Reauthorization: S. 2724 (1990): Memorandum 01

James F. Fitzpatrick

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October 25, 1990

MEMORANDUM

FROM: James F. Fitzpatrick

RE: Religious Restrictions on NEA Funding

Restrictions on NEA funding that specifically target art that "denigrates the objects or beliefs of a particular religion or non-religion" are blatantly unconstitutional. They violate the First Amendment right to freedom of speech and expression; they abrogate the right to freedom of religion, which protects free exercise of religion and requires the separation of Church and State; and they are unconstitutionally vague and overbroad.

1. Freedom of Speech

The Supreme Court has long recognized that the First Amendment prohibits restrictions of religious speech or religious art. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Supreme Court struck down a licensing requirement allowing censorship of "sacrilegious" films.¹

¹ Significantly, the definition of "sacrilege" struck down in Burstyn closely paralleled the concept of "denigration of] the objects or beliefs of the adherants of a particular religion." The state courts had defined sacrilege as "the act of violating or profaning anything sacred," and had interpreted the prohibition to mean "that no religion, as that term is
The Court flatly rejected the statute as inconsistent with the First Amendment. It emphasized that:

[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them. . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine.

Id. at 505.

Since Burstyn, the Court has consistently ruled that the expression of an idea may not be restricted on the ground that the idea is offensive or disagreeable. Texas v. Johnson, 109 S. Ct. 2533, 2544 (1989); Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989). Just last June, in United States v. Eichman, 58 L.W. 4744 (June 11, 1990), the Court reemphasized that "virulent ethnic and religious epithets" are within the protection of the First Amendment." Id. at 4746. Congress cannot constitutionally restrict NEA funding on the basis of religious "denigration."

2. Freedom of Religion

The First Amendment Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

[Footnote continued from previous page] understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule," and as "bar[ring] a visual caricature of religious beliefs held sacred by one sect or another." Id. at 504 & n.15.
In brief, the Establishment Clause prohibits the Government from favoring any religion, and the Free Exercise Clause prohibits the Government from discriminating against any religious practice. As the Court held in Burstyn, freedom of religion is threatened under both these clauses whenever religious expression is singled out for censure -- including by an attempt to regulate the religious content of art:

In seeking to apply the broad and all-inclusive definition of "sacrilegious" . . . the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. . . . Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other aspects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all.

Id. at 504-05. These implications of restrictions on religious speech for freedom of religion are exacerbated by the broad diversity of religious belief: "[c]onduct and beliefs dear to one [religion] may seem the rankest 'sacrilege' to another." Id. at 530 (Frankfurter, J., concurring).
3. **Vagueness and Overbreadth**

Funding restrictions on the basis of "denigration" of religion are also unconstitutionally vague. *Id.* at 531, 533. Justice Frankfurter emphasized in *Burstyn* that "Blasphemy was the chameleon phrase which meant the criticism of whatever the ruling authorities of the moment established as orthodox religious doctrine." *343 U.S.* at 528-29. Restrictions on religious "denigration" have a particularly chilling impact on art:

To allow such vague, undefinable powers of censorship is bound to have stultifying consequences on the creative process of literature and art. . . . To stop short of proscribing all subjects that might conceivably be interpreted to be religious, inevitably creates a situation where the censor bans only that against which there is a substantial outcry from a religious group. . . . Consequently . . . [creators] would be governed by [their] notions of the feelings likely to be aroused by diverse religious sects, certainly the powerful ones. The effect of such demands upon art and upon those whose function is to enhance the culture of a society need not be labored.

*Id.* at 531-32. Religious "denigration" is in the eye of the beholder; the term is too vague to withstand constitutional challenge. See also *Bullfrog Films v. Wick*, 847 F.2d 502, 513-14 (9th Cir. 1988) (striking down as unconstitutionally vague a regulation restricting films that "appear to have as their purpose or effect to attack or discredit . . . religious . . ."
views or practices."

**CONCLUSION**

Thus, restrictions on NEA funding of "blasphemous" works would violate freedom of speech and freedom of religion. Because the subject matter of the artwork is constitutionally protected, Congress cannot discriminate on the basis of that subject matter in making grants:

"[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them."