Reauthorization: Williams/Coleman Compromise (October 27, 1990): Memorandum 03

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MEMORANDUM

FROM: James F. Fitzpatrick

RE: Critique of Constitutional Issues Raised by Section 103(a) in Williams/Coleman Compromise Version of H.R. 4825

Although the new compromise version of H.R. 4825 purports to deny funding only for obscene works based on the Supreme Court's Miller v. California standards, in fact Section 103(a) of the bill may create new, unconstitutional grant approval standards. Section 103(b) requires that, in grantmaking regulations and procedures which the NEA shall promulgate, the Chairman "shall ensure" that applications are judged not only in terms of artistic excellence and merit but also "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." This provision clearly sets up two new funding approval hurdles, beyond the obscenity criterion, which are patently unconstitutional.

What do these new "standards" mean? How can one determine whether a particular work of art is within "general standards of decency" or respects "the diverse beliefs and values of the American public"? Is
Michelangelo's David "decent"? Would a parody of revered figures like Washington, Jefferson or Lincoln be "disrespectful" to our cultural heritage?

And what is "the American public"? As the Supreme Court has emphasized, "People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." Miller v. California, 413 U.S. 15, 33 (1973). Whose "diverse beliefs" -- Fundamentalist Christians, Orthodox Jewish, Moslem, Christian Science, Unitarian, or all of them -- provide the test for "respectfulness"? And whose "values"?

These funding standards are so broad as to have no specific content meaning; they permit an administrator to make speech-based decisions without any fixed standards. Consequently, they will chill creative output because an artist simply will have no clear indication of their meaning. All of these considerations have led the Supreme Court consistently to hold vague and amorphous content standards such as these to be unconstitutional.

Moreover, these provisions raise again serious procedural concerns which were effectively dealt with in the obscenity context by removing the basic constitutional determinations from a bureaucrat's desk and placing them in the hands of a court. These two new
standards could be read to require the Chairman to be prepared to defend to any public official that a particular grant was decent and respectful, because the Chairman may be said to "ensure" that NEA grants are so endowed.

The Supreme Court has emphasized that standards of vagueness are especially stringent in the First Amendment context. In *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), the Court stressed that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

*Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), exemplifies the Court's intolerance of such amorphously vague standards as "decency" in the context of restrictions upon First Amendment freedoms. In *Shuttlesworth*, the Court struck down as unconstitutionally vague a statute that encroached on First Amendment freedoms by permitting city officials to deny a parade permit if the officials believed that "decency, good order, morals or convenience require that it be refused" (emphasis added). The Court stated that "subjecting the exercise of First Amendment freedoms to [restrictions] without narrow, objective, and definite
standards . . . is unconstitutional." Id. See also Pope v. Illinois, 481 U.S. 497, 504 (1987) (Scalia, J. concurring) (content restrictions on art would require the interpretation of artworks that may be ambiguous, obscure, or unintelligible to some, and therefore are especially prone to arbitrary or discriminatory enforcement); Erznoznick v. City of Jacksonville, 422 U.S. 205, 213 (1975) (statute barring depictions of nudity is unconstitutionally vague; it "might prohibit newsreel shots of the opening of an art exhibit").

The notion of "disrespectful" speech is similarly unconstitutionally vague. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Court struck down a licensing requirement that allowed "sacrilegious" films to be censored. The Court wrote:

In seeking to apply the board 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.

Id. at 504-05. In his concurring opinion in Burstyn, Justice Frankfurter stated that "[t]o allow such vague, indefinable powers of censorship is bound to have stultifying consequences on the creative process of
literature and art." *Id.* at 531. Likewise, in *Bullfrog Films v. Wick*, 847 F.2d 502, 513-14 (9th Cir. 1988), the Ninth Circuit struck down as unconstitutionally vague regulations that denied certification to materials "which appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices." *Id.* at 505. The Court stressed that "[s]uch content-based distinctions are patently offensive to the First Amendment." *Id.* at 511.

Even setting aside their inherent vagueness, the standards set by H.R. 4825 run afoul of long-established First Amendment principles. While Congress may constitutionally impose sanctions for obscene speech -- which is a form of expression not protected by the First Amendment -- H.R. 4825 reaches far beyond the obscene in these two new standards. Under well-established constitutional principles, "indecent" speech and "disrespectful" speech are both protected by the First Amendment, which flatly forbids restrictions on the expression of an idea on the mere ground that the idea may be offensive or disagreeable.

First, "indecent" speech does not fall within the scope of the obscenity exception and, therefore, is accorded broad First Amendment protection. In *Sable Communications v. FCC*, 109 S. Ct. at 2836, the Supreme Court stressed that "[s]exual expression which is
indecent but not obscene is protected by the First Amendment." In FCC v. Pacifica Foundation, the Court noted that "the normal definition of 'indecency' merely refers to nonconformance with accepted standards of morality." 438 U.S. 726, 740 (1978). The Court emphasized that "indecent" materials are not necessarily obscene, and that materials can be "indecent" even in the absence of prurient appeal. Id. Merely "indecent" works do not meet the Miller test and are therefore protected by the First Amendment.¹ Thus, whatever may be meant by "decency" -- and the term may well be unconstitutionally vague -- the First Amendment stringently limits restrictions on indecent speech or art.

Second, the proposed criterion that artistic works "respect . . . diverse beliefs and values" is particularly repugnant to Court precedent. The regulation of "dis respectful" speech is completely inconsistent with the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

¹ In Carlin Communications v. FCC, the Second Circuit emphasized that "Were the term 'indecent' to be given meaning other than Miller obscenity, we believe the statute would be unconstitutional." 837 F.2d 546, 560 (2d Cir.), cert. denied, 109 S.Ct. 305 (1988).
disagreeable." Id. at 2544. Thus, even speech that is "doubtless gross and repugnant in the eyes of most" or that "may have an adverse emotional impact on the audience" is protected by the First Amendment. Hustler Magazine v. Falwell, 108 S. Ct. 876, 879, 882 (1988).

"[A]ny suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." United States v. Eichman, 58 L.W. at 4746. One function of art is to challenge, not merely entertain, its viewers:

[A] principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."


CONCLUSION

Thus, the decency and disrespect provisions of Section 103(a) in the compromise version of H.R. 4925 have serious constitutional implications. Because the subject matter of the artwork is constitutionally protected, Congress cannot discriminate on the basis of that subject matter in making grants. As the Supreme Court ruled long ago:
Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings the public will pick and choose.