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# First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist

Lionel S. Sobel\*

## I.

Seventy years ago, Justice Oliver Wendell Holmes authored what has become one of the best known phrases in first amendment jurisprudence. "The most stringent protection of free speech," he asserted, "would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>1</sup> By this phrase, Justice Holmes demonstrated, to the satisfaction of most, that the first amendment is not as absolute as the plain meaning of its words suggests. He did so by reasoning backwards from an assumed conclusion—that falsely shouting fire in a crowded theatre may be punished—to the necessary meaning of the constitutional provision that permits such a result.

In most cases, this form of reasoning would be suspect or worse. But Justice Holmes employed it without criticism, because the conclusion he assumed was what Professor William Van Alstyne has so aptly described as an "irresistible counterexample."<sup>2</sup> Irresistible counterexamples are assumed conclusions that appear to be so self-evident, so beyond dispute, that they do not follow *from* the law. Instead, for those who accept them, irresistible counterexamples dictate what the law itself must be.

The use of irresistible counterexamples has itself proved irresistible to scholars and judges alike.<sup>3</sup> If the examples are truly compelling, they are persuasive tools of argumentation, and their use rarely does harm. Recently, however, Justice Antonin Scalia abused an "irresistible

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1. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

2. Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 113 (1982).

3. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.01, at 2-5 (1984).

counterexample," and in so doing, created an opinion that, in the wrong hands, could be used to harm government support for artistic and cultural expression.

The case in question is *Arkansas Writers' Project, Inc. v. Ragland*,<sup>4</sup> which on its face has little if anything to do with government support for art or culture. What it did concern was the constitutionality of an Arkansas statute that imposed a sales tax on general interest magazines (as well as other merchandise), but exempted religious, professional, trade, and sports journals. The Supreme Court held that the statute violated the first amendment because the statute treated some publications less favorably than others, and—worse yet—distinguished among publications on the basis of their content. While these facts did not compel the conclusion that the statute was unconstitutional, they did give rise to a presumption of unconstitutionality. In order to overcome the presumption, Arkansas had to show that the distinctions made by its statute served a compelling interest and that the statute was narrowly tailored to achieve that particular interest. This, Arkansas failed to do,<sup>5</sup> and thus it lost the case.

The Court's opinion, authored by Justice Thurgood Marshall, is short and direct, and is a logical application of the principles announced just five years ago in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,<sup>6</sup> in which the Court declared unconstitutional a state tax on all newspaper expenditures for paper and ink in excess of 100,000 dollars. Justice Marshall's opinion breaks no new ground and fits comfortably into the existing fabric of first amendment doctrine. Nevertheless, Justice Scalia dissented.

In a surprisingly shrill opinion,<sup>7</sup> Justice Scalia argued that tax exemptions are "a form of subsidy," and that a government decision to subsidize some but not all speech "is not subject to strict scrutiny."<sup>8</sup> The Court's majority had ruled otherwise, and Justice Scalia criticized that result using what he apparently considered to be an "irresistible counterexample." Justice Scalia wrote:

By [strictly scrutinizing the Arkansas sales tax statute], the majority casts doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject-matter. . . . The Kennedy Center, which is subsidized by the Federal Government in the amount of up to \$23 million per year . . . is authorized by statute to "present classical and contemporary music, opera, drama, dance, and poetry." . . . Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded? Are

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4. 107 S. Ct. 1722 (1987).

5. See *infra* text accompanying notes 70-72.

6. 460 U.S. 575 (1983).

7. See, e.g., 107 S. Ct. at 1730-32 (Scalia, J., dissenting).

8. *Id.* at 1731.

. . . the funding activities of the Corporation for Public Broadcasting . . . subject to strict scrutiny because they provide money for . . . some subjects but not others?

Because there is no principled basis to distinguish the subsidization of speech in these areas—which we would surely uphold—from the subsidization that we strike down here, our decision today places the granting or denial of protection within our own idiosyncratic discretion. In my view, that threatens First Amendment rights infinitely more than the tax exemption at issue.<sup>9</sup>

The majority opinion does not reply to this dissent or address its points in any fashion. This failure was noted immediately by Professor Stephen Barnett who concluded, quite correctly, that Justice “Scalia’s critique deserved better than the silence it received from the Court.”<sup>10</sup> If Justice Scalia were correct about the implications of *Arkansas Writers’ Project*, his assertions deserve greater attention because a judge in some other case may conclude that Kennedy Center subsidies and Corporation for Public Broadcasting (CPB) grants, or other similar forms of government support for the arts, are in fact unconstitutional—even though Justice Scalia neither intended nor desired such a result.

Justice Scalia was joined in dissent by Chief Justice William Rehnquist. This is not surprising, because several years earlier, Justice Rehnquist authored a remarkably similar dissent in *Southeastern Promotions, Ltd. v. Conrad*.<sup>11</sup> The issue in that case was whether the City of Chattanooga had violated the first amendment rights of the producers of the rock musical *Hair* when the city rejected their application to stage the show in a city-operated theater. The city did so on the grounds that *Hair* included nudity and obscenity and thus would not be in the community’s “best interest.”

Best interest or not, *Hair*’s producers eventually won. The Supreme Court held that the city’s refusal to rent the theater to the producers had been a prior restraint, and that the city’s handling of their application had lacked the procedural safeguards required by the first amendment. In his dissent, then-Associate Justice Rehnquist contended that “the apparent effect of the Court’s decision is to tell the managers of municipal auditoriums that they may exercise no selective role whatsoever in deciding what performances may be booked.”<sup>12</sup> And then, using irresistible counterexamples of his own, Justice Rehnquist asked, rhetorically, “May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential

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9. *Id.* at 1732.

10. Barnett, *Free Speech in the New Court*, 73 A.B.A. J., Dec. 1987, at 48, 49.

11. 420 U.S. 546 (1975).

12. *Id.* at 571-72.

producer on a first come, first served basis?"<sup>13</sup> As Professor Kenneth Karst observed in his comment on *Southeastern Promotions*, the Court's majority "answered these questions with silence."<sup>14</sup>

The failure of the Court to respond to Justices Scalia and Rehnquist is puzzling, because in both cases their questions are easily answered. Yes, government subsidization of the Kennedy Center is subject to strict scrutiny because the Center is authorized to present certain kinds of expressive activities but not others. Yes, the funding activities of the CPB are likewise subject to strict scrutiny because the CPB provides money for the production of programs on some subjects but not others. Yes, an opera house may be able to limit its productions to operas; it may not have to show rock musicals. Yes, a municipal theater may devote an entire season to Shakespeare; and if it does so, it need not book producers on a first come, first served basis.

None of these answers, however, would have required a different result in *Arkansas Writers' Project* or in *Southeastern Promotions*. Thus, although the examples employed by Justices Scalia and Rehnquist may have been "irresistible," these examples were not "counterexamples," because the conclusions they assumed were perfectly consistent with the results reached by the Court's majority in both cases. An appreciation of this consistency is important not only in connection with those two cases in particular, but also in connection with the larger question of government support for the arts in general.

The purpose of this Essay is to promote such an appreciation, and its thesis is this. First, the first amendment does impose standards by which courts may evaluate the constitutionality of government subsidies of cultural and artistic expression. Second, those standards do permit the government to be selective about the recipients of its largess, provided the government uses appropriate criteria in making its selections. Third, some criteria, though appropriate, must nevertheless undergo strict scrutiny. And, fourth, in many cases such criteria will withstand strict scrutiny, although the criteria in *Arkansas Writers' Project* and *Southeastern Promotions* did not.

## II.

At first blush, some may wonder how the first amendment has anything at all to say about government *support* for artistic and cultural expression. The first amendment, after all, prohibits the government from "abridging" free expression, not encouraging it. And in fact, first

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13. *Id.* at 572-73.

14. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 248 (1976).

amendment issues would not arise if government support were equally available to all who asked for it. In reality, however, support for the arts is rarely if ever available to all. Instead, resources are limited, and the government almost always has to choose between those who get support and those who do not. When the government provides support to some people, but not others, those who did not get it may contend that the government has abridged their free expression rights by denying the support they requested.

The government provides support for the arts in many different ways, and this Essay uses the words "support" and "subsidy" in the broadest sense. "Support" and "subsidy" are meant to include: first, financial grants of the sort made by the Corporation for Public Broadcasting and the National Endowment for the Arts; second, spending by the government in connection with its ownership and operation of facilities such as the Kennedy Center, theaters, arenas, museums, libraries, and broadcast stations; and, third, spending by the government in connection with its ownership of such facilities, when the government, rather than operating the facilities itself, rents them to others.

The first amendment prohibits the government from "abridging" free expression by inhibiting or discouraging it, as well as by prior restraint or subsequent punishment of speech.<sup>15</sup> Professor Melville Nimmer has even suggested that the government may abridge speech simply by eliminating a "basic incentive" for it.<sup>16</sup>

By any of these standards, the government undoubtedly "abridges" expression when it refuses to rent a theater to one person on account of the content of the show that person wishes to stage, even though the government is willing to rent the theater for other shows.<sup>17</sup> Whether that refusal is unconstitutional poses a further problem; but in such a case, the threshold question of "abridgment" must be answered against the government. The threshold question of "abridgment" also seems easily answered against the government in cases in which government-supported libraries remove books,<sup>18</sup> government-supported museums remove artworks,<sup>19</sup> and government-supported theaters or television stations cancel scheduled movie exhibitions.<sup>20</sup>

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15. M. NIMMER, *supra* note 3, § 4.07, at 4-33.

16. *Id.*

17. See *Southeastern Promotions*, 420 U.S. at 546; *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1045 (1985).

18. *Cf. Board of Educ. v. Pico*, 457 U.S. 853 (1982) (limiting discretion of school board to remove books from a high school library).

19. *Cf. Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir.) (holding that an art exhibit may be excluded from a private area of a college), *cert. denied*, 474 U.S. 1007 (1985).

20. *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986); *cf. Muir v. Alabama Educ.*

Government "abridgment" of expression is less recognizable in cases in which limited resources require the government to select recipients from among many applicants. No doubt, some would say that an abridgment is not easily recognized in these cases because none exists. And in *Arkansas Writers' Project* Justice Scalia made just such an argument. He contended that the selective sales tax exemption at issue in that case was a form of "subsidy," and that the denial of a subsidy does not "necessarily" abridge expression, because the denial of a subsidy "does not, as a general rule, have any significant coercive effect."<sup>21</sup>

Characterizing a tax exemption as a subsidy is a bit of verbal alchemy that provides valuable insights, but it does not lead to the conclusions that Justice Scalia advocates. Allowing the use of public forums for expressive purposes also is recognized as a form of "subsidy."<sup>22</sup> Yet the first amendment rights of those who wish to use public forums for expression do not depend on their ability to prove that they would be significantly coerced if the government denied them permission to do so.<sup>23</sup> Justice Scalia's contention that there is no difference between a tax exemption and a government subsidy is accurate. But the coin has another side: there also is no difference between the denial of a subsidy and a tax. The burden of not receiving a subsidy is exactly equal to the burden of having to pay a tax.

In concluding that the Arkansas sales tax was not coercive, Justice Scalia obviously was influenced by what he considered to be its small size. He found it "implausible that the 4% sales tax . . . was meant to inhibit, or had the effect of inhibiting, this appellant's publication."<sup>24</sup> On this point, however, Justice Scalia assumed facts not in evidence, or at least not revealed in his opinion. Four percent of *gross receipts*, which is the base on which Arkansas' tax is computed,<sup>25</sup> may well equal or exceed the total *profits* of many publications. And the ability of a company to raise its prices sufficiently to collect the sales tax from customers, without thereby losing a greater amount in sales because of the price hike, is more difficult to determine than Justice Scalia admits.<sup>26</sup>

Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) (holding that individual viewers may not compel broadcast of programs on public stations because the stations are not public forums).

21. *Arkansas Writers' Project*, 107 S. Ct. at 1731 (Scalia, J., dissenting).

22. M. YUDOF, *WHEN GOVERNMENT SPEAKS* 234, 236 (1983).

23. See *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); cf. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 318-20, 324-25 (1968).

24. *Arkansas Writers' Project*, 107 S. Ct. at 1731 (Scalia, J., dissenting).

25. ARK. STAT. ANN. §§ 84-1903, 84-1903.1 (1980 & Supp. 1985), described in *Arkansas Writers' Project*, 107 S. Ct. at 1724.

26. The Department of Justice *Merger Guidelines*, for example, define "markets" using a calculation which assumes that, for some products, a mere 5% increase in price will cause customers to purchase substitutes, if they are available. U.S. DEP'T OF JUSTICE (ANTITRUST DIV.), *MERGER GUIDELINES*, 49 Fed. Reg. 26,823 (1984), discussed in H. HOVENKAMP, *ECONOMICS AND FEDERAL*

In any event, the seemingly small size of the tax at issue in *Arkansas Writers' Project* should not have led to the conclusion that it would not inhibit those who had to pay it. Whatever its size, the burden of paying the tax was exactly equal to the benefit of being exempt from it. And Arkansas considered that benefit sufficiently valuable to enact the exemption in the first place, and then to defend it in court. Indeed, Arkansas' determination that some publications ought to be exempt from its sales tax is tantamount to a confession that its tax would burden certain, if not all, publications. It is troubling that what Arkansas confessed, Justice Scalia found "implausible." But in this case at least, Arkansas was, in effect, bound by its confession, and properly so.

More generally, the reciprocal nature of burdens and benefits demonstrates that the extent of the burden imposed on those who do not receive government subsidies is exactly equal to the extent of the benefit conferred on those who do receive them. When governments grant subsidies, one may assume that the government thinks those subsidies are sufficiently valuable to be worth granting. Thus, those who do not receive subsidies are deprived of something valuable; this deprivation burdens them to the same degree that recipients of subsidies are benefited. Whatever that degree might be, the denial of a subsidy that someone else has received is an "abridgment" for first amendment purposes. The abridgment may not be direct like prior restraints and subsequent punishments, but it is an indirect abridgment like other varieties of government interference with the process of communicating.<sup>27</sup>

### III.

The government's granting and denying of subsidies for expression on a selective basis is not automatically unconstitutional, simply because the denials are a form of "abridgment." The first amendment is not absolute, and the government frequently abridges speech in a perfectly constitutional fashion. Whether the government grants and denies subsidies for expression in a constitutional manner depends on the criteria used by the government in making its selections. Naturally, the criteria used by the government in granting subsidies for cultural and artistic expression often involve content-related factors, which is why some people who favor government subsidies for the arts would prefer to keep the first amendment out of the selection process entirely, if they could.

The perceived difficulty with content-based decisions is that statements occasionally can be found in Supreme Court opinions, some of

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ANTITRUST LAW 74-77 (1985) and law review commentary cited therein.

27. See generally M. NIMMER, *supra* note 3, §§ 4.02, 4.07, 4.09.

which are quite recent, which seem to declare content-based decisions irretrievably unconstitutional. Justice Marshall quoted two such statements in his opinion for the Court in *Arkansas Writers' Project*: "[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";<sup>28</sup> and "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."<sup>29</sup>

Clearly, these statements do not mean exactly what they say, any more than the first amendment itself does. If these statements were to be taken at face value, the Supreme Court would have, by now, declared unconstitutional all laws concerning defamation, privacy, fraud, national security, and countless other subjects, because such laws do discriminate against and restrict speech specifically on the basis of its content. In fact, the Supreme Court itself has commented on the qualified meaning that must be given to the claim that the first amendment prohibits the government from restricting expression because of its content. As the Court indicated in *Young v. American Mini Theatres, Inc.*,<sup>30</sup> "broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached."<sup>31</sup>

The broadly phrased first amendment principle that restrictions on speech must be "content neutral" is actually much narrower than it seems. "Content neutrality" is an umbrella term that covers three different varieties of neutrality: viewpoint neutrality, quality neutrality, and subject matter neutrality. The first amendment does not require the government to be neutral to the same degree in all three of these areas.<sup>32</sup> This insight helps to establish criteria for subsidizing the arts, because in actual practice, governments have based their decisions on the viewpoint, artistic quality, and subject matter of the works to be subsidized. Thus, in order to adopt constitutional standards for subsidizing art and culture, it is necessary to understand the degree of neutrality required by the first amendment in each of these three areas.

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28. 107 S. Ct. at 1727 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

29. *Id.* (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

30. 427 U.S. 50 (1976) (Stevens, J., plurality opinion).

31. *Id.* at 65.

32. See M. NIMMER, *supra* note 3, § 2.07 (discussing viewpoint and subject matter neutrality).

## A.

The first amendment virtually always requires *viewpoint* neutrality.<sup>33</sup> Thus, if the Corporation for Public Broadcasting were to award grants for the production of documentaries about Central America, it could not constitutionally adopt as a criterion for awarding such grants the requirement that funded documentaries support, rather than criticize, President Reagan's opposition to the Nicaraguan Sandinistas.

Even less political and more benevolent criteria would be unconstitutional, if they were viewpoint based. In 1984, for example, *Rigoletto* was staged at the Metropolitan Opera House in New York City. The opera performed, however, was not Guiseppe Verdi's nineteenth-century version set in sixteenth-century Italy. It was, instead, a contemporary update set in twentieth-century America, which in the eyes of many, promoted offensive and stereotypical images of Italian-Americans. The National Endowment for the Arts (NEA) had given the Met an 850,000 dollar grant that year. Congressman Mario Biaggi of the Bronx protested the use of NEA funds to promote disparaging ethnic images. He also proposed an amendment to the National Foundation on the Arts and Humanities Act<sup>34</sup> that would have prohibited the NEA from funding ethnically or racially offensive productions.<sup>35</sup> No such bill was enacted. But had it been, such a bill would have been unconstitutional, even though well intentioned, because it would not have been viewpoint neutral.<sup>36</sup>

Justice Scalia seems to acknowledge the unconstitutionality of viewpoint-based criteria—though he does so with apparent reluctance, for he writes that “[p]erhaps a . . . stringent, prophylactic rule is appropriate . . . when the subsidy pertains to the expression of a particular viewpoint on a matter of public concern.”<sup>37</sup> Why “perhaps”? The first amendment permits no other result in these or any similar examples.

33. *Pacific Gas & Elec. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328, 331-32 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *see also* M. NIMMER, *supra* note 3, § 2.07, at 2-103 n.30.

34. 20 U.S.C. §§ 951-968 (1982 & Supp. 1985).

35. Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 *Geo. L.J.* 1521, 1522 (1986).

36. *Accord* Note, *supra* note 35, at 1544, 1551; *cf.* *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986) (pornography ordinance held unconstitutional on grounds it was not viewpoint neutral, because it prohibited speech that treated women in disapproved ways, even though speech treating women in approved ways was not prohibited no matter how sexually explicit it might be).

37. *Arkansas Writers' Project*, 107 S. Ct. at 1731 (Scalia, J., dissenting) (emphasis added).

## B.

Although the first amendment requires viewpoint neutrality, it does not always require neutrality as to the *artistic quality* of works that are to receive government subsidies. The ability to make decisions based upon artistic quality is crucial when the government's resources are limited and are insufficient to provide subsidies to all who apply for them. In such cases, the government must select those who are to be given grants, and only a limited number of logical criteria exist on which to base such selections. The government could award grants on a first come, first served basis. It could divide the available resources equally among all grant applicants. It could select recipients on the basis of the anticipated quality of the works they would create. Or the government could select recipients on the basis of the subject matter of the works that would be created.

The first amendment permits the government to use quality as a basis for selecting subsidy recipients—rather than requiring subsidies to be awarded on a first come, first served basis, or in equal shares to all applicants—because decisions based upon quality best serve the government's objectives. When the government subsidizes the arts, it does so for reasons other than the redistribution of wealth. Although such subsidies may have a redistributive effect, the subsidization of art and culture has different objectives. Among the objectives that Congress has recognized are: the encouragement of American progress in the arts; the creation of a climate that fosters imagination; the establishment of material conditions that facilitate the release of creative talent; and the education of Americans concerning the aesthetic dimensions of our lives and the diversity of our cultural heritage.<sup>38</sup>

While subsidies awarded on a first come, first served basis, or in equal shares to all applicants, would redistribute wealth, they would not contribute to achieving these objectives. Artistic and cultural works that are likely to contribute to the achievement of these objectives cannot be created by just anyone who is given the resources to make the attempt. Works of this sort require artistic talent as well as material resources, and artistic talent simply is not possessed by everyone in equal measure. Awarding subsidies on a first come, first served basis would reward administrative efficiency rather than artistic talent. Thus, "first come, first served" would not even be a rational basis for awarding artistic and cultural subsidies, let alone a basis required by the first amendment.

Subsidies awarded in equal shares to all who applied for them

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38. National Foundation on the Arts and Humanities Act, 20 U.S.C. § 951 (1982 & Supp. 1985).

would not contribute to the achievement of the objectives of subsidization either. The government subsidizes the arts because it recognizes that talent alone is not sufficient for the creation of art and culture: resources too are necessary. When the government's resources are limited, dividing funds equally among all who apply for subsidies is likely to result in each applicant receiving too little money to aid the creative process. Thus, this method too would not be a rational means to achieve the government's objectives, let alone a method required by the first amendment.

For the government to achieve its objectives, government subsidies must be large enough to aid their recipients, and the recipients must have talent. These requirements may be fulfilled if, but only if, the government selects a relatively limited number of recipients on the basis of the anticipated quality of their work. So long as "quality" judgments are based on artistic factors—rather than viewpoint considerations—first amendment doctrine does not prohibit the government from taking anticipated quality into account in making its subsidization selections. The necessity of excluding viewpoint considerations from quality judgments, however, does raise an additional issue.

Artistic quality, of course, cannot be objectively measured; and there is a risk that viewpoint considerations might influence—or even be disguised as—quality judgments. Although the first amendment permits subsidies to be awarded on the basis of artistic quality, the possibility of impermissible viewpoint discrimination makes the identity of those government officials who make quality judgments a first amendment issue. In this regard, the first amendment requires the following: First, an organizational separation between government officials whose jobs are political in nature, on the one hand, and government officials whose expertise is in art and culture and whose jobs are nonpolitical, on the other; and second, the placement of responsibility for selecting subsidy recipients solely in the hands of the nonpolitical art and cultural experts, even though the decision to provide subsidies, and decisions as to their nature and aggregate amount, must be made by politically accountable government officials.<sup>39</sup> This structural approach to fulfilling the dictates of the first amendment appears to have been the reason for the creation of the Corporation for Public Broadcasting, which acts as a

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39. See *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575-76 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985); cf. M. NIMMER, *supra* note 3, § 4.09(D), at 4-87; M. YUDOF, *supra* note 22, at 243; Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1160-64 (1974); Karst, *supra* note 14, at 257-59; Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 644-47 (1980); Note, *Artistic Freedom and Government Subsidy: Performing Arts Institutions in the United States and West Germany*, 6 HASTINGS INT'L & COMP. L. REV. 803, 824 (1983).

nonpolitical expert in the selection of recipients of federal funds that have been appropriated and approved by political bodies, namely, Congress and the President.<sup>40</sup>

Although the first amendment apparently requires this sort of organizational structure, one federal court has ruled otherwise. In *Advocates for the Arts v. Thomson*<sup>41</sup> the United States Court of Appeals for the First Circuit upheld a decision by the Governor of New Hampshire refusing to approve a 750 dollar grant that had been awarded to the literary magazine *Granite* by the New Hampshire Commission on the Arts. The Governor's decision was triggered by *Granite's* earlier publication of a poem entitled *Castrating the Cat*, which the Governor characterized as "an item of filth" and an "obscenit[y]" (though not in the constitutional sense). The First Circuit, speaking through Judge Levin H. Campbell, found no "constitutional issue" in the Governor's reversal of the decision of the Arts Commission, even though the court acknowledged that "[t]here may, of course, be good reason to leave the decision to an agency whose members are familiar with the arts and relatively removed from political pressures."<sup>42</sup> Instead, the First Circuit ruled that "[i]t is ultimately the prerogative of elected officials to decide when and how to spend the tax dollar, and those administering grant programs cannot ignore the importance of continued legislative and executive confidence in their judgment."<sup>43</sup> The Supreme Court denied *Granite's* petition for certiorari.<sup>44</sup> Judge Campbell's opinion, however, has not fared as well in the "higher court" of academic opinion, which has justifiably criticized the court's holding.<sup>45</sup> Nor was the opinion followed in a subsequent Court of Appeals decision addressing the very same point.<sup>46</sup>

In a thorough and thoughtful opinion by Judge Stephen Reinhardt in *Cinevision Corp. v. City of Burbank*,<sup>47</sup> the United States Court of Appeals for the Ninth Circuit observed,

When decisions about what forms of expression will be permitted or which individuals will be allowed to express themselves . . . are made by a political body . . . , those decisions must be scrutinized most carefully. . . . To the extent the decision-maker is removed from the heat of the political process, or is free to make an inde-

40. Canby, *supra* note 39, at 1150-52.

41. 532 F.2d 792 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).

42. *Id.* at 797 n.7.

43. *Id.*

44. *Advocates for the Arts v. Thomson*, 429 U.S. 894 (1976).

45. Shiffrin, *supra* note 39, at 646; Note, *supra* note 39, at 822-24 (1983); *cf.* Note, *supra* note 35, at 1541-43, 1548. *But see* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1111 n.28 (1979).

46. *See* *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984); *see also infra* notes 47-50 and accompanying text.

47. 745 F.2d 560 (9th Cir. 1984).

pendent judgment, the constitutional problem is less acute.<sup>48</sup>

The court illustrated this principle by noting that a professional museum director's decision regarding exhibit selections would be less suspect under the first amendment than a decision by a local, elected official to veto a proposed museum exhibit.<sup>49</sup> Similarly, a professional concert promoter's decision not to book a particular performance "will have a better chance of surviving first amendment scrutiny than a similar decision made by a mayor or other elected officials."<sup>50</sup> On these points, the Ninth Circuit is most certainly correct.

Although the first amendment does not always require neutrality as to artistic quality in the subsidy-selection process, its tolerance for quality as a decisionmaking criterion is based on the assumption that the quality of a work is somehow relevant to the selection decision—as would be the case, for the reasons just argued, if the government's resources were limited. Because this Essay broadly defines "subsidy,"<sup>51</sup> however, there will be cases in which the government's resources are not in fact limited. For example, if the government were to own a theater that it rented to others on a show-to-show basis, the theater would not be a limited resource whenever it was not being rented. If someone wanted to rent the theater for a period during which it otherwise would not be used, the artistic quality of the proposed show should be entirely irrelevant to the government—as it would be under the first amendment. In this circumstance, a supposedly quality-based decision not to rent the theater could only be a subterfuge for a decision based on the viewpoint or subject matter of the proposed show. A viewpoint-based decision would be clearly unconstitutional.<sup>52</sup> A subject matter-based decision would require further analysis.

### C.

The third variety of "content neutrality" is subject matter neutrality. The first amendment does not absolutely require this form of neutrality. The Supreme Court virtually stated as much in *FCC v. Pacifica Foundation*<sup>53</sup> and *Young v. American Mini Theatres, Inc.*,<sup>54</sup> in which it upheld the constitutionality of laws that prohibit the dissemination of adult entertainment at certain times and in certain places. Moreover, in many other cases the Court has upheld the constitutionality of laws

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48. *Id.* at 575.

49. *Id.* at 575-76.

50. *Id.*

51. See *supra* text preceding note 15.

52. See *supra* notes 33-37 and accompanying text.

53. 438 U.S. 726, 744 (1978) (Stevens, J., plurality opinion).

54. 427 U.S. 50, 63 (1976) (Stevens, J., plurality opinion).

that are not subject matter neutral, without so much as a passing reference to the content-neutrality requirement. For example, in *New York Times Co. v. Sullivan*<sup>55</sup> the Court upheld the constitutionality of a law that makes newspapers liable for printing defamatory political statements about public officials, if those statements are made with actual malice. In *Time, Inc. v. Hill*<sup>56</sup> the Justices held constitutional a law that makes magazines liable for publishing interesting but inaccurate articles that invade the privacy of their subjects, if such articles are published with knowledge of, or reckless disregard for, their inaccuracy. Recently in *Harper & Row, Publishers v. Nation Enterprises*<sup>57</sup> the Court upheld the constitutionality of a law making journalists liable for copying the written but as yet unpublished recollections of former public officials.

Under the first amendment, constitutionality does not depend on subject matter neutrality. If, however, a law is subject matter neutral, its purpose necessarily will be to protect what Professor Nimmer refers to as "non-speech" governmental interests.<sup>58</sup> Laws of this sort are presumptively constitutional, and will be upheld so long as they satisfy certain conditions outlined by the Supreme Court in *United States v. O'Brien*.<sup>59</sup>

On the other hand, if a law is not subject matter neutral, its purpose necessarily will be to protect what Professor Nimmer refers to as "anti-speech" governmental interests.<sup>60</sup> Laws of this sort are presumptively unconstitutional, but not conclusively so. Even laws that are not subject matter neutral are constitutional if they survive what Professor

55. 376 U.S. 254 (1964).

56. 385 U.S. 374 (1967).

57. 471 U.S. 539 (1985).

58. M. NIMMER, *supra* note 3, § 2.07 at 2-99 to 2-100. A "non-speech" governmental interest is one that is injured, not by the content of the speech, but by the mere act of communicating regardless of the content of the communication. Parade ordinances that regulate the time and place parades may be staged, in order to prevent interference with traffic, are examples of restrictions that protect a "non-speech" interest. See M. NIMMER, *supra* note 3, § 2.04. Laws designed to protect "non-speech" interests are presumptively constitutional, because the protection of such interests does not require the restriction of speech content, and laws of this sort do not seek to restrict particular ideas or information. *Id.* § 2.06.

59. 391 U.S. 367, 377 (1968); see also M. NIMMER, *supra* note 3, § 2.06; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-3, 12-5, 12-6, 12-20 (1978).

60. M. NIMMER, *supra* note 3, § 2.07, at 2-100 to 2-103; see also L. TRIBE, *supra* note 59, §§ 12-2, 12-3. An "anti-speech" governmental interest is one that is injured by the content of speech. Libel laws, for example, further the governmental interest in the protection of reputation—an interest that is injured by the false and defamatory content of libelous speech. See M. NIMMER, *supra* note 3, § 2.04. Laws designed to protect "anti-speech" interests are presumptively unconstitutional, because in order to protect such interests laws of this sort necessarily restrict the content of speech, in direct violation of the first amendment. *Id.* § 2.05[B].

Nimmer describes as “definitional balancing,”<sup>61</sup> but what courts and most other commentators describe as “strict scrutiny,” which requires that the law in question serve a “compelling state interest.”<sup>62</sup> A law authorizing the Kennedy Center to present music, opera, drama, dance and poetry, but not learned lectures or political speeches, would be subject matter discriminatory. A decision by the Corporation for Public Broadcasting to fund productions on certain subjects, but not others, would also be subject matter discriminatory, as would a municipal theater policy limiting its productions to operas or Shakespeare, to the exclusion of rock musicals and contemporary drama. Since government subsidy decisions like these are not subject matter neutral, they are subject to strict scrutiny.

The application of strict scrutiny does not mean, however, that subject matter-based decisions will always—or even frequently—be unconstitutional. Indeed, Professor Robert Kamenshine has said that it would be “absurd” to “bar the government from supporting contemporary art over traditional art, ballet over modern dance, and family-oriented entertainment over adult entertainment.”<sup>63</sup> For Professor Kamenshine, “[t]he proposition that government is constitutionally prohibited from creating a museum of modern art or a children’s theatre, or from providing aid to similar private endeavors is difficult to take seriously.”<sup>64</sup> While this may be too strong a way to put it, Professor Kamenshine’s conclusion is correct. Government decisions to subsidize some forms of art and culture, but not others, are usually constitutional because such decisions usually serve compelling governmental interests.

#### IV.

Some people—Justices Scalia and Rehnquist apparently among them—may be reluctant to subject benevolent government policies to strict scrutiny, because they fear that “strict scrutiny” is a standard that cannot be met.<sup>65</sup> This, however, is not the case. Insofar as government subsidies for the arts are concerned, subject matter-based selections can and do serve compelling governmental interests and thus may satisfy strict scrutiny.<sup>66</sup> The compelling interests in question are those

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61. M. NIMMER, *supra* note 3, § 2.03.

62. See, e.g., *Pacific Gas & Elec. v. Public Utils. Comm’n of Cal.*, 475 U.S. 1, 19 (1986); *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 540 (1980); *Elrod v. Burns*, 427 U.S. 347, 362 (1976); L. TRIBE, *supra* note 59, § 12-8.

63. Kamenshine, *supra* note 45, at 1111.

64. *Id.*

65. Cf. Karst, *supra* note 14, at 248-52, 259-63.

66. See, e.g., M. NIMMER, *supra* note 3, § 4.09[D], at 4-81 to 4-88; Canby, *supra* note 39, at

that induce governments to provide subsidies for art and culture in the first place—for example, those identified by Congress in the National Foundation on the Arts and Humanities Act.<sup>67</sup>

The selection of certain subjects for subsidies does result, of course, in the rejection of others, and the speech of those whose subjects are rejected is abridged to a measurable degree.<sup>68</sup> On the other hand, whenever government resources are limited, selectivity on some basis is required in order for the government to achieve its objectives at all.<sup>69</sup> If proper criteria are used, selections based on subject matter can produce a net gain in the amount of artistic and cultural expression actually produced. Thus, if the government elects to use its limited resources to subsidize forms of expression that are not readily available without subsidies (such as Shakespeare, opera, ballet, fine art, and documentaries), rather than forms of expression that are readily available even without subsidies (such as contemporary drama, rock concerts and dance shows, popular graphic arts, and situation comedies), the amount of speech gained through selective subsidization exceeds the amount lost. On balance, the purpose of the first amendment—the encouragement of expression—is achieved, and this type of government subsidy decision withstands strict scrutiny.<sup>70</sup> The same cannot be said, however, for the government subsidy decisions made in *Arkansas Writers' Project* or *Southeastern Promotions*.

## V.

The government decision at issue in *Arkansas Writers' Project*, which exempted from sales tax only those journals devoted to religious, professional, trade, and sports subjects, appears to have been viewpoint neutral. The government decision at issue in *Southeastern Promotions*, which denied rental of a city-owned theater to the producers of *Hair*, may have been viewpoint neutral too, although Professor Karst properly questions whether the decision actually was viewpoint neutral.<sup>71</sup> In neither case was the government's decision based on quality. Instead, in both cases the decisions were based on subject matter, but they could not survive strict scrutiny.

In *Arkansas Writers' Project* the state did not argue that religious, professional, trade, and sports journals had been given subsidies, be-

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1133-34; Karst, *supra* note 14, at 259; Shiffrin, *supra* note 39, at 640-44.

67. See *supra* note 38 and accompanying text.

68. See *supra* notes 15-27 and accompanying text.

69. See *supra* text preceding and following note 38.

70. Cf. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

71. Karst, *supra* note 14, at 255.

cause unless subsidized, journals on these subjects were less likely to be published than journals on other subjects. Such an argument would have lacked factual support, and to its credit, Arkansas tried a different, although equally implausible, argument. Arkansas contended that the sales tax exemption for religious, professional, trade, and sports journals was intended to encourage “fledgling” publishers. If so, however, the exemption was both overinclusive, because it also exempted well-established religious, professional, trade, and sports journals, and underinclusive, because it failed to exempt fledgling publishers whose journals covered other subjects. As a result, the exemption did “not serve its alleged purpose in any significant way,”<sup>72</sup> even if that purpose is assumed to be compelling.

In *Southeastern Promotions* the City of Chattanooga did not argue that it had excluded *Hair* from its theater because other producers wanted to rent the theater at the same time in order to stage other shows that were less likely than *Hair* to be produced without the use of the city-owned theater. Instead, the city acknowledged that it excluded *Hair* simply because the show was not “in the best interest of the community.” The Supreme Court ruled against the city on the grounds that the city’s refusal to rent to *Hair*’s producers was a prior restraint that lacked the necessary procedural safeguards.

The result in *Southeastern Promotions* would not have been different, however, even if the city had provided the procedural safeguards required by the first amendment in prior restraint cases. The issue then would have been whether the city’s grounds for refusing to rent the theater were constitutional. A “best interest of the community” standard is not constitutional. It is vague,<sup>73</sup> and “serving the community’s ‘best interest’” is hardly a “compelling” governmental interest.<sup>74</sup> Moreover, the city would have been unable to show that excluding *Hair* from its theater was the least restrictive means of protecting that interest.<sup>75</sup>

If the Chattanooga theater had been an opera house, or had been devoting its entire season to Shakespeare—as Justice Rehnquist rhetorically suggested—the case would have focused on a different issue. The question then would have been whether a production of *Hair* would have conflicted with the city’s use of the theater for opera or Shakespeare. If no conflict existed—because, perhaps, the producers of *Hair* wanted to rent the theater when it was not otherwise in use—then the city’s refusal to rent to *Hair*’s producers would not have served a com-

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72. Arkansas Writers’ Project, Inc. v. Ragland, 107 S. Ct. 1722, 1729 (1987).

73. Cf. *Cinevision Corp.*, 745 F.2d at 573.

74. *Id.*

75. M. NIMMER, *supra* note 3, § 2.05[B], at 2-39 to 2-41.

elling governmental interest, and thus would have been unconstitutional. On the other hand, if there had been such a conflict, the city could have made a very persuasive argument that opera and Shakespeare were less likely than *Hair* to be produced in Chattanooga without the use of the city-owned theater. In that case, the city's decision to select opera or Shakespeare over *Hair* would have served the compelling governmental interest of broadening the artistic and cultural horizons of the city's residents. And thus, the decision would have been constitutional.