THE FIFTY-FIFTH CLEVELAND-MARSHALL FUND LECTURE

THE FIRST AMENDMENT: WHEN THE GOVERNMENT MUST MAKE CONTENT-BASED CHOICES

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I. INTRODUCTION

In 1989, there was a national controversy over two works of art that had been partially funded through the federal government's National Endowment for the Arts (hereinafter NEA). One work of art was by the artist Andres Serrano. Titled the "Piss Christ," it was a photograph of a cross suspended in a jar of urine. The other was a photography exhibit by Robert Mapplethorpe that depicted homosexual activity, including some violent images and some with children.[2]

Senator Jesse Helms led the attack on such government funded art. Senator Helms was successful in persuading Congress to adopt a bill that prohibited the use of federal funds for material that would be considered obscene, including depictions of sadomasochism, homoeroticism, the sexual exploitation of children, and individuals engaged in sex acts.[3] Also, artists

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[2] For a description of these events, see Kim M. Shipley, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241, 242-45 (1991).

[3] Pub. L. No. 101-512, § 103(B), 104 Stat. 1963, codified at 20 U.S.C. § 954(d) (Supp. IV 1992).

receiving federal funds had to certify in advance that no federal money would be used to produce or disseminate such material.[4]

Immediately, the Helms-initiated law was challenged as being unconstitutional.[5] I joined the chorus of voices attacking the restrictions. I remember appearing on several panels, including one on a local television station, where I explained that the First Amendment prohibits the government from restricting speech based on its content and that is exactly what the Helms bill does.

Yet, as I reflected on this position, something bothered me. I was objecting to the government making choices about what to fund based on content and yet inevitably wasn't that what the government has to do? The government cannot possibly fund all artists who request money.[6] Some will get funding and others will not. Surely, the choices are not to be made randomly or by lottery. They will be based on the content of the art. If content was to be the basis for funding anyway, what was so bad about the Helms bill?

The more I reflected on this problem, the harder and more important it seemed. I kept seeing cases that posed the same issue in other contexts. Countless cases have arisen where a library removes a book from its shelves because of perceived offensive content.[7] The traditional response is that the government cannot do this because it is a content-based restriction on speech. But surely libraries constantly make content-based choices in deciding what books to acquire or keep. What then makes a particular content-based choice objectionable? Many cases involve government owned or leased auditoriums that refuse to book a play because of its content.[8] Again, does it really help analysis to say that the government cannot make content-based choices when that is inherently what the government must do?

Increasingly, I came to see that some of the hardest First Amendment issues, the ones most dividing lower courts and perplexing commentators involved instances in which the government had to make content-based choices. The more I looked the more cases and examples I found. Yet, as I read the cases, I

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[4] For a description of these requirements, see Note, *Federal Arts Funding at What Cost?: The Impact of Funding Guidelines on the First Amendment and the Future of Art in America*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 175 (1991).

[5] *See generally* Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992); Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).

[6] The National Endowment for the Arts receives 17,000-18,000 applications for funding each year and about 4,000-4,500 are successful. Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts*, 102 YALE L.J. 1209, 1211 n.6 (1993).

[7] *See, e.g.*, Bicknell v. Vergennes Union High Sch. Bd., 638 F.2d 438, 440-41 (2d Cir. 1980); Minarcini v. Strongsville Sch. Dist., 541 F.2d 577, 580-82 (6th Cir. 1977).

[8] *See, e.g.*, Southeastern Promotions v. Conrad, 420 U.S. 546, 547 (1975); Bowman v. Bethel-Tate Bd. of Educ., 610 F. Supp. 577, 579 (S.D. Ohio 1985).

found the analysis terribly unsatisfying. All used traditional First Amendment principles and they seemed of little help.

Thus, I focus my attention on the problem of the First Amendment when the government must make content-based choices. I want to divide my remarks into four parts. I begin by reviewing the traditional bedrock rule of the First Amendment: The government cannot regulate speech based on its content. Second, I identify a broad range of cases where this rule cannot apply because the government must make content-based choices. Third, I suggest that the usual First Amendment principles are not helpful in analyzing these cases. Finally, I offer some initial thoughts about directions for dealing with this problem.

II. THE PROHIBITION AGAINST CONTENT-BASED DISCRIMINATION

The Supreme Court frequently has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content. In *Police Department of Chicago v. Mosley*,[9] for example, the Court said: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[10]

Virtually every First Amendment decision from the Supreme Court states this principle and most are decided based on it. For example, the Supreme Court's recent decision in *Simon and Schuster, Inc. v. New York State Crime Victims Board*[11] is illustrative. New York, like many states, adopted a so-called Son of Sam law that prohibited crime perpetrators from profiting from their crimes by selling book, television, or film rights to their stories.[12] The Supreme Court, within just a few weeks of the oral argument, unanimously invalidated the law.[13] In an opinion by Justice Sandra Day O'Connor, the Court said that the First Amendment prohibits content-based restrictions of speech unless the government can show that such regulation is necessary to achieve a compelling government interest.[14] The Court further explained that the New York law was a content-based restriction of speech because crime perpetrators could profit from their writings and stories unless the content concerned their crime.[15] The Court concluded that the content-based restriction on speech did not meet strict scrutiny and the Court invalidated the law.[16]

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9 408 U.S. 92 (1972).

10 *Id.* at 95.

11 112 S. Ct. 501 (1991).

12 *Id.* at 504-05.

13 *Id.* at 501.

14 *Id.* at 504, 509-10.

15 *Id.* at 509.

16 *Simon & Schuster*, 112 S. Ct. at 512.

Another recent case even more powerfully illustrates the Court's reliance on the principle of content neutrality. The case, *R.A.V. v. City of St. Paul*,[17] involved the difficult question of hate speech.[18] St. Paul, Minnesota, adopted an ordinance prohibiting the burning of crosses or the placing of swastikas or other expressions of hate in a manner likely to anger, alarm, or cause resentment.[19] The Court unanimously invalidated the law.[20] Justice Antonin Scalia wrote for the plurality, explaining that the St. Paul law was a content-based restriction on speech.[21] Scalia said that the law prohibited the expression of hate based on race, but allowed the expression of hate based on factors such as sexual orientation or political beliefs.[22] Scalia indicated that such content-based restrictions on speech cannot be tolerated.[23]

More recently, in *Turner Broadcasting System v. Federal Communications Commission*,[24] the Court elaborated on this principle of content neutrality.[25] Justice Anthony Kennedy explained that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."[26] Justice Kennedy thus noted: "For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[27] Hence, the Court endorsed a two-tier system of review.[28] The Court uses "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[29] But, "[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[30]

The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject

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17 112 S. Ct. 2538 (1992).

18 *Id.* at 2542.

19 *Id.* at 2541, 2547-48.

20 *Id.* at 2539.

21 *Id.* at 2548.

22 *R.A.V.*, 112 S. Ct. at 2547.

23 *Id.* at 2549.

24 114 S. Ct. 2445 (1994).

25 *Id.* at 2458-59.

26 *Id.* at 2458.

27 *Id.*

28 *Id.* at 2458-59.

29 *Turner*, 114 S. Ct. at 2459.

30 *Id.*

matter neutral.[31] Viewpoint neutral means that the government cannot regulate speech based on the ideology of the message.[32] For example, it would be clearly unconstitutional for the government to say that pro-choice demonstrations are allowed in the park but anti-abortion demonstrations are not allowed. A controversial flag burning case from a few years ago is indicative of this.[33] The Supreme Court held that government cannot prohibit flag burning because such laws in effect say that the flag can be used to express the view of patriotism, but not the view of dissent.[34] Such viewpoint regulation is not allowed.

Subject matter neutral means that the government cannot regulate speech based on the topic of the speech.[35] A case from a decade ago, *Carey v. Brown*,[36] is illustrative. Illinois adopted a statute prohibiting all picketing in residential neighborhoods unless it was labor picketing connected to a place of employment.[37] The Supreme Court held this unconstitutional.[38] The Court explained that the law allowed speech if it was about the subject of labor, but not otherwise.[39] The Court said that whenever the government attempts to regulate speech in public places it must be subject matter neutral.[40]

Why is there so much concern about content neutrality? Obviously, the fear is that the government will target particular messages and attempt to control thoughts on a topic by regulating speech.[41] As the Court recently noted, "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[42] A viewpoint restriction does this directly. The government could try to control dissent and advance its own interests by stopping speech that expresses criticism of government policy, while allowing praise. A subject matter

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31 *See, e.g.*, Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

32 *See* Sabrin, *supra* note 6, at 1220.

33 *See* Texas v. Johnson, 491 U.S. 397 (1989) (invalidating Texas law prohibiting flag desecration).

34 *Id.* at 414.

35 Sabrin, *supra* note 6, at 1217.

36 447 U.S. 455 (1980).

37 *Id.* at 457.

38 *Id.* at 471.

39 *Id.* at 461.

40 *Id.* at 462.

41 As the Court noted, "[such restrictions] raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 508 (1991).

42 Turner Broadcast System v. Federal Communications Comm'n, 114 S. Ct. 2445, 2458 (1994).

restriction on speech can accomplish the same goal. In the 1960s, a law prohibiting speech about the war—a subject matter restriction—obviously would have had a far greater impact on anti-war speech.

Almost two decades ago, Professor Kenneth Karst persuasively argued that equality is at the core of the First Amendment.[43] All speech, regardless of its content, must be treated the same by the government.[44] To allow the government to target particular views or subjects permits the government to greatly distort the marketplace of ideas.[45]

To this point, I have simply tried to explain that the traditional bedrock principle of the First Amendment is that the government must be content-neutral. I must confess at this point, that I have oversimplified a bit. The Court has recognized that there are certain categories of speech that are unprotected by the First Amendment: incitement of illegal activity[46] and obscenity[47] come readily to mind. In these categories, the government can prohibit and punish speech. These categories are obviously defined by their content. Actually, these categories are not inconsistent with the basic rule of content-neutrality. That rule says that the government must be content-neutral unless it can show that its action is necessary to meet a compelling government interest.[48] In essence, the Court has said that such a compelling interest exists in prohibiting incitement and in controlling obscenity.[49]

III. CONTENT-BASED CHOICES ARE SOMETIMES INEVITABLE

A serious First Amendment problem exists because there is a wide range of areas where the government must make content-based choices. This is not an issue in just an isolated case or two, but a recurring—though often unrecognized—theme in countless cases.[50]

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[43] Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

[44] *Id.* at 28.

[45] *Id.* at 31.

[46] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (articulating the current test for incitement).

[47] Miller v. California, 413 U.S. 15, 23-24 (1973) (articulating the current test for obscenity).

[48] *See, e.g.*, Turner Broadcasting System v. Federal Communication Comm'n, 114 S. Ct. 2445, 2469 (1994).

[49] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Miller v. California, 413 U.S. 15, 23 (1973).

[50] Other articles recognizing and discussing this theme include, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992), and Lionel S. Sobel, *First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist*, 41 VAND. L. REV. 517 (1988).

Consider some examples. Many local governments own auditoriums that are used for events such as plays and rock concerts. Numerous cases have arisen in which the government has refused to allow a certain play or concert, or has cancelled a performance based on content. For instance, in *Southeastern Promotions v. Conrad*,[51] the Supreme Court considered a decision by the City of Chattanooga, Tennessee to refuse the play "Hair" to be performed in a city-owned theater. In *Brown v. Board of Regents*,[52] a lower federal court was asked to consider a decision by the University of Nebraska to refuse to allow a movie, "Hail Mary"—which depicted the birth of Christ in a contemporary setting—from being shown in a state-operated theater.[53] In *Cinevision v. City of Burbank*,[54] the issue was whether the City violated the Constitution when it refused to allow a city auditorium to be used for concerts by performers such as Blue Oyster Cult, Todd Rundgren, and Jackson Browne.[55]

There have been many cases like these. All involve the same basic question: When can a city deny use of its theater or auditorium based on the content of the speech? It is not helpful to say that the government cannot make content-based choices because it must. Surely, if the city decides to book Shakespeare for its theater season, or focus its concert season on a classical music, no one can object. Yet, those are content-based choices. If content-based choices are going to occur, why can't a city say no to "Hair", "Hail Mary", or Jackson Browne?

Another area where this problem occurs is in connection with libraries. The Supreme Court faced this issue in *Board of Education, Island Trees Union Free School District v. Pico*,[56] where a school attempted to remove from its library books that it denounced as anti-American.[57] *Pico* is reflective of dozens, indeed hundreds of cases, where libraries remove books or refuse to purchase books based on perceived offensive content. In reading these cases, I am often amazed at the books targeted. For example, in *Minarcini v. Strongsville City School District*,[58] a school board ordered that the libraries remove copies of Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch 22*.[59] In *Salvail v. Nashua Board of Education*,[60] the issue was whether the school board could order removal of

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51 420 U.S. 546 (1975).

52 640 F. Supp. 674 (D. Neb. 1986).

53 *Id.* at 675.

54 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

55 *Id.* at 566.

56 457 U.S. 853 (1982). *See* Helen M. Quenemoen, *Board of Education v. Pico: The Supreme Court's Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103 (1983).

57 457 U.S. at 857.

58 541 F.2d 577 (6th Cir. 1976).

59 *Id.* at 579.

60 469 F. Supp. 1269 (D.N.H. 1979).

Ms. magazine from its libraries.[61] And the issue is not limited to school libraries. In *American Council of the Blind v. Boorstin*,[62] the question was whether it was constitutional for Congress to prevent the Library of Congress from using federal funds to purchase *Playboy* magazine in braille.[63]

I could go on and on with examples. The central point is that it is not helpful to invoke the traditional principle and say that the government cannot make content-based choices. No library can buy all books. Inevitably, over time some books must be removed from the shelves to make room for others. Nor is it satisfactory to say that the government cannot look at the message of the books. If a public or school library decides not to buy the books of the Aryan Brotherhood, is there really a First Amendment requirement that such tracts be acquired? It is tempting to say that a public library should buy even the most objectionable material that is protected by the First Amendment. But if a school library with very limited library funds chooses classics and highly regarded children's books over racist propaganda, that hardly seems likely to be declared unconstitutional.

Another frequent area where the problem emerges is when the government chooses to subsidize speech in some way. This, of course, is what the NEA controversy was all about. The government was funding artists and wanted to exercise some control over the content of the art produced with federal funds.[64] The government very much wanted to decide what art to fund on the basis of whether the content was objectionable.

The issue of government funding of the arts and the First Amendment arose before the NEA battle. For example, in *Advocates for Arts v. Thompson*,[65] the question was whether it was constitutional for the State of New Hampshire to refuse funding for a literary magazine after it published a poem titled, "Castrating the Cat," which was deemed offensive.[66] In *Gay and Lesbian Student Association v. Gohn*,[67] the question was whether the University of Arkansas violated the Constitution in refusing to subsidize the Gay and Lesbian Student Association.[68] In the recent case of *Board of Trustees of Stanford University v. Sullivan*,[69] the issue was whether it was constitutional for the National Institutes of Health to condition receipt of a grant for artificial heart research

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61 *Id.* at 1271-72.

62 644 F. Supp. 811 (D.D.C. 1986).

63 *Id.* at 812-13.

64 *See* Sabrin, *supra* note 6, at 1225.

65 532 F.2d 792 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).

66 *Id.* at 793.

67 850 F.2d 361 (8th Cir. 1988).

68 *Id.* at 362.

69 773 F. Supp. 472 (D.D.C. 1991).

on government approval before publishing or publicly discussing research.[70] When Stanford researchers refused this condition, the NIH withdrew the contract and awarded it to someone else.[71]

Again, it simply does not do to say that the government cannot make content-based choices. The government cannot fund all art or all magazines or all groups that want money. Therefore, choices must be made. The choices inherently must—and should—be done with an eye to content.

I have mentioned government owned theaters, libraries, and subsidies but these do not begin to exhaust the areas where the government has to make content-based choices. Consider a state university that must decide whether to tenure a faculty member. Obviously, the decision, in part, must be based on an appraisal of the content of the person's scholarship. Consider a government owned newspaper or magazine. Choices about what to publish surely will be content-based.

I describe all of these examples for many reasons. First, they show that the problem I am focusing on—the government having to make content-based choices—is pervasive, not isolated. Here, I strongly disagree with Amy Sabrin's contention that "the process of awarding subsidies to support the arts is unique among government functions, in that it involves allocating finite resources among projects that are by their very nature expressive speech under the First Amendment."[72] The NEA controversy posed the issue starkly, but it is the same constitutional question that arises in numerous other contexts described above.

Second, the outcomes of the cases are completely inconsistent. There are cases where the government wins and cases where the government loses, but no principle explains the inconsistent results.

Finally and most importantly, looking at the examples reveals the many similarities in all of them. All involve instances in which the government is an affirmative provider of speech, not simply—as in the usual case—a regulator. In having government owned theaters and libraries and funding, the government is facilitating speech, not simply regulating it. The usual First Amendment case arises when the government acts to stop speech from occurring at all. Here, the government is not banning the speech, just stopping public money or resources from being used.

Moreover, all of the cases involve the allocation of a scarce resource where choice is inevitable. Some plays will be performed, some books bought, some artists subsidized; some not. A choice cannot be avoided and that choice must be based on content.

Thus, two key questions arise: How are such choices to be appraised under the First Amendment? When do government decisions violate the Constitution?

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70 *Id.* at 473.

71 *Id.*

72 Sabrin, *supra* note 6, at 1233.

IV. THE FAILURE OF TRADITIONAL RESPONSES

Consider many answers that simply do not work. One answer—the one most frequently relied upon by courts—is to use the traditional rule that the government cannot make content-based choices. This, for example, is exactly what the Court did in *Southeastern Promotions v. Conrad*.[73] When Chattanooga, Tennessee prohibited the use of the auditorium for the play "Hair", the Court held this unconstitutional.[74] The Court restated the traditional rule that the government cannot make content-based choices and said that prohibiting "Hair" is a content-based choice.[75]

Yet, if I have demonstrated anything to this point, it is that this approach just does not work. Intuitively, there is something that bothers me about a city deciding not to allow the play "Hair" because of its content, but it just can't be said that the government cannot make content-based choices when it owns a theater, or runs a library, or gives money. As I have said repeatedly, there is no way to avoid content-based decisions.

A second approach frequently taken by courts is to invoke the so-called "unconstitutional condition doctrine."[76] The unconstitutional condition doctrine says that the government cannot condition receipt of a benefit on a person giving up a right.[77] For example, it would be clearly unconstitutional for the government to say to welfare recipients that they must give up their right to criticize the government if they want to continue to receive welfare support. The Supreme Court has explained:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. 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.[78]

Frequently cases dealing with government subsidies use this rationale for invalidating restrictions on speech. For example, in *Finley v. National Endow-*

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[73] 420 U.S. 546 (1975).

[74] *Id.* at 563.

[75] *Id.* at 554-55 (emphasizing that the City's procedure was an impermissible prior restraint of speech).

[76] *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 529 (1981); Perry v. Sindermann, 408 U.S. 593, 597-98 (1972).

[77] For a superb discussion of the unconstitutional condition doctrine and its relation to government funding of the arts, *see generally* Cole, *supra* note 50. *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

[78] Perry v. Sindermann, 408 U.S. at 597.

ment of the Arts,[79] a federal district court refused to dismiss the plaintiffs challenge to NEA restrictions.[80] The court invoked the unconstitutional condition doctrine and said that the plaintiff presented a viable claim that the government was impermissibly conditioning benefits based on restrictions on the content of the artists' work.[81]

At first blush the unconstitutional condition doctrine seems a viable approach to the problem. Yet, on reflection, the unconstitutional condition doctrine is not at all satisfactory. First, at the outset, it must be noted that the current viability of the unconstitutional condition doctrine is very much in doubt. In 1991, the Supreme Court decided *Rust v. Sullivan*, where the Court upheld the constitutionality of a federal regulation which prohibited Planned Parenthood clinics receiving federal funds from engaging in abortion counseling or referrals.[82] A challenge was brought arguing that this was an unconstitutional condition: the government was impermissibly conditioning receipt of federal funds on doctors and health care providers giving up their free speech rights.[83]

The Supreme Court rejected the First Amendment challenge and held that the gag rule was constitutional.[84] The Court said that the government was simply choosing to fund some speech and not others.[85] The Court said that the government could make this choice in expending federal revenue.[86] If *Rust* is followed, little appears left of the unconstitutional condition doctrine.[87] In the NEA context, isn't the government simply choosing to fund some speech and not other?[88]

More importantly, the unconstitutional condition doctrine is not analytically useful in dealing with the problem. Ultimately, it begs the key question of when content-based choices by the government are constitutional. The unconstitutional condition doctrine says that the government cannot impose

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[79] 795 F. Supp. 1457 (C.D. Cal. 1992).

[80] *Id.* at 1464.

[81] *Id.* at 1463-64.

[82] 500 U.S. 173 (1991).

[83] *Id.* at 181.

[84] *Id.* at 192.

[85] *Id.* at 193.

[86] *Id.* at 198.

[87] *But see* Cole, *supra* note 50, at 691 (explaining a viable approach to the unconstitutional conditions doctrine after *Rust*).

[88] It should be emphasized that *Rust* did not purport to overrule the unconstitutional conditions doctrine. The Court said that its decision did not mean that "funding . . . is invariably sufficient to justify government control over the content of expression." 500 U.S. at 199. On the other hand, if *Rust* is taken seriously, it is not clear why the government cannot always control the content of expression when it is paying the bill.

an unconstitutional condition as a prerequisite for receiving a federal benefit.[89] But this requires deciding what is unconstitutional. Is it unconstitutional for the NEA to prevent use of federal funds for sexually oriented art? Is it unconstitutional for the municipal auditorium to prevent performance of certain plays? The unconstitutional condition doctrine cannot answer these questions. There must be some other doctrine to determine when the government is acting unconstitutionally.

A third approach to the problem is to invoke the prior restraint doctrine. A core principle of the First Amendment is that the government cannot engage in prior restraints.[90] Classically, a prior restraint is an attempt by the government to censor speech before it occurs.[91] A court order enjoining speech is a classic form of a prior restraint.[92] A law that requires a permit or a license for speech to occur is another paradigm example of a prior restraint.[93]

Arguably, all of the government decisions that I have discussed are examples of prior restraints. For instance, when the government chooses not to allow a certain play to be performed, isn't that a prior restraint? If the government imposes a restriction on the recipient's use of money, isn't that a prior restraint?

Yet, on reflection, the prior restraint doctrine is not very helpful. At the outset, it is somewhat troubling to see the government's action as a restraint on speech. The government is facilitating speech by subsidy and the restraint seems secondary to the enhancement of First Amendment values.[94] More importantly, if choices by the government as to what to fund are prior restraints, the government cannot avoid prior restraints in this area. The government will fund certain artists and not others, buy some books and not others. If that is a prior restraint, one is sure to occur, and then the question is what prior restraints in this area are allowed and which are not. The prior restraint doctrine is seemingly of little help in answering this question.

At this point, there is a temptation to throw up one's hands and just give up. One way to give up would be to say that the government can do whatever it wants. As long as it must make choices, let it choose as it wishes. One can even dress up this answer in constitutional clothes. Arguably, in all of the instances I am considering, the government is itself a speaker. Allowing government restrictions is simply protecting the government's rights of expression. After *Rust v. Sullivan*, then Solicitor General Kenneth Starr expressed this viewpoint,

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89 *Id.* at 197.

90 *See, e.g.*, New York Times v. United States, 403 U.S. 713, 714 (1964); Near v. Minnesota, 283 U.S. 697, 713-14 (1931).

91 *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraint comes this court bearing a heavy presumption against its constitutional validity.").

92 *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557-62 (1976).

93 *See, e.g.*, Lovell v. Griffin, 303 U.S. 444, 450 (1938) (requiring a permit to distribute literature).

94 *See* Shipley, *supra* note 2, at 269.

declaring that he was "pleased" that the Court had ruled that "the government as financier . . . is able to take sides; it is able to have viewpoints when it is funding."[95]

Yet, this is a dismal solution. Even assuming that the government has speech rights, the question is how they are balanced against those of individuals. Allowing the government to do anything when it makes choices is no solution. Surely the NEA could not say that it will subsidize white artists, but not artists of color. Undoubtedly, a municipal auditorium could not say that it would allow plays praising the Vietnam War, but not criticizing it. Some government choices are acceptable, others are not, and the question must be to figure out which are in each category.

Another way to just give up would be to say that the government must get out of the business if it cannot avoid content-based choices. The argument can be dressed up in noble clothes. In a time of scarce resources, with inadequate money for basic necessities, should the government really be spending money on the arts?

But, this, too, is hardly an adequate answer. Imagine a world with no public libraries, no municipal theaters or auditoriums, no government subsidies for research or art. This solution seems even more inimical to the First Amendment. The First Amendment, above all, is about encouraging more speech. Eliminating all government support is killing the patient in order to try to save it.

V. TOWARDS A SOLUTION

To this point my goal has been to show a serious problem and the inadequacy of current solutions. This is important in itself. I realize, of course, that it is not enough. Having posed a puzzle, it is my responsibility to solve it. The difficulty is that I do not have an easy answer. I have, however, become increasingly convinced that the solution will not be found within First Amendment law. First Amendment law is largely focused on limiting the government's ability to regulate speech. Here, the government inherently must regulate.

Ultimately, the issue is about how to control the government in a situation where the government must act. On reflection, that is really what due process is all about—assuring fair government processes in instances when government acts. Indeed, historically, due process is based on the notion that personal freedom can be secured only when there is an institutional check on arbitrary government actions. The more I have thought about it, the more I have come to the conclusion that the best solution when the government must make content-based choices is to assure the fairest possible process in accord with the due process clauses of the Fifth and Fourteenth Amendments. Substantively, the government must make choices; but procedurally the courts should insist that they are done in the fairest way possible.

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95 *See* Cole, *supra* note 50, at 676.

Let me give some important examples of what a fair process should include in instances in which the government must make content-based choices. First, the government must have clearly stated criteria for how choices will be made. If it is the NEA, there must be explicit criteria for how choices will be made among funding applicants. Likewise, cities should have written criteria as to what plays or concerts will be allowed in municipal auditoriums. Requiring such criteria serves many purposes. It limits discretion of government officials. The Supreme Court has said, for example, that if the government is going to have a licensing system there have to be clear criteria leaving virtually no discretion to the licensing authority.[96] This is to minimize the likelihood that the government will use its licensing discretion to suppress unpopular messages. Criteria also facilitate judicial review and, if nothing else, create the sense of a fair process.

The requirement for criteria is a major change in the law. In the municipal auditorium cases no criteria ever seem to exist. The cases always involve decisions in particular instances to allow or prohibit specific plays or concerts. In fact, in most of the cases I have discussed, no criteria appear to have existed.

Second, the criteria must be as specific as possible and should be invalidated if they are unduly vague. A reasonable person should be able to understand the basis upon which the government will be making its funding decisions. For example, a key flaw in the Helms restriction on NEA funding was the vagueness of the criteria. In *Bella Lewitzky Dance Foundation v. Frohnmayer*,[97] the United States District Court for the Central District of California invalidated the NEA certification requirement on exactly this basis.[98] But this case is very much the exception. Because criteria are essentially non-existent, there are virtually no other cases that have relied on vagueness as a basis for decision.

Third, the criteria must not discriminate among speech or speakers based on the ideas expressed. The government simply cannot attempt to impose an orthodoxy of belief by favoring some ideas over others. This notion was expressed in the Supreme Court's decision in *Board of Education, Island Trees Union Free School District v. Pico*.[99] The plurality opinion made it clear that the government cannot remove books from a library if it acts from the motive of disapproving a particular idea.[100] For example, prohibiting NEA funds for ethically or racially offensive productions would be impermissible because it would be a choice based on the idea of the message expressed. In other words, subject matter restrictions would be permissible, but viewpoint ones would not be allowed.

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[96] *See, e.g.*, Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 616-22 (1976) (holding that an ordinance which required giving advance written notice to local police department in order to canvass house to house was void because of vagueness).

[97] 754 F. Supp. 774 (C.D. Cal. 1991).

[98] *Id.* at 782.

[99] 457 U.S. 853 (1982).

[100] *Id.* at 871.

This approach, while desirable, will have many problems in implementation. Funding authorities can purport to be making quality-based determinations, but in reality make decisions based on viewpoint. Subject matter restrictions can hide viewpoint discrimination. Yet, the prohibition on viewpoint discrimination seems essential and the burden will fall on the courts to determine when a restriction is a pretext for viewpoint discrimination.

Furthermore, even viewpoint restrictions will be allowed if there is a sufficiently compelling government interest. For example, a school system likely would have a compelling interest in choosing not to spend scarce library dollars for racist propaganda. There, of course, is no formula for deciding what is a compelling interest; but that is a problem throughout constitutional law and there is no reason to believe that it is any greater difficulty here.

Fourth, courts should be available to scrutinize decisions to assure that the criteria have been reasonably applied. There is the danger that criteria formulated in terms of quality can be manipulated in practice to discriminate based on the ideas expressed. Courts, however, should be able to monitor government decisions to assure that they are not based on impermissible motives.

At first blush, this solution hardly seems radical. Yet, I know of no case that has followed such an approach. Consider how it would apply in practice. The government can run a theater, but it must publish clear, non-vague criteria as to how it will choose plays or concerts. It cannot deny access based on dislike of the ideas or views of any play. Similar rules can be articulated for libraries or for instances in which the government is giving subsidies.

I realize that I have only begun to outline what a due process solution would be like. Yet, I am convinced that it offers a way out of the problem of instances in which the government must make content-based choices.

So to return to where I started: Can Senator Jesse Helms deny funding to art like Serrano's Piss Christ or Mapplethorpe's homoerotic art? No. Putting aside the lack of clear criteria, Senator Helms' objection to Serrano's work is that it is blasphemous and Senator Helms believes that blasphemy is a bad idea. Senator Helms opposes Mapplethorpe because of a dislike of homosexuality.

VI. CONCLUSION

Courts develop legal rules to guide their analysis in future cases and to help individuals know the standards upon which to base their conduct. Additionally, principles articulated by the Supreme Court guide lower court decision-making. Thus, it is understandable that the Court has fashioned basic First Amendment rules, such as the prohibition against content-based discrimination. In the vast majority of cases, this is a useful principle. When the government decides who to let use a public park, content-based discrimination certainly should not be allowed. Above all, the First Amendment must mean that the government cannot target and try to eradicate particular views.

The problem with rules is that there are some areas where they are not helpful and, indeed, sometimes pernicious. An example is the one discussed in this paper: the prohibition against content-based discrimination is not useful in evaluating the conditions the government can impose when it is facilitating speech. As the government's role in society has grown, it has become

increasingly important in funding speech activities. Public universities, public libraries, public auditoriums, and public funding of the arts are just a few examples.

In all of these areas, the government inherently must make content-based choices. Above all, my point is that the traditional approach to First Amendment issues does not work when the government imposes limits on what it funds. Instead, courts and commentators must fashion new principles for those situations where the government must make content-based choices.