grants seek to support long-term investments in the humanities, such as institutional endowments, construction and renovation of buildings, and equipment purchases.[62] The Office of Preservation funds projects aimed at archiving and preserving newspapers, books, journals, and other humanities research materials.[63]

When an application first arrives at the NEH, the staff reviews the application for compliance with technical and procedural requirements.[64] The staff then refers compliant applications to panels composed of the applicants' peers for review of scholarly merit.[65] Through the use of the peer panels, the NEH has achieved a high degree of insu-

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55. *Id.* at 5.
56. *Id.* at 9-10.
57. *Id.* at 11-13.
58. *Id.* at 14-15.
59. *Id.* at 16-19.
60. *Id.* at 20.
61. *Id.*
62. *Id.*
63. *Id.* at 21.
64. *Id.* at 6. The NEA follows procedures very similar to those described for the NEH. *See* National Endowment for the Arts Application/Grant Process, CONG. DIG. Jan. 1991 at 6. While the procedures are similar, however, they also contain certain differences. See *infra* notes 121-27 and accompanying text for a discussion of the differences related to the 1990 Amendments. For a discussion of the different customs of the two endowments, see *infra* notes 135-38 and accompanying text.
65. NATIONAL ENDOWMENT FOR THE HUMANITIES, *supra* note 53, at 6.

lation from the political process and bureaucratic control in its funding decisions and maintained a high level of quality in its funding choices.[66]

The peer panels are composed of experts in different fields of scholarship. Each panel specializes in a particular field, such as literature, art criticism, or history.[67] Members of the panel include scholars and professionals in that particular field. The chairperson of the Endowment selects panel members on the basis of expertise and diversity, with no need for confirmation by Congress or the President.[68] The composition of the peer panels changes frequently. No more than twenty percent of each incoming class of panel members may stay for longer than three years.[69] To further assure the isolation of the panels from political pressure, no scholar may serve on a panel or subpanel when the panel or subpanel considers his own application.[70]

The panels select worthy applications on the basis of enumerated criteria. Under the procedures followed until 1989, these criteria focused solely on the scholarly merit of the project.[71] Indeed, Congress originally created the panels to ensure that funded projects met the standards of scholarly excellence and to insulate the endowments from bureaucratic control.[72] Prior to the creation of the peer panels, only a presidentially appointed council reviewed applications.[73]

The presidentially appointed councils have continued to play a role in the selection process in spite of the use of peer panels. After a peer panel reviews an application, the panel forwards it to the council.[74] The council then reviews the application and, in turn, forwards the application to the chairperson of the Endowment.[75] The chairperson has the

66. The Civil War Documentary produced by Ken Burns is an example of a universally acclaimed NEH-funded project.

67. NATIONAL ENDOWMENT FOR THE HUMANITIES, *supra* note 53, at 6.

68. 20 U.S.C. § 959(a) (1988). The exact criteria were as follows: "[E]ach Chairperson shall appoint individuals who have exhibited expertise and leadership in the field under review, who broadly represent diverse characteristics in terms of aesthetic or humanistic perspective, and geographical factors, and who broadly represent cultural diversity." *Id.*

69. *Id.*

70. *Id.*

71. These criteria are codified at 20 U.S.C. § 954(c)(1)-(8) (1988). See *supra* note 36 for the text of the newest criteria.

72. *See* Note, *supra* note 9, at 1973. The use of peer panels fulfills the congressional directive that no "department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association." 20 U.S.C. § 953(c) (1988).

73. The President's council contained twenty-six members.

74. *See* NATIONAL ENDOWMENT FOR THE HUMANITIES, *supra* note 53, at 6.

75. *Id.* While the councils have generally supported the projects approved by the panels, a funding controversy may make the councils scrutinize applications more closely. *See* Tessier, *supra* note 26, at 307.

final authority to overrule the determinations of the panel.[76]

The Foundation also works in conjunction with state councils on the arts and humanities to fund projects.[77] These councils award subgrants of Foundation money and administer other funds.[78] Besides making grants themselves, the state councils further the goals of the Foundation by promoting local involvement in the arts and humanities.[79]

The growth in artistic and scholarly activity cannot be attributed solely to grants provided by the national and state governments. Private grants and subsidies account for much higher dollar amounts than Endowment grants.[80] To receive private funding, however, an artist or scholar often needs to receive the imprimatur of an Endowment grant.[81] Private funding sources tend to avoid making an independent determination of merit, viewing the endowment's peer review system as a guarantor of the merit of funded projects.[82] If an applicant fails to receive a grant, his work may be perceived as failing to rise to the level of significant art or scholarship.

In promoting scholarly and artistic merit, the endowments have balanced the needs of the grant recipients, private sponsors, local gov-

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76. *See* NATIONAL ENDOWMENT FOR THE HUMANITIES, *supra* note 53, at 6. *But see Hearings on Rights, supra* note 49, at 34 (statement of Rev. Timothy Healy, President of the New York State Puhlic Library and former President of Georgetown University, pointing out the inconsistency between the goal of political independence and the final authority on awards resting in the hands of a federal official).

77. *See* NATIONAL ENDOWMENT FOR THE HUMANITIES, INTRODUCTION TO STATE PROGRAMS (1985).

78. *Id.* at 5-9. In 1988, the budgets of the state councils surpassed the budget of the NEA by almost $80 million.

79. NATIONAL ENDOWMENT FOR THE HUMANITIES, *supra* note 77, at 3. The state councils use a funding procedure that is similar in many ways to the procedure used by the endowments. For example, the state councils use peer review panels. *Id.* at 15. Significant differences, however, between the state councils and the Foundation do exist. The standards for state peer review panels vary from state to state, and may differ from the Endowment's standards. *Id.* at 3. For example, state panels may consider local audience preferences in addition to artistic or scholarly excellence. *Id.* at 16. Furthermore, the state government may retain more control and may exercise closer scrutiny over the state councils occasionally taking an active role in the development and presentation of a funded project. *See* Advocates for the Arts v. Thomson, 532 F.2d 792, 793 (1st Cir. 1976) (upholding a provision of the state humanities commission procedures in which the governor of the state has final authority over the grants); NATIONAL ENDOWMENT FOR THE HUMANITIES, *supra* note 77, at 11.

80. *See, e.g.*, Passaro, *supra* note 2, at 61 (noting that in 1989, $153 million in NEA grants spurred $1.4 billion in funding from private sources; another $6 billion in funding from private sources was awarded independent of NEA grants). The 1985 study comparing funding for the arts in several countries, *supra* note 35, found that the lower figure for the United States did not reflect the large amount that private sources gave to the arts. Such generous private supporters did not exist in the other countries in the study. SCHUSTER, *supra* note 35, at 45.

81. *See, e.g., Hearings on Rights, supra* note 49, at 54 (statement of Rep. Pat Williams).

82. *Id.*

ernment, and the ultimate audience for funded projects. The Foundation functions as a stimulant to the world of the arts and humanities, rather than as an independently-functioning, self-contained agency. Congress has disturbed this balance when it has enacted content-based restrictions on the endowments in the past.

C. *Congress's First Response to Controversy: The 1989 Restrictions*

Two events sparked the acrimonious and well-publicized review of the endowments in the summer of 1989. The first controversy focused on the federally funded *Piss Christ* by Andres Serrano.[83] *Piss Christ* was a plastic crucifix immersed in a jar containing Serrano's own urine.[84] When the exhibit came to the attention of Reverend William Wildmon and his fundamentalist Christian organization, the American Family Association, they launched a letter-writing campaign to Congress decrying the anti-Christian nature of the work.[85] The letters castigated Congress for allowing such a work to receive federal funding.[86] Reverend Wildmon also took his case to the general public with advertisements in such publications as *U.S.A. Today*.

In the meantime, officials at the Corcoran Gallery of Art in Washington, D.C. decided to cancel *The Perfect Moment*, a funded exhibit, shortly before its opening date.[87] *The Perfect Moment*, by Robert Mapplethorpe, included homoerotic and sadomasochistic photographs.[88] Gallery officials noted the growing furor over federal funding of art, and the fact that this art offended some members of the public as the bases for their decision.[89] Ironically, while Corcoran officials sought to avoid public controversy over the overt sexual nature of *The Perfect Moment*, cancellation of the exhibit only inflamed the underlying conflict between taxpayers who objected to federal funding of what they considered obscene, and artists and the arts audience who wanted to encourage creativity and freedom of expression.[90]

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83. Andres Serrano has received broad acclaim for his artistic works. He won an important award, the Award in the Visual Arts, in 1988, and has participated in the Bicentennial Exhibition at the Whitney Museum of American Art. *See* Fox, *supra* note 4, at 18.

84. *See* Passaro, *supra* note 2, at 65.

85. Fox, *supra* note 4, at 19.

86. *See* Tessier, *supra* note 26, at 304. (quoting a Democratic congressional staffer who said that some sectors of the public believed that the NEA promotes pornography).

87. See Passaro, *supra* note 2, at 65-66.

88. *Id.* at 65. A Cincinnati museum director later was prosecuted under the Ohio obscenity law when he exhibited *The Perfect Moment* at the museum. He was acquitted. *Barrie Says Political Control Motivated Charges Against Art Center*, UPI, Nov. 17, 1990, *available in* LEXIS, Nexis library, OMNI file.

89. Passaro, *supra* note 2, at 65-66.

90. One member of Congress summed up the debate at the House subcommittee hearings on the 1990 Amendments as follows:

Reverend Wildmon and his followers received sympathy from Senator Jesse Helms. Senator Helms had been a long-time critic of the endowments, arguing that artists should survive according to the dictates of the marketplace, not according to the dictates of a government agency.[91] Harnessing the pressures placed on Congress by the letter-writing campaign, Senator Helms in 1989 attached legislation to the 1990 agency reappropriation bill that placed severe content-based restrictions on the endowments.[92] These restrictions would have prohibited the agency from funding art that could be offensive to any segment of American society.[93] The Helms restrictions received Senate approval, but failed to survive in the House of Representatives.[94]

Supporters of the Helms Amendment, however, did not go unrewarded for their efforts. In 1989 Congress included the first ever content-based limitations on Foundation grants in the 1990 appropriation.[95] Under these limitations, the endowments added a requirement that projects not be obscene in addition to their prior test of artistic excellence.[96] To guide the endowments in this determination, Congress created a commission to study the implementation of new standards for funding such as the *Miller v. California* test for obscenity.[97] As a further guide, Congress listed several subjects that it classi-

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The purpose of this hearing is to consider two powerful American imperatives. The first is the absolute necessity to protect freedom of expression, and in this case the freedom of artists to express themselves freely and to engage in the creative process without restraint.

The second imperative is the right of taxpayers through their elected officials to determine how their tax dollars shall be spent.

Hearings on Rights, *supra* note 49, at 2 (statement of Rep. Williams).

91. As Senator Helms said, "it is [t]ime for them [artists], as President Reagan used to say, 'to go out and test the magic of the marketplace.'" 135 CONG. REC. S8808 (daily ed. July 26, 1989).

92. Senator Helms' proposal would have prohibited funding of the following materials:

(1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or

(2) materials which denigrate the objects or beliefs of the adherents of a particular religion or non-religion; or

(3) material which 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. S8807-8 (daily ed. July 26, 1989).

93. One commentator noted that while a majority of Americans believe that experts should judge the quality of art, these criteria would impose on the endowments Congress' judgment as to the quality of art. Arthur I. Jacobs, *One if by Land, Two if by Sea*, 14 NOVA L. REV. 343, 343 (1990) (citation omitted).

94. Rather than adopt a version of the Helms Amendment, the House voted to instruct its conferees merely to "address the concerns contained" in the Helms Amendment. 135 CONG. REC. H5630, H5640-41 (daily ed. Sept. 13, 1989).

95. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741-42 (1989).

96. *Id.*

97. 413 U.S. 15 (1973). The *Miller* test has three elements:

(a) whether "the average person, applying contemporary community standards" would find

fied as per se obscene and as ineligible for funding: "depictions of sadomasochism, homoeroticism, the sexual exploitation of children, and or individuals engaged in sex acts . . . ."[98] While they echoed some of the Helms Amendment's concerns, these limitations were less restrictive than those proposed by Senator Helms.

To fulfill these conditions, the NEA required applicants to sign a certification swearing that they would not produce obscenity and would comply with any Endowment findings of obscenity.[99] This pre-certification process was challenged in *Bella Lewitzky Dance Foundation v. Frohnmayer*.[100] The *Lewitzky* court held that the certification requirement and the restrictions it sought to enforce violated the applicants' Fifth and First Amendment rights to due process and free speech.[101] The Due Process Clause violation arose because the Endowment, itself, made obscenity determinations. The district court struck down this provision, holding that the Supreme Court's *Miller* test required a jury, applying local standards, to make this determination.[102] The free speech violation arose under the unconstitutional conditions doctrine.[103] The court also struck down the certification requirement as an unconstitutional condition on the receipt of NEA grants.[104] Ironically, the NEH, in its interpretation of the 1989 limitations, did not require these pre-certification promises.[105]

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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.

Id. at 24. The Court in *Miller* upheld the use of this test by a jury in an adversarial proceeding using local community standards. *Id.* at 30-31. The Court was not presented, however, with the question of whether this test could constitutionally be applied in another context, such as when an agency makes grant determinations.

98. Pub. L. No. 101-121 § 304(a), 103 Stat. at 741.

99. For a description of the certification process, see Bella Lewitzky Dance Foundation v. Frohnmayer, No. 90-3616, 1991 U.S. Dist. LEXIS 332 (C.D. Cal. Jan. 9, 1991) (describing how the NEA required such certification prior to the release of any funds).

100. *Id.* The plaintiffs were two nonprofit corporations, one of which performed modern dance and the other exhibited visual art. Both applied for NEA grants, but refused to sign the certification that their projects would not be obscene. On this basis, plaintiffs received no funds from the NEA. *Id.* at *2-8.

101. *Id.* at *34-36.

102. *Id.* at *25. In addition to the fact that the Endowment was not equipped to apply the *Miller* text correctly, the court noted that the 1989 law did not require the Endowment to apply the *Miller* test for obscenity in the first place. *Id.*

103. *Id.* at *33-35. For a discussion of the unconstitutional conditions doctrine, see *infra* part III.A.

104. *Id.* at *36.

105. *See Hearings on the Reauthorization of the National Endowment for the Arts: Hearings Before the House Subcommittee on Postsecondary Education of the Committee on Education and Labor*, 101st Cong., 2d Sess. 190 (1990) [hereinafter *Hearings on Reauthorization*] (statement of Lynne Cheney, Chairperson, National Endowment for the Humanities and National

Congress also placed special limitations on the institutions involved with the *Piss Christ* and *Perfect Moment* exhibits. These two institutions, the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina and the Institute of Contemporary Art at the University of Pennsylvania, made subgrants of Foundation money to these artists. Under the 1989 restrictions, neither institution could receive funds without Congress's prior approval of the project.[106] Congress, thus, retained the power, otherwise delegated to the endowments, to make grants to these two institutions.

Senator Helms boasted that the enacted restrictions would send the appropriate message to the NEA.[107] Other conservative opponents of the endowments vowed that the future would bring further debate on the issue of endowment grants.[108]

D. Congress's Second Response to Controversy: The Arts, Humanities, and Museums Amendments of 1990

For the opponents of the endowments, the funding limitations enacted in 1989 did not provide adequate guidance and congressional oversight of the grant-making process. Opponents of the endowments continued their battle when the Foundation appeared before Congress for its 1990 reauthorization. The taxpayers' right not to subsidize offensive art was couched in terms of wise administration. The terms of the debate created the danger that politicians opposing restrictions would appear to be pro-obscenity.[109]

In 1990 members of Congress introduced a variety of schemes that were designed to safeguard against the funding of offensive projects. Representative Philip Crane proposed an amendment to abolish the NEA altogether.[110] Representative Dana Rohrabacher sought to expand the list of de facto obscene subject matter found in the 1989 limitations.[111] Senator Helms introduced amendments that mirrored his proposals from the previous year.[112] Representative Pat Williams sought

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Council on the Humanities).

106. Tit. II, 103 Stat. at 738.

107. *See* Jesse A. Helms, *Art, the First Amendment, and the NEA Controversy*, 14 NOVA L. REV. 317 (1990) (defending the enacted restrictions while calling Congress' decision not to enact his legislation "unwise").

108. *See e.g.*, Henry Hyde, *The Culture War*, NATIONAL REVIEW, Apr. 30, 1990, at 25-27.

109. This danger became real for 21 Democratic members of Congress who voted against the restrictions in 1989. The National Republican Congressional Committee sent press releases to their districts accusing the members of supporting obscenity. *See* Tessier, *supra* note 26, at 312.

110. Crane Amendment to H.R. 4825, 101st Cong., 2d Sess., 136 CONG. REC. H94320 (daily ed. Oct. 11, 1990).

111. Rohrabacher Amendment to H.R. 4825, 101st Cong., 2d Sess., 136 CONG. REC. H9442-43 (daily ed. Oct. 11, 1990).

112. Helms Amendment to H.R. 4825, 101st. Cong., 2d Sess., 136 CONG. REC. S16626 (daily

increased oversight by shifting more funding decisions to the state councils, where local procedures presumably would not fund offensive projects.[113] In the end, Congress reached a compromise that retreated from some of the 1989 limitations. The 1990 legislation, called The Arts, Humanities and Museums Amendments of 1990, reinstated artistic or scholarly merit as the sole criterion in funding decisions, but reiterated the 1989 imperative of not funding obscene projects.[114]

This compromise shifted the burden of determining obscenity from the endowments to the courts. Under the new scheme, a state must bring suit against a grant recipient under applicable obscenity laws to determine whether a project is obscene after the project is complete.[115] If a court determines that a funded project is obscene, the Endowment Chairperson may then impose a variety of sanctions on the offender.[116] The Chairperson may demand repayment of federal dollars or refuse future funding to the grantee for a fixed period of time.[117]

These new restrictions remove the constitutional concerns that the *Lewitsky* court had with the 1989 restrictions. The 1990 restrictions eliminate the due process violation because a jury determines obscenity by applying the *Miller* test in the course of a full trial.[118] Because the endowments no longer make this initial obscenity determination, artists gain added procedures beyond the preliminary application in which to demonstrate the artistic merit of their work. Furthermore, the 1990 amendments remove the First Amendment unconstitutional condition violation.[119] Artists may receive federal funding for their projects without an initial obscenity determination, and, thus, can receive the private funding attendant to endowment funding.

The 1990 law also cures the First Amendment chilling effect caused by the old restrictions.[120] Grant applications following the 1990 amendments do not include the problematic certification requirements. The 1990 amendments, however, state emphatically that the NEA will not fund obscenity.[121]

The 1990 amendments include other language directed at the con-

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ed. Oct. 24, 1990).

113. Representative Williams reasoned that shifting more funding decisions to the states would produce projects that closely track local community values. *See* 135 CONG. REC. H9422-23 (daily ed. Oct. 11, 1990).

114. Pub. L. No. 101-512 § 103(b), 104 Stat. at 1963-64 (amending 20 U.S.C. 954(d)).

115. *Id.* § 102(c), § 103(h), 104 Stat. at 1964, 1065-66.

116. *Id.* § 103(h), 104 Stat. at 1965-66.

117. *Id.*

118. *See supra* note 102.

119. *Id.*

120. *Id.*

121. Pub. L. No. 101-512 § 103(b), 104 Stat. at 1963.

cerns of conservative lawmakers. Congress imposed a new purpose on the Foundation — to promote public confidence in the administration of taxpayer funds.[122] The amendments also impose new responsibilities on the NEA chairperson in the development of funded projects.

As one of these responsibilities, the NEA chairperson may disburse a grant only under an installment plan that the chairperson devises to ensure the grantee's continued compliance with the conditions of the grant.[123] A grantee initially may receive a maximum installment of two-thirds of the total grant. To release the rest of the grant, the NEA chairperson must review the progress of the project and determine continued compliance.[124] Presumably, compliance includes the continued artistic merit of the project. If the chairperson determines that a developing project has become obscene and is without artistic merit, further installments could be withheld without resorting to the panel review process.[125]

This last procedure places the NEA under strict political control. By placing continued funding in the discretion of the chairperson, the new procedures can influence the artist to moderate any offensive material in the project. This procedure also gives the chairperson the power to undermine the decisions of the panels. Because the chairperson is a politically appointed official, his views will tend to reflect those of his superiors. This new accountability in the NEA is inconsistent with the principle that the funding decisions of the endowments should be free from political control.[126]

The 1990 amendments, however, impose no similar responsibilities on the NEH chairperson.[127] While Congress scrutinized the NEH during the hearings on these new procedures,[128] the absence in the NEH's recent history of any controversies spared it from special legislative treatment.[129] Congress, however, seemed to send a general message to both endowments through its selective application of funding limitations. The uncontroversial NEH received no reprimand, while the controversial NEA received a reprimand. The message from Congress is clear: Endowments do not rouse our constituents with offensive projects

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122. Pub. L. No. 101-512 § 101(5), 104 Stat. at 1961 (amending 20 U.S.C. § 951).

123. Pub. L. No. 101-512 § 103(g), (j), 104 Stat. at 1965.

124. *Id.*

125. *Id.*

126. Indeed, the 1990 law stated that "[i]t is necessary and appropriate for the Federal Government to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry . . ." 20 U.S.C. § 951(5) (1988).

127. *See* Arts, Humanities and Museum Amendments of 1990, Pub. L. No. 101-512, § 103(b), 104 Stat. 1961, 1963-64 (1990).

128. *See Hearings on the Reauthorization, supra* note 105, at 166-322.

129. *Id.* at 189-90.

and we will not question your procedures.

Two factors explain the different treatment that Congress gave the NEA and the NEH in 1990. First, each endowment has a different purpose. One seeks to promote excellence in original works of art while the other promotes excellence in scholarship.[130] Second, the NEH requires a higher level of information about projects from applicants.[131] These two factors worked together to shield the NEH from much controversy in recent years.

Excellence in art produces images which tend to be more powerful than words in their ability to generate controversy. A graphic photograph or sculpture attacks the viewer in an almost visceral way. Upon seeing the image, the viewer immediately receives the shock value. One must read and understand words, however, interacting with the text in a rational way.[132] The offensive or shocking subject matter of scholarship is usually an unconventional idea. The greater visceral power of images, however, does not diminish the capacity of scholarship and literature to shock and offend. Unpopular ideas and banned books litter history.[133] Indeed, scholarship has come under fire in the United States even in this century.[134] Because of the absence of a deeply controversial idea fueling unpopular or radical scholarship, such as Marxism was in the 1950s,[135] NEH funded projects have failed to create controversy.

In addition, the NEH has avoided controversy by requiring applicants to provide more detailed information about their projects prior to receiving a grant. For example, the NEH will require a television show applicant to submit scripts, detailed descriptions, scholarly research to be presented, and any other information relevant to the project.[136] This

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130. For a statement on the mission of each endowment, see 20 U.S.C. § 954(c) (NEA), § 956(c) (NEH) (1988).

131. *See Hearings on the Reauthorization, supra* note 105, at 189 (statement of Lynne Cheney, the NEH chairperson) (stating that "we know what the applicant's [sic] to us intend to do with federal funds before the grant is made").

132. *See* LYNNE A. CHENEY, NATIONAL ENDOWMENT FOR THE HUMANITIES, HUMANITIES IN AMERICA 17 (1988) (asking "[w]hen giving oneself over to moving pictures on the screen is so easy and when those pictures are so vivid, who will want to undertake the demanding work of decoding . . . a printed page?").

133. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 13 (listing some well-known books such as LADY CHATTERLEY'S LOVER that have been declared obscene).

134. Much of this debate has centered on the political beliefs of professors. This has been the basis of controversy in academia from Marxism in the 1950s, *see* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (discussed *infra* notes 193-206 and accompanying text), to today's debate over the "political correctness" and "hate speech" movements.

135. Several of the cases on academic freedom discussed *infra* arose from the anticommunist fear that was pervasive in this era. *See infra* notes 193-206 and accompanying text.

136. *See Hearings on the Reauthorization, supra* note 105, at 189 (statement of Lynne Cheney).

heightened showing of information allows the NEH to sift through the applications carefully and to eliminate projects that may be lacking in scholarly merit.[137] As one congressional member noted, the NEH has been spared controversy due to its success in focusing on scholarly merit.[138] An emphasis on scholarly merit, however, would not necessarily shield the NEH from controversy because valid scholarship may be offensive or unpopular.[139]

While several congressional members praised the uncontroversial nature of the NEH during the 1990 hearings,[140] present praise for the NEH could turn into disdain should a public controversy involving the NEH arise. Several commentators have interpreted the NEA controversies as a debate over values.[141] Conservative congressional members have corroborated this analysis. Because NEH grants fund the exploration of values and ideas directly,[142] a debate equal in fervor to the NEA debate may extend to the NEH if the NEH funds a project challenging mainstream sensibilities while still containing scholarly merit. Therefore, it is important to find some First Amendment principles that will protect NEH funding decisions in the event that such a public controversy results in the imposition of content-based regulation on the NEH.

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137. *Id.* During the hearings, one grantee praised this heightened requirement of information because it "puts producers through their paces" on a project. *Id.* at 237 (testimony of Ken Burns).

138. Rep. Coleman noted the distinction: "I guess as far as we're concerned, . . . the accountability for the humanities is present and functioning and that still remains to be resolved with the arts." *Id.* at 231.

139. A current debate involving the validity of controversial scholarship revolves around Dr. Leonard Jeffries, Jr. of the City University of New York. Dr. Jeffries teaches, among other things, that melanin, which gives skin black pigmentation, also makes blacks intellectually superior to whites. The case of Dr. Jeffries is discussed by Samuel Weiss, *Are There any Enforceable Limits on Academic Freedom of Speech*, New York Times, Nov. 10, 1991, at E8. Were Dr. Jeffries to receive an NEH grant, the NEH likely would come under fire.

140. *Hearings on the Reauthorization, supra* note 105, at 230-31 (statement of Rep. Coleman).

141. *See* Gary Indiana, *Democracy, Inc.*, ARTFORUM, Sept., 1989, at 11-12 (discussing censorship and homophobia in the arts). Representative Robert Dornan characterized the debate as follows:

> It is clear . . . that America is engaged in a kulturkampf, or culture war. . . . America is struggling to define its moral and ethical foundations. . . .
>
> It is time for average Americans to take their country back from the amoral elites — in the universities . . . in certain sectors of the arts community and elsewhere — who have nothing but contempt for them and their way of life. It is time to put the NEA out of business.

135 CONG. REC. H9440 (daily ed. Oct. 11, 1990).

142. The main criterion for the NEH is "substantial scholarly and cultural significance." 20 U.S.C. § 956(c)(4) (1988).

III. Scrutiny of Funding: First Amendment Concerns

A. *Government Subsidies and the Unconstitutional Conditions Doctrine*

Congressional advocates of strict funding limitations on the endowments maintain that governmental subsidies to the arts and humanities are privileges granted by Congress and are not required by the Constitution.[143] These advocates further argue that because artists and scholars may express themselves in the absence of federal funding, limitations on funding do not violate the First Amendment.[144] Thus, the advocates of content-based limitations argue that Congress may place any limitations it desires on endowment grants.[145]

While conceding that particular government subsidies are not required by the Constitution, the Supreme Court of the United States has limited the power of the government to condition subsidies in certain instances.[146] This limitation, known as the unconstitutional conditions doctrine, prevents the government from blocking access to a First Amendment right through the use of a powerful inducement such as a government subsidy or a tax deduction. The Court uses this doctrine to prevent the government from regulating speech indirectly when it cannot regulate it directly.[147] In order for a condition on a subsidy to be constitutional, the condition must survive strict scrutiny analysis.[148]

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143. *See* 135 Cong. Rec. H9437 (daily ed. Oct. 11, 1990) (statement of Rep. Norman Shumway).

144. *See* Helms, *supra* note 107, at 319.

145. *Id.*; 135 Cong. Rec. H9444-45 (daily ed. Oct. 11, 1990) (statement of Rep. Armey) (discussing the right of the taxpayer to refuse funding for offensive art).

146. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Federal Communications Comm'n. v. League of Women Voters, 468 U.S. 364 (1984); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating that "even though government may deny [a] benefit for any numher 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").

The Court has used the unconstitutional conditions doctrine to protect other constitutional rights besides freedom of speech. For example, the Court used this doctrine to protect freedom of religion in Sherbert v. Verner, 374 U.S. 398 (1963). For discussion of this use of the doctrine, see Richard A. Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 Harv. L. Rev. 5, 11 (1988) (and references therein).

147. The scope and the application of this doctrine has received extensive analysis in the legal literature. Many authors have questioned its rationale, its validity, and its use, or misuse, in particular cases. *See* Epstein, *supra* note 146; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State,* 132 U. Pa. L. Rev. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 Harv. L. Rev. 1415 (1989); Symposium, *Unconstitutional Conditions* 70 B.U. L. Rev. 593 (1990); Gary A. Winters, Note, *Unconstitutional Conditions as "Nonsubsidies": When is Deference Inappropriate?,* 80 Geo. L.J. 131 (1991).

148. Speiser v. Ransdell, 357 U.S. 513, 529 (1958) (applying strict scrutiny analysis to a condition as a subsidy).

Strict scrutiny analysis requires the government to show that a compelling justification exists for the condition and that the condition is narrowly tailored to this justification.[149]

The Supreme Court's first pronouncement on content-based limitations on government subsidies occurred in *Speiser v. Randall*.[150] In *Speiser*, a California law required citizens to sign an oath of loyalty to the United States in order to receive a property tax exemption.[151] Several veterans refused to sign the oath and failed to receive the exemption.[152] They claimed that California's failure to award them the exemption violated their First Amendment rights.[153]

The Supreme Court held that when California withheld the subsidies based on the plaintiff's refusal to take the oath, the government deterred political statements and, in effect, coerced citizens into abstaining from making such statements.[154] The Court proclaimed that the coercive effect of the regulation infringed on constitutionally protected speech because it was aimed specifically at the suppression of dangerous ideas.[155] In *Speiser*, the government mandated loyalty oaths in order to suppress advocacy of a particularly dangerous idea at the time—Marxism.[156] The Court found that the state interest advanced by the regulations was insufficient justification for its regulation of speech.[157]

The Court in *Speiser* was unclear as to the limits of the unconstitutional conditions doctrine. In *Regan v. Taxation With Representation*,[158] the Court implicitly clarified these limits and in the process gave meaning to the suppression of dangerous ideas language in

149. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 231 (defining the strict scrutiny standard as requiring that "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end").

150. 357 U.S. 513 (1958).

151. *Id.* at 514-15. The oath stated: "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in the event of hostilities." *Id.* at 515.

152. *Id.* at 515.

153. *Id.* at 517. To be more precise, the citizens argned that the regulations infringed on their First Amendment rights as they apply to the states through the Fourteenth Amendment. *Id.*

154. Justice Brennan wrote for the Court that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.* at 518.

155. *Id.* at 519.

156. *Id.* at 530 (Black, J., concurring).

157. *Id.* at 529. California argued that the State's interest involved deterring veterans, who were special role models in society, from encouraging disloyalty to the government. *Id.* at 528. The Court called the loyalty oath a "short-cut" for the more extensive procedures the State should have used to curtail unlawful speech. *See id.* at 529.

158. 461 U.S. 540 (1983).

Speiser. In *Regan*, the plaintiff challenged a statute that regulated tax exempt organizations and their contributors. Under the statute, to maintain the tax exemption for its contributors, the organization could not conduct substantial lobbying activities.[159] The statute, thus, prevented the use of tax deductible contributions to subsidize lobbying. The plaintiff claimed that the regulation of lobbying placed an unconstitutional restraint on free speech by restricting access to a government subsidy.[160]

The Court held that the regulation did not place an unconstitutional condition on the receipt of the exemption; rather, it simply refused to subsidize a certain kind of activity.[161] Absent the regulation, the organization could continue to lobby, but without a government subsidy.[162] The Court found *Speiser* distinguishable because in *Speiser* the government had infringed on a fundamental right. The Court found that there was no fundamental right to government-subsidized lobbying.[163] Because no fundamental right was involved, the Court applied the rational basis test to the statute.[164] Under this deferential test, the Court found that the statute was constitutional.[165]

Underpinning the Court's decision in *Regan* was a finding that the statute reflected permissible concerns over the allocation of resources rather than impermissible regulation of the content of speech. Thus, the Court did not apply strict scrutiny.[166] The Court reasoned that a First Amendment violation does not arise every time Congress chooses not to subsidize an activity.[167] In *Regan* the plaintiff still could engage in lobbying in the absence of tax exempt status. The plaintiff merely could not lobby at the expense of the public.[168] Indeed, the Court relied expressly on the content-neutrality of the statute. Because the statute did not regulate the content of the lobbying, it did not attempt to sup-

159. *Id.* at 543.

160. *Id.* at 543-44

161. *Id.*

162. *Id.* at 548.

163. *Id.* at 545-46.

164. *Id.* at 549. The Court displayed broad deference to Congress. In the estimation of the Author, the 1989 Endowment restrictions would pass this scrutiny because it is at least rational for Congress to regulate the use of taxpayer funds. Under the Court's strict scrutiny analysis as used in *Speiser*, bowever, Congress would need a compelling justification and a narrowly defined means in order to limit federal funding.

165. *Regan*, 461 U.S. at 550.

166. *Id.* at 549-50. In addition to the finding that no content-based regulation existed in *Regan*, the Court noted the lack of a suspect classification, such as race or national origin, at work. *Id.* at 548.

167. *Id.* at 546.

168. *Id.*

press dangerous ideas.[169] The Court noted that a different case would arise if Congress tried to suppress dangerous ideas through a grant or denial of a subsidy. In such a case, Congress, by choosing which activities to subsidize, would be regulating content.[170]

The contrast between *Speiser* and *Regan* emphasizes the fundamental concerns underlying the unconstitutional conditions doctrine. The Court seems to give heightened scrutiny to content-based regulations aimed at suppressing dangerous ideas. In *Regan*, the tax statute applied equally to all organizations that fell under its regulation. These organizations could lobby for any purpose or express any viewpoint and not receive different treatment. The mere fact that the plaintiffs' organization received different treatment did not regulate the content of lobbying by their group or other organizations. In *Speiser*, however, the government's loyalty oath created a distinction based on content and discriminated between two types of speech — one pro-United States and the other anti-United States. The Supreme Court's analysis, thus, implies that while Congress may place some regulation on subsidized speech, content-based regulation is improper when it suppresses particular ideas, especially those ideas that can be called dangerous. Congressional regulation of subsidized speech is constitutional only when it suppresses speech regardless of content.

Under *Speiser* and *Regan*, Congress may not condition NEH grants on restrictions aimed at suppressing dangerous ideas. If Congress enacted a restriction stating that only those projects favorable to the Democratic Party or the Republican Party could receive NEH grants, it would constitute an improper restriction.[171] In this scenario, Congress would have attempted to suppress ideas dangerous to one party or the other without a compelling justification. Similarly, Congress could choose to subsidize scholarship involving the United States Constitution, but could not instruct the NEH to subsidize only a particular viewpoint on the subject.[172] Through such selective subsidization, Congress would be favoring certain viewpoints and effectively suppressing other potentially dangerous ideas.

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169. *Id.* at 548.

170. *Id.* In the case of suppression of dangerous ideas, the Court asserted that it would apply strict scrutiny. *Id.*

171. *See* Kreimer, *supra* note 147, at 1374-75; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 611 (1990). Kreimer argues that funding decisions based on such political preferences are invalid because they are not "germane to the program's purpose." Kreimer, *supra* note 147, at 1375.

172. In celebration of the bicentennial of the Constitution, the NEH announced a special project to solicit scholarship of the Constitution.

After the Supreme Court's recent decision in *Rust v. Sullivan*,[173] commentators have questioned whether analysis under the unconstitutional conditions doctrine is still relevant.[174] While *Rust* may narrow the general scope of the doctrine, this Note argues that it leaves the suppression of dangerous ideas language of the *Speiser* and *Regan* decisions untouched.

In *Rust*, the Court upheld regulations of the Department of Health and Human Services which prohibited recipients of family planning funds from proposing abortions or referring patients to doctors willing to perform abortions.[175] Relying on the unconstitutional conditions doctrine, petitioners, doctors and recipients of funds, argued that these regulations infringed on their freedom of speech.[176] Specifically, they argued that the regulations discriminated on the basis of content and, therefore, were different from those in *Regan*.[177]

The Court, however, held that the regulations did not discriminate on the basis of content. For the unconstitutional conditions doctrine to apply, a condition must apply to a valid recipient, not to the entire program.[178] In *Rust*, the regulations permissibly discriminated between eligible and ineligible clinics, ensuring that only qualified clinics receive funds under the statutory scheme.[179] In effect, the Court accorded great deference to the government in reaching this decision in *Rust*.[180] The *Rust* decision allows the government to restrict subsidization on the basis of content by characterizing the speech as not qualifying for the subsidization in the first place. It would seem that under this deferential approach, many content-based conditions are valid. The Court, however, expressly determined that the regulations could not target dangerous ideas, but found that abortion advocacy was not a dangerous idea.[181] Thus, the Court specifically retained the unconstitutional condi-

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173. 111 S. Ct. 1759 (1991). Chief Justice Rehnquist's majority opinion in *Rust* closely follows, and expands upon, his dissent in Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 402-08 (1984).

174. *See* Winters, *supra* note 147, at 145-56. Winters finds that under the new understanding of the doctrine, "the Court [will] view most government allocation schemes affecting constitutional rights as presumptively acceptable policy decisions about how to allocate resources." *Id.* at 132.

175. *Rust*, 111 S. Ct. at 1764-66. The statute authorizing funding to the clinics stated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* at 1764-65. Prior to the regulations promulgated in 1988, recipients could counsel patients about abortion under this statute.

176. *Id.* at 1771.

177. *Id.* at 1772.

178. *Id.* at 1774.

179. *Id.* at 1773.

180. *See* Winters, *supra* note 147, at 132 (noting the Court's preference for viewing funding limitations as "presumptively acceptable policy decisions").

181. 111 S. Ct. at 1772.

tions doctrine as applied to the suppression of dangerous ideas.

Significantly, the Court distinguished *Rust* from a previous case, *Keyishian v. Board of Regents*,[182] in which the regulation of expression at a university through government funding was found unconstitutional.[183] The Court expressly found that universities play such an important role in society that they are fundamental to its development.[184] Because universities are so fundamental, limitations on university speech should command strict scrutiny analysis, in spite of the *Rust* holding.[185] The maintenance of a strict scrutiny standard in this area would support the view that any content-based regulations on the NEH also should be exposed to strict scrutiny analysis.

B. Academic Freedom and the First Amendment

The First Amendment prevents the government from regulating speech.[186] The Judiciary and legal scholars have recognized the fundamental value of this freedom, yet have differed on its rationale. Various models exist as to what the First Amendment protects and what it does not protect.[187] Uncontested is the principle that political speech should receive full First Amendment protection because our democratic scheme of government requires it.[188]

Professor Alexander Meiklejohn theorized that academic speech forms an essential element of the citizen's need to be informed for the purposes of democratic politics.[189] Through this process of learning, cit-

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182. 385 U.S. 589 (1967). In *Keyishian*, the Court invalidated a New York law requiring professors to deny that they were ever communists. *Id.* at 592-93.

183. *Rust*, 111 S. Ct. at 1776.

184. *Id.*

185. *Id.*; *see also* Winters, *supra* note 147, at 133 (noting that the Court will "perk up its ears only when it finds . . . that a differential subsidy represents an effort to stifle one clearly-defined viewpoint in a debate").

186. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

187. *Compare* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (arguing that the First Amendment protects only speech that is related to the functioning of democratic politics and that such speech is protected absolutely) *with* Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891 (1949) (reviewing ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT (1948)) (urging the qualified protection for a broad range of speech); *and* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (arguing that the government may regulate speech only when that speech becomes action).

188. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (stating that "every citizen shall have the right to engage in political expression and association"); Meiklejohn, *supra* note 187, at 263-64 (concluding that political freedom is embodied in the First Amendment.)

189. Professor Meiklejohn wrote: "the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'" Meiklejohn, *supra* note 187, at 263 (citation omitted). As for intellectual freedom, Professor Meiklejohn found that "there can be no doubt that the citizens of this nation need that teaching. Without it, the program of self-government is

izens formulate preferences and make informed decisions about their society. Their decisions are expressed through voting in the democratic process.[190] If Professor Meiklejohn is correct, then academic speech merits full First Amendment protection as an important form of political expression.[191] Other scholars, however, have argued that such expression has no direct influence on the political process.[192]

In *Sweezy v. New Hampshire*,[193] a plurality of the Court foreshadowed Professor Meiklejohn's analysis of academic speech and laid the foundation for a heightened protection of academic speech. In *Sweezy*, a New Hampshire statute gave the State Attorney General the power to investigate subversive persons in order to remove such persons from public employment.[194] Sweezy was a Marxist professor at the University of New Hampshire who refused to answer questions during the course of an investigation on the content of a lecture in which he discussed Marxism and socialism.[195] He argued that the First Amendment protected him from an investigation into the subject matter of his lectures at the University.[196] Sweezy was jailed for contempt for his failure to answer the questions.[197]

A plurality of the United States Supreme Court found that New Hampshire's action impermissibly infringed on Sweezy's right to academic freedom and political expression without a compelling justification.[198] The plurality applied strict scrutiny analysis to the regulations.[199] The plurality stated that it could not conceive of any circumstances when the government could interfere with academic

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doomed to futility . . . ." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 129 (1965).

190. MEIKLEJOHN, *supra* note 189, at 128.

191. For a thorough discussion on the history of academic freedom and its treatment hy the courts, see J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989). For Professor Byrne, judicial opinions discussing the constitutional right of academic freedom are fraught with "paradox or confusion." *Id.* at 252. This Note argues that the recent *University of Pennsylvania* case sheds at least some substantive light on this problem by discussing what it means to regulate directly the content of academics. *See infra* notes 217-28 and accompanying text.

192. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

193. 354 U.S. 234 (1957).

194. *Id.* at 237-38.

195. *Id.* at 243.

196. *Id.* at 244.

197. *Id.* at 244-45.

198. *Id.* at 250-51 (plurality opinion of Warren, C.J.). Two concurring Justices also adopted this view. *Id.* at 261-62 (Frankfurter, J., concurring).

199. *Id.* at 251-54 (plurality opinion) (conceding the "fundamental interest of the state" in rooting out subversives, but finding that the authorized investigative procedures were excessively intrusive and failed to meet this interest satisfactorily); *Id.* at 265 (Frankfurter, J., concurring) (finding that New Hampshire's interest was not compelling).

freedom.[200]

The plurality justified this extraordinary protection by noting that colleges and universities play a special role in American society by providing a forum for questioning the values, beliefs, and principles of society in order to better understand society.[201] All fields of academic study remain either incomplete or open to new discoveries or ideas, particularly the social sciences.[202] The primary motivation of academics is the pursuit of further knowledge in these incomplete areas. In this environment, governmental suppression of ideas collides with the special role of the university. Thus, the *Sweezy* plurality concluded that government regulation of academics would stifle scholarship and eventually cause society to stagnate and die.[203]

Justice Frankfurter, in an infiuential concurrence in *Sweezy*, found that the state interest in investigating the violent overthrow of the government was not sufficiently compelling.[204] For Justice Frankfurter, academic freedom depended on excluding government from the four essential freedoms that universities require: hiring, subject matter, manner of teaching, and admissions.[205] Justice Frankfurter believed that scholarship would decline without freedom from governmental intrusion in these areas.[206]

By finding that unrestricted academic speech is an invaluable requirement for a democratic society, the plurality and Justice Frankfurter implied that the government could not regulate the content of scholarship explicitly or implicitly.[207] To regulate content would impair the scholarly quest for truth. The Supreme Court, however, has left the limits of academic freedom unclear.[208] Thus, several unanswered questions persist. What governmental interest is sufficiently compelling to justify an intrusion into academic and political freedom? For the pur-

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200. *Id.* at 251.

201. *Id.* at 250.

202. *Id.*

203. *Id.* Chief Justice Warren would certainly agree with the philosophy expressed by Professor Meiklejohn, *supra* note 189, that academics are vital to self-government. Universities and colleges train the young, who are the future leaders of the nation. To prevent the universities from pursuing truth would limit the ability of these youth to govern themselves effectively. In this manner, civilization would stagnate and die. *Sweezy*, 354 U.S. at 250.

204. *Id.* at 261.

205. *Id.* at 263 (citation omitted).

206. *Id.* at 262. Justice Frankfurter also seems to be in accord with Professor Meiklejohn's philosophy on the importance of academia, *supra* note 189, in asserting that "[t]hese pages need not be burdened with proof . . . of the dependence of a free society on free universities." *Id.*

207. *See supra* notes 168, 171.

208. *See* Byrne, *supra* note 191, at 293, 295 (characterizing *Sweezy* as "an ambiguous description of the relationship between academic custom and positive legal right" and *Keyishian* as being "extraordinarily vague").

poses of the NEH, is the expenditure of taxpayer funds a sufficiently compelling interest to justify a content-based regulation?

In *Keyishian v. Board of Regents*,[209] the Supreme Court also provided little guidance on the meaning of academic freedom. In *Keyishian*, some professors refused to certify that they were not communists and were fired.[210] The professors sought reinstatement, arguing that the required certification violated their First Amendment rights.[211]

The Supreme Court struck down the certification requirements, finding them to be unconstitutionally vague and overbroad.[212] While basing its holding on other grounds, the Court paid homage to the importance of academic freedom.[213] The Court found that academic freedom was a special concern of the First Amendment that merited strict scrutiny under the void for vagueness theory.[214] The Court appeared to be most afraid of regulations that would impose orthodox views on the classroom.[215] While extolling the importance of academic freedom and arguing for its extended protection, the Court in *Keyishian*, as in *Sweezy*, gave little guidance on the scope of academic freedom. The *Keyishian* case, however, does stand for the proposition that violations of academic freedom must receive strict scrutiny analysis.[216]

Recently the Supreme Court addressed the scope of academic freedom in *University of Pennsylvania v. EEOC*.[217] In *University of Pennsylvania*, a Chinese-American female professor was denied tenure.[218] She sought discovery in a Title VII suit of her tenure review files in the hopes of uncovering evidence of discrimination.[219] The University of Pennsylvania claimed that such discovery would violate the academic freedom of a university to control hiring through the tenure system.[220] The University of Pennsylvania also argued that the confidentiality of the peer review files was an essential feature of the tenure decision process.[221]

The Court held that the peer review files fell outside the scope of

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209. 385 U.S. 589 (1967).
210. *Id.* at 592.
211. *Id.* at 592, 597-604.
212. *Id.* at 604, 609.
213. *Id.* at 601-04. The Court discussed academic freedom as a part of its discussion of why the regulation was void for vagueness.
214. *Id.* at 603-04.
215. *Id.* at 603.
216. The *Rust* court cited *Keyishian* for this point. Rust v. Sullivan 111 S. Ct. 1759, 1776 (1991).
217. 110 S. Ct. 577 (1990).
218. *Id.* at 580.
219. *Id.*
220. *Id.* at 586.
221. *Id.*

academic freedom and, therefore, were subject to discovery.[222] In explaining its decisions in *Sweezy* and *Keyishian*, the Court gave specific content to the concept of academic freedom. First, the court noted that the government may not place content-based regulations on scholarship in universities due to the idea of academic freedom.[223] The Court held, however, that discovery of the University of Pennsylvania's peer review files did not affect the content of scholarship at the university.[224]

Second, the court determined that the government may not place direct regulations on the hiring decisions of universities.[225] In the *University of Pennsylvania* case, discovery of the files did not place any requirements on the University as to hiring.[226] Discovery merely made the hiring process public. It did not force the University to institute any changes in its process. If the University were to change the hiring process out of fear of public disclosure, the government did not compel those changes directly.[227] The Court left open the possibility, however, that indirect regulation also might raise First Amendment issues if the regulation creates a sufficiently direct burden on speech.[228]

The *University of Pennsylvania* opinion relied on one of Justice Frankfurter's four requirements for academic freedom, the freedom to chose who may teach, but the Court did not address the other three.[229] The fact that the Court readily adopted one of these requirements implies that the Court in some future case also will adopt the other three as essential to academic freedom. Thus, a regulation also may not infringe upon the subject matter of scholarship, the manner of teaching, or the admissions at a university.

IV. The National Endowment for the Humanities, Unconstitutional Conditions, and Academic Freedom

The works of Andres Serrano and Robert Mapplethorpe undoubtedly challenge mainstream values in a profound and visceral way. Indeed, these works sparked a controversy in which advocates waged a vigorous debate over values, particularly over which values merit the attention of the American public and which do not. One participant in the debate characterized it as a "struggle[] to define [the] moral and

222. *Id.* at 587.
223. *Id.* at 586-87.
224. *Id.* at 587.
225. *Id.* at 587-88.
226. *Id.* at 588.
227. *Id.* at 587-88.
228. *Id.* at 588.
229. *See supra* note 205 and accompanying text (listing the other freedoms proposed by Justice Frankfurter.)

ethical foundations" of American society.[230] The fact that such a fundamental debate occurred in close proximity to the National Endowment for the Humanities creates the possibility of content-based regulation in the future. Together with the fact that the 1989 restrictions applied directly to the NEH, the possibility of content-based regulations raises serious questions over the proper role of government funding for the humanities. Should the Congress, or even state and local humanities agencies, be allowed to place restrictive limitations on the content of NEH projects? Should funding criteria involving the acceptability of a project to mainstream America supplant or intrude on the traditional funding criteria of scholarly merit?

Because the NEH funds projects which deal with fundamental values in a direct way, through scholarly inquiry in such fields as history, literature, art, and religion, these questions of governmental involvement are important. While to date the NEH has not been subject to the same intense controversy or scrutiny as the NEA, the NEH is not immune from such an occurrence. Unpopular ideas about values in the humanities and social sciences exist, and, given exposure to mainstream America, may generate hostility. When NEH funds are involved, such hostility will tend to increase because the government, through the use of taxpayer funds, is the patron. The result of such hostility will be content-based limitations in the style of the 1989 restrictions.

Content limitations on the NEH also may arise in another way. The NEA may again become the subject of controversy over a funded project. Congressional response to this controversy may extend to the NEH as well as to the NEA target. This happened in 1989 when the NEH received content-based regulations as a result of an NEA controversy.

Facing the threat of content-based regulation, the NEH may look to the First Amendment doctrines of unconstitutional conditions and academic freedom for protection. The doctrine of unconstitutional conditions applies to NEH funding decisions because content-based regulation would seek to suppress dangerous ideas. According to the unconstitutional conditions doctrine, the government may not aim at suppressing dangerous ideas. Provocative scholarship could be considered by some to be dangerous ideas worthy of suppression. Thus, a denial of a subsidy could be used to prevent the public dissemination of such ideas. The Supreme Court has consistently applied the doctrine to prevent the government from regulating indirectly what it cannot regulate directly. The Court's latest pronouncement on this doctrine in *Rust*

230. 135 CONG. REC. H9440 (daily ed. Oct. 11, 1990) (statement of Rep. Robert Dornan).

v. Sullivan,[231] recognizes the importance of this doctrine in protecting the academic freedom of scholars.

Academic freedom may be seen as the protection against the suppression of dangerous ideas in academia. A majority of the Court in *Sweezy* refused to sanction regulations based on the content of academic speech due to the special role of the university and the inherent value of scholarship. Under the *University of Pennsylvania* case, the government cannot regulate scholarship directly. Regulation of scholarship at a university would destroy the independent environment that is crucial to the functioning of a university.

The NEH is not a university or a college. It teaches no classes and does not conduct independent research directly. However, the mission of the NEH and the universities is the same. Both entities support scholars and promote them on the basis of scholarly excellence. In this respect, the NEH is like a public university without enrolled students. Instead of educating students, the mission of the NEH is to educate the general public. And instead of granting degrees or tenure as a reward for excellence, the NEH grants money to pursue scholarly excellence. Therefore, the principles of First Amendment law that protect scholarship at universities should be applied with equal vigor to the context of the NEH grants.

For the purposes of the funded project, the government and the NEH grantee are subject to the same limitations that govern the relationship between the government and the university. Once the university decides on the basis of scholarly merit to employ or grant tenure to a professor, the government may not disturb that relationship because the scholar's work is controversial or unpopular. To do so would constitute an illegitimate attempt to suppress dangerous ideas. Similarly, the government may not attempt to suppress dangerous ideas through the grant or denial of an NEH grant. While there is no right to such a subsidy, the government may not deny one for reasons that violate the academic freedom of potential recipients.

To allow the government to infringe on academic freedom through the use of content-based regulations would impair the functioning of the NEH. While the NEH disseminates scholarship in mainstream society, limitations on recipients would prevent the dissemination of new or controversial ideas in the United States. The sequestration of such ideas is the particular danger that academic freedom seeks to prevent.

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231. 111 S. Ct. 1759 (1991).

V. CONCLUSION

Throughout its history, the NEA has been the subject of controversy. Its counterpart, the NEH, has avoided similar controversy but, nonetheless, has been the subject of content-based regulation. Although currently free of such restrictions, the NEH could be faced with further regulation in the future. In such a case, the NEH should look to the First Amendment doctrines of unconstitutional conditions and academic freedom for protection.

The unconstitutional conditions doctrine prevents the government from placing conditions on subsidies in ways that violate the fundamental rights of potential recipients. The doctrine is particularly applicable when the government attempts to suppress dangerous ideas through the imposition of such conditions. In addition, although some may view provocative scholarship as dangerous ideas worthy of suppression, the doctrine of academic freedom specifically recognizes the importance of protecting such scholarship from content-based regulation. Because the quest for all scholarly knowledge promotes the good of society, both these doctrines should require the application of strict scrutiny analysis to any content-based regulation.

Universities participate in the quest for scholarly knowledge, and, thus, receive strict First Amendment protection through the doctrine of academic freedom. Because the NEH also participates in this quest, it should receive the same strict protection. Permitting any less protection would violate traditional notions of First Amendment freedoms.

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