

COMMENTS

Brooklyn Institute of Arts & Sciences v. City of New York: The Death of the Subsidy and the Birth of the Entitlement in Funding of the Arts

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*Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?*¹

INTRODUCTION

In *Brooklyn Institute of Arts & Sciences v. City of New York*,² the hallowed halls of the Brooklyn Institute of Arts and Sciences (the “Brooklyn Museum of Art”) provided a First Amendment battleground, generating enormous publicity. Noise from City Hall and the sounds of shuffling feet in Brooklyn echoed as the Brooklyn Museum of Art sought a preliminary injunction barring the im-

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1. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, P 3, reprinted in *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 65-66 (1947) (appendix to dissent of Rutledge, J.).

2. 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

position of penalties by Mayor Giuliani and the City for the Museum's exercise of its First Amendment rights.³

The City had withheld funds appropriated to the Museum for operating expenses and maintenance,⁴ and also sought to eject the Museum from its City-owned land and building due to the display of a controversial exhibit "Sensation: Young British Artists from the Saatchi Collection," which allegedly constituted a violation of the terms of the Museum's lease and contract with the City of New York.⁵ The Exhibit contained works of art that were offensive to the religious sensibilities of many in the community, in particular, Roman Catholics.⁶ "The Holy Virgin Mary," by Chris Ofili, was one such work which depicted the Virgin Mary covered with elephant dung, and surrounded by photographs of buttocks and female genitalia.⁷

The United States District Court for the Eastern District of New York was thus forced to determine, inter alia, whether the de-

3. See *id.* at 186, 191-92. The Museum commenced this action on September 28, 1999, pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief to prevent the defendants from punishing or retaliating against the Museum for displaying the "Sensation" Exhibit, in violation of its rights under the First and Fourteenth Amendments. The subjects of plaintiff's October 1, 1999 amended complaint, namely claims of violation of the Equal Protection Clause and state and local law, will not be dealt with in this Comment; see also U.S. CONST. AMEND. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . .").

4. See 64 F. Supp. 2d at 186-193; see also Brief for Appellant at 3, *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999)(No. 99-9326) [hereinafter Appellant's Brief].

5. See Appellant's Brief at 3.

6. See *id.* at 50-51. The Exhibit included approximately ninety works of contemporary British artists, several of whom have been recognized by the artistic community. See 64 F. Supp. 2d at 190. Besides "The Holy Virgin Mary," the exhibit also contained several pieces by Damien Hirst, who works mostly in dead fish and animals. These included a shark, a sliced-up cow, a lamb and a bisected pig in formaldehyde-filled cases and a Rube Goldberg-like device in which maggots fed on a dead cow's head and gave birth to flies, which were eventually zapped by an electrical device called an "insect-o-cutor." See *Excerpts from the New York Times Coverage of the Opening of "Sensation," an Exhibit of New Art at the Brooklyn Museum of Art*, WKLY. STANDARD, Oct. 11, 1999, at 40.

7. See Appellant's Brief at 50-51; see also, 64 F. Supp. 2d at 186. "The pitiful justification given by the 'artist' Chris Ofili is that elephant dung has cultural significance in Africa. But the cutouts he used were taken from a purely American icon, the glossy pornographic photo-magazine. There is nothing African about that. . . Ofili was born in Britain, not Africa." David Fielding, editorial, *Bowing To Blasphemy*, PITTSBURGH POST-GAZETTE, Oct. 12, 1999, at A-10.

nial of a benefit, subsidy, or contract operates as a penalty for engaging in certain forms of speech, in violation of the First Amendment.⁸ The Court was faced with the question of whether this case involved “requiring [taxpayers] to support a particular point of view, [or] barring government officials from invidiously discriminating against ideas they find offensive, either to themselves or to members of the community.”⁹ Judge Nina Gershon, who wrote the opinion, decided the latter.¹⁰

In granting the Brooklyn Museum’s request for a preliminary injunction, the District Court stated that Defendants’ actions constituted “viewpoint discrimination.”¹¹ Following Judge Gershon’s decision, Mayor Giuliani claimed that the Judge had “lost all reason,” and the City filed a brief on appeal to the United States Court of Appeals for the Second Circuit on November 24, 1999.¹² After a heated six-month legal clash between the City and the Brooklyn Museum, both sides eventually reached a settlement on March 27, 1999, which was approved and signed by District Court Judge Nina Gershon.¹³ As part of the settlement, the City of New York and the Brooklyn Museum “agreed to drop dueling lawsuits over the “Sensation” Exhibit and pay their own legal fees.”¹⁴ The deal restored all City funding previously allocated to the Museum and also committed the City to grant \$5.8 million over two years for a museum renovation project.¹⁵ The deal also left unresolved the is-

8. See 64 F. Supp. 2d at 199.

9. *Id.* at 201.

10. See *id.* at 205-06. The Court issued a preliminary injunction proscribing the City of New York from taking any steps to inflict any punishment or sanction of any kind against the Brooklyn Museum as a result of the “Sensation” Exhibit, including but not limited to: withholding any money appropriated to the Museum; denying or discriminatorily treating future funding requests of any kind due to the Exhibit; evicting or seeking to evict the Museum from its city-owned premises; and interfering, directly or indirectly, with the composition of the Board of Trustees of the Museum. See *id.*

11. See *id.* at 200 (“[The City] has acknowledged that its purpose is directly related, not just to the content of the exhibit, but to the particular viewpoints expressed. There can be no greater showing of a First Amendment violation.”).

12. See Appellant’s Brief; see also David Barstow, *Oct. 31 - Nov. 6: A Ruling Against Giuliani*, N.Y. TIMES, Nov. 7, 1999, at B2.

13. See *City, Art Museum Reach Settlement in Lawsuits*, ST. LOUIS POST-DISPATCH, Mar. 29, 2000, at A10.

14. See *id.*

15. See *id.*; see also *Scrap Over Art Costs New York \$5.8 Million*, LONDON FREE

sues presented by the suit, particularly, what strings the government can constitutionally attach to the use of its money. The Supreme Court, however, did recently grant certiorari in a strikingly similar First Amendment issue, the consolidated cases of *Legal Services Corp. v. Velazquez* and *United States v. Velazquez*.¹⁶

Regardless of whether the District Court arrived at the correct decision in *Brooklyn Institute of Arts & Sciences*, this Comment argues that the court's opinion articulated no limiting principle. Judge Gershon essentially left open the possibility of the government being an "unwilling perpetual partner to every form of expression its subsidy recipients choose to utter after subsidies begin."¹⁷ Part I explains the history and purpose of the Brooklyn Museum of Art, its lease and contract with the City of New York, and its involvement with the Sensation Exhibit. Part I also analyzes the Supreme Court's First Amendment jurisprudence in the area of what conditions the government is forbidden to attach to its subsidies through five recent cases, and also introduces the doctrine of viewpoint discrimination. Part II discusses the District Court's holding in *Brooklyn Institute of Arts & Sciences*. Part III argues that the decision in *Brooklyn Institute of Arts & Sciences* has the effect of forbidding government to attach *any* content-based conditions to art subsidies, and contains no limiting principle. Finally, this Comment concludes that the *Brooklyn Institute of Arts & Sciences* decision gives unfettered discretion to the boards of directors of any city-funded museums (including New York

PRESS, Mar. 29, 2000, at C5.

16. *Legal Servs. Corp. v. Velazquez*, 2000 LEXIS 2363, *cert. granted*, 68 U.S.W.L. 3629 (U.S. Apr. 3, 2000) (No. 99-603) together with *United States v. Velazquez*, 2000 U.S. LEXIS 2364 (U.S. Apr. 3, 2000) (No. 99-960); *See* Joan Biskupic, *High Court Will Consider Limits of Legal Aid to Poor*, WASHINGTON POST, Apr. 4, 2000, at A2; *see also* Linda Greenhouse, *Weighing Restrictions on Legal Aid for Poor*, (Apr. 4, 2000) <<http://www.nytimes.com/library/politics/scotus/articles/040400legal-welfare.html>>:

The [Supreme Court] agreed to decide whether Congress had violated the First Amendment when it restricted the types of arguments that lawyers supported by Legal Services Corporation can make on behalf of clients seeking welfare benefits. Under the restriction, the lawyers can help clients who are seeking to receive or restore specific welfare benefits, but may not become involved in "an effort to amend or otherwise challenge existing [federal or state welfare] law."

Id.

17. Appellant's Brief at 57.

City, as the settlement extends only until the end of Mayor Giuliani's term) and this may very well result in ending all government funding of the arts.

I. BACKGROUND

A. *The History of the Brooklyn Museum of Art*

The Brooklyn Museum originated as the Brooklyn Apprentices' Library, founded in 1823, and was located in what is presently known as Brooklyn Heights.¹⁸ In 1843, the Brooklyn Institute, the Library's successor, was incorporated, and expanded its collection over the next several decades.¹⁹ By the late 1800s, prominent citizens and public figures of the independent City of Brooklyn conceived of a plan to vastly expand the Institute's collections and provide an immense new building, rivaling the combined collections of the Metropolitan Museum of Art and the Museum of Natural History.²⁰ In 1889, the New York State Legislature passed a statute which authorized setting aside a portion of land in Prospect Park "for building sites for museums of art and science and libraries," leasing such sites at nominal rent for up to one hundred years to corporations "created for educational purposes," provided that "such museums and libraries shall at all reasonable times be free, open, and accessible to the public and private schools of the said city, and open and accessible to the general public on such terms as the said mayor and the commissioners shall approve. . . ."²¹ In addition to the state legislation incorporating the Brooklyn Museum and authorizing the use of City parkland for it, the relationship between the City and the Brooklyn Museum is governed by a lease and a contract.²² These documents consis-

18. See *Brooklyn Inst. of Arts & Sciences*, 64 F. Supp. 2d at 186; see also Brief for Appellee at 4, *Brooklyn Inst. of Arts & Sciences* (No. 99-9326) [hereinafter Appellee's Brief].

19. See 64 F. Supp. 2d. at 186; see also Appellee's Brief at 4.

20. See 64 F. Supp. 2d at 186-87; see also Appellee's Brief at 4.

21. Laws of N.Y. 1889, ch. 372, § 2. The Brooklyn Institute was reorganized into the Brooklyn Institute of Arts and Sciences, now known as the Brooklyn Museum of Art, by the New York State Legislature in 1890. See Laws of N.Y. 1890, ch. 172.

22. See Appellant's Brief at 5. The City of Brooklyn leased the land to the Institute on December 23, 1893 the City of Brooklyn leased the land to the Institute for a term of

tently track the language of the 1889 Act as to the use of the property and the requirements for access to the Museum by schoolchildren and the general public.²³ They further provide that if the Museum is not maintained to further its legislatively mandated purpose, the lease shall be forfeited.²⁴

B. *City Funding of the Brooklyn Museum*

The City's contract with the Museum provides that "[the City] shall pay to the [Institute] each year such sum as may be necessary for the maintenance of said Museum Building, or as may be authorized by law or be apportioned or appropriated by [the City]."²⁵ The City's appropriation for the fiscal year 2000 to the Museum's "extensive collection," specifies that the funding contributes to the "maintenance, security, administration, curatorial, educational services, and energy costs."²⁶ The City subsidy as allocated by the City Counsel amounts to \$7.2 million per year, paid in monthly installments, which is approximately twenty-eight percent of the Museum's operating budget.²⁷

It is the City's position that the Museum "must administer the

one hundred years. In addition, the City of Brooklyn subsequently entered into a building lease and contract with the Institute to house the Institute's collections for a term coextensive with the lease. The City of New York is the successor to the City of Brooklyn under the lease and contract. When the original term of the lease agreement expired in December 1993, the Museum remained a tenant in possession of the land and the building on the same terms and conditions as contained in the lease and contract. The contract also provides that the Mayor nor the City of Brooklyn do not have any ownership rights with respect to the collections housed in the Museum Building, and that such collections remain the sole property of the Brooklyn Institute. *See* 64 F. Supp. 2d at 187-88.

23. *See* Appellant's Brief at 5; *see also* 64 F. Supp. 2d at 187.

24. *See* 64 F. Supp. 2d at 187-88 ("[I]f and when such museums . . . shall cease to be maintained according to the true intent and meaning of said act, and of this lease, then this lease shall be forfeited, and the said lands, and buildings thereon erected shall revert to the City of Brooklyn.") (quoting Lease Agreement).

25. *Id.* at 189 (quoting Contract).

26. *See* Appellant's Brief at 4 (quoting City's Fiscal Year 2000 appropriation to the Museum).

27. Most of the Museum's operating budget (which is about \$25 million) comes from private contributions, membership fees, admission charges, and other non-governmental sources. *See* Appellee's Brief at 7; *see also* Greg B. Smith, *Judge To Rudy: Give Back Museum Funds*, DAILY NEWS, Nov. 2, 1999, at 7 (noting that the City cut off a \$7.2 million subsidy to the Brooklyn Museum because of the content of the "Sensation" Exhibit.).

funds in a manner consistent with its longstanding obligations, which reflect the purpose of the Museum's operations on City property."²⁸ Under section 1110 of the New York City Charter, the Mayor, the City's Commissioner of Cultural Affairs, Schuyler Chapin, and other City officials are "trustees of the property, funds, and effects of the City," and therefore are responsible for ensuring that funds appropriated by the City are administered appropriately.²⁹

The City was not asked to fund the "Sensation" Exhibit, or any particular exhibit.³⁰ Rather, the City's annual final report and budget request form is designed to determine, inter alia: the general purposes and plans of the Brooklyn Museum; descriptions of immediate past and future programming; accomplishments and plans for educational programs; and financial data.³¹

C. *The "Sensation" Exhibit*

In addition to displaying works from its 1.5 million object permanent collection (which includes Egyptian, classical and ancient middle eastern art, painting and sculpture, arts of Africa, the Pacific, and the Americas, Asian art, decorative arts, costumes and textiles, and prints, drawings, and photography), the Brooklyn Museum regularly displays temporary exhibits.³² The exhibit, "Sensation: Young British Artists from the Saatchi Collection," (hereinafter "Sensation" Exhibit or "Sensation") was arranged to be displayed from October 2, 1999 through January 9, 2000.³³ The "Sensation" Exhibit, from a collection owned by Charles Saatchi, was first shown in 1997 at the Royal Academy of Art in London, where it drew record crowds and became the center of controversy.³⁴

Brooklyn Museum's Director, Arnold L. Lehman, responsible for making the ultimate selection of works of art for exhibition at

28. See Appellant's Brief at 4-5.

29. See *id.* at 5.

30. See 64 F. Supp. 2d at 189-90.

31. See *id.* at 189-90.

32. See *id.* at 188-89.

33. See Appellant's Brief at 5.

34. *Id.*

the Museum, first viewed “Sensation” in London, and decided to bring it to New York.³⁵ In deciding whether to exhibit a particular piece of art, Lehman does not take into consideration the art’s potentially offensive nature; rather, the only selection criteria he has are the artist’s intention, his own professional judgment, and context.³⁶ Lehman considered the works in “Sensation” to be “challenging,”³⁷ partly because they were sexually explicit.³⁸

One of the most controversial works, which Lehman had viewed and approved prior to the Exhibit’s opening, was the eight foot long by six foot high painting by Chris Ofili entitled, “The Holy Virgin Mary.”³⁹ The painting depicted the Virgin Mary with a clump of elephant dung at her right breast and cutouts of buttocks and female genitalia from pornographic magazines surrounding her.⁴⁰ In fact, Ofili had been quoted in the press as saying, “I think the Virgin Mary was an excuse for pornography in the homes of these holy priests and godfearers.”⁴¹ On September 22, 1999, Mayor Giuliani, a Roman Catholic, responded negatively when he became aware of the inclusion of “The Holy Virgin Mary” in the then-forthcoming exhibit:

It offends me. . . . You don’t have a right to a government subsidy to desecrate someone else’s religion. And therefore we will do everything we can to remove funding from the Brooklyn Museum until the director [Arnold Lehman] comes to his senses. . . . What the city is going to do is try to remove all the funding it pos-

35. *See id.* at 6; *see also* 64 F. Supp. 2d at 190.

36. *See* Appellant’s Brief at 6.

37. *Id.*

38. *Id.* Mayor Giuliani also accused Museum officials of unethically helping Charles Saatchi, the owner of the “Sensation” Exhibit, to inflate the value of his art. *See* Smith, *supra* note 27, at 7. Saatchi, a client of Christie’s, proposed that it contribute to the Exhibit. Christie’s eventually contributed \$50,000 for the exhibit at the Brooklyn Museum, its most significant financial commitment to a temporary exhibit to date, as well as costs for printing of invitations to the pre-gala opening event, and an \$8,000 magazine ad. Saatchi also contributed £100,000 towards the costs of the Exhibit at the Museum. *See* Appellant’s Brief at 9-10. “You’ve got to be putting your head in the sand to think this is about the First Amendment. This is about making millions and millions of dollars by aggressively and viciously attacking the religion that many people in New York City hold dear.” Smith, *supra* note 27, at 7 (quoting Mayor Giuliani).

39. *See* Appellant’s Brief at 6.

40. *See id.*

41. *See id.*

sibly can from the Brooklyn Museum, and send them a message. Because taxpayers' dollars should not be used to support an exhibit where somebody has apparently done a collage . . . in which elephant dung is splattered on linen [and] is called the Holy Virgin Mary. . .⁴²

Originally, due to the "challenging" nature of the exhibit, the Brooklyn Museum planned on charging an admission fee, and barring children under seventeen years of age unless accompanied by an adult.⁴³ Upon the City's observation that this restriction would violate the lease without getting City approval (which would not be forthcoming), the Museum decided to admit children with a posted warning recommending parental guidance: "*HEALTH WARNING: The contents of this exhibition may cause shock, vomiting, confusion, panic, euphoria, and anxiety. If you suffer from high blood pressure, a nervous disorder, or palpitations, you should consult your doctor before viewing this exhibition.*"⁴⁴ After the Museum decided to proceed with the exhibit deemed inappropriate for schoolchildren, Mayor Giuliani issued a statement that the City funds would be discontinued because the Museum violated "a state statute, their lease and contract with the City."⁴⁵ The Mayor also

42. See Appellee's Brief at 11-12. The Mayor also referred to a Damien Hirst work of two pigs preserved in formaldehyde and displayed in two glass tanks as "sick stuff" to be exhibited in an art museum and that the city should not have to pay for it. See *id.*; see also 64 F. Supp. 2d at 191.

43. See Appellant's Brief at 7; see also Appellee's Brief at 9-10.

44. Appellant's Brief at 7. At his press conference on September 23, 1999, the Mayor stated:

The lease under which the museum operates says they have to keep it open, with equal access to everyone, including public and private school children. And the fact is that the people running the museum find this exhibit so horrendous and so disgusting that they are not allowing children in without the permission of their parents. That's a direct violation of the lease. . . The lease says that in order to close down access the Museum has to get the permission—it has in fact to be reasonable—[of] the Mayor and [of] the Commissioner. Last time I checked [I'm] the Mayor and I don't find closing down access to a public museum consistent with the use of tax-payer dollars and that's the whole problem here.

Appellee's Brief at 14.

45. Appellant's Brief at 14 (quoting Mayor Giuliani). In response to the City's threats that it would withhold the Museum's monthly payment of \$497,554, due on October 1, 1999, the Museum commenced the action that is the subject of this Comment on September 28, 1999. See 64 F. Supp. 2d at 191-92.

insinuated that the Museum's Board had not fulfilled its responsibilities and should be replaced.⁴⁶ On September 30, 1999, two days after the Museum commenced its lawsuit for a preliminary injunction, the City commenced an ejectment action against the Brooklyn Museum in New York State Supreme Court, Kings County.⁴⁷

D. *The Doctrine of Unconstitutional Conditions and its Application to Brooklyn Institute of Arts & Sciences*

The doctrine of unconstitutional conditions concerns whether the government may condition the receipt of a benefit (i.e. subsidy, loan, grant) on the recipient's waiver of a constitutional right.⁴⁸ The traditional view, advocated by Justice Holmes, is that courts should rarely involve themselves in overturning what may be an unconstitutional condition.⁴⁹ This view posits that a governmental benefit, by definition, is akin to governmental charity.⁵⁰ Thus, the greater power to withhold the subsidy necessarily includes the lesser power to condition receipt of such subsidy on the recipient's agreement to give up a right.⁵¹ Additionally, if the potential recipient chooses to exercise her constitutional right and forego the subsidy, "she is in no worse a position than if the government had offered her no subsidy in the first place."⁵²

Although courts have rejected the Holmesian position in other contexts,⁵³ the Supreme Court's unconstitutional conditions jurisprudence in the context of the First Amendment's speech and press

46. See Appellant's Brief at 14.

47. See *id.*; see also 64 F. Supp. 2d at 192.

48. See Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. CR.-C.L. L. REV. 107, 127 (1998).

49. See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 597 (1990).

50. See Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 549 (1996).

51. See *id.*

52. *Id.* at 549.

53. Holmes' position is not without flaw in the context of the Fourteenth Amendment's Equal Protection clause. Although there is no free-standing right to receive welfare, the government may not give welfare only to whites, for example, since it would violate every person's right to equal racial treatment under the law. See *id.* at 550.

clause has been murky. An analysis of five recent decisions—*Hannegan v. Esquire, Inc.*⁵⁴ *Regan v. Taxation With Representation of Washington*,⁵⁵ *Rust v. Sullivan*,⁵⁶ *Rosenberger v. Rector and Visitors of the University of Virginia*,⁵⁷ and *National Endowment of the Arts v. Finley*⁵⁸—provides the framework for understanding the present unconstitutional conditions doctrine, and also introduces the doctrine of viewpoint discrimination, the First Amendment doctrine that underlies the Brooklyn Museum’s claim that the City’s withdrawal of its operating subsidy due to the content of the “Sensation” Exhibit was unconstitutional.

1. *Hannegan v. Esquire, Inc.*

Hannegan was a case involving postal subsidies for periodicals.⁵⁹ In *Hannegan*, the Supreme Court held that the Postmaster General could not deny second-class postal privileges to *Esquire* magazine, admittedly not containing material that was obscene and therefore illegal, because he found it not to be conducive to the “public good.”⁶⁰ The Court essentially ruled that the First Amendment bars government officials from censoring works said to be “morally improper.”⁶¹ Judge Gershon in *Brooklyn Institute of Arts & Sciences* broadly read *Hannegan* as supporting the proposition that government cannot suppress ideas indirectly, by the denial of a benefit, any more than it can do so directly.⁶²

2. *Regan v. Taxation With Representation of Washington*

In *Regan*, the Supreme Court held that Congress could constitutionally condition special tax status under the Internal Revenue Code (in which certain not-for-profit entities (excluding veterans’ organizations) were able to receive tax deductions for their donations) on an agreement by not-for-profit organizations to refrain

54. 327 U.S. 146 (1946).

55. 461 U.S. 540 (1983).

56. 500 U.S. 173 (1991).

57. 515 U.S. 819 (1995).

58. 524 U.S. 569 (1998).

59. See *Hannegan*, 327 U.S. 146 (1946).

60. *Id.* at 149.

61. See *id.*

62. See 64 F. Supp. 2d at 199.

from lobbying.⁶³ In rejecting TWR's claim that Congress had to subsidize the lobbying activities of all organizations which qualified for tax-exempt status since it had chosen to subsidize the veterans' organizations, the Court held that Congress may choose which activities to subsidize and which activities to refrain from subsidizing, regardless of whether the recipient is exercising a constitutional right.⁶⁴

The Court in *Regan* expressly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."⁶⁵ The Court's holding had a caveat, however. The decision cautioned that some restrictions on speech which "aim at the suppression of dangerous ideas" may violate the Constitution.⁶⁶ Because the Internal Revenue Code permitted the not-for-profit entity to establish a separately incorporated organization to engage in lobbying, the condition was not unconstitutionally burdensome.⁶⁷

3. *Rust v. Sullivan*

Rust involved Congress' refusal to fund family planning counseling which encouraged, promoted, recommended, or provided referrals to patients for abortion.⁶⁸ Congress had conditioned receipt of federal grants under Title X of the Public Service Act⁶⁹ by family planning medical clinics on their waiver of their First Amendment right to provide their patients with information about abortion as a method of family planning.⁷⁰ The Court ruled that government

63. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549-52 (1983).

64. See *id.* at 545-46.

65. *Id.* at 546 (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).

66. *Id.* at 548 (quoting *Cammarano*, 358 U.S. at 513).

67. See *id.* at 544 n.6.

68. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

69. 42 U.S.C.S. §§ 300-300a-41 (1970).

70. See *Rust*, 500 U.S. at 203. In 1988, the Secretary of Health and Human Services promulgated new regulations (42 C.F.R. 59.8 (a)(1); 59.10(a); and 59.9 (1989)), which specified that projects receiving Title X funds (1) may not provide counseling concerning the use of abortion, or referral for abortion, as a method of family planning; (2) may not engage in activities that encourage, promote, or advocate abortion as a method of family planning; and (3) must be organized so that they are physically and financially separate

is not obliged to subsidize all points of view when it funds some.⁷¹ When it funds selectively, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.”⁷² For example, the Court stated that Congress acted lawfully when it appropriated money to promote democracy abroad and:

[w]as not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. . . . Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.⁷³

The Supreme Court in *Rust* likened the doctors receiving Title X funds to carriers of a government message about family planning.⁷⁴ The *Rust* Court relied in part on the fact that Title X grantees were able to advise and counsel patients about abortion through separate, affiliated programs that did not receive federal funds.⁷⁵ The Court warned, however, that:

[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized that the existence of a Government “subsidy,” in the form of Government-owned property, does not justify the restriction of speech in areas that have “been traditionally open to the public for expressive activity, or have been ‘expressly dedicated to speech activity’ Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached

from prohibited abortion activities. *See* 500 U.S. at 179-81.

71. *See* Appellant’s Brief at 47.

72. *Rust*, 500 U.S. at 193.

73. *Id.* at 194.

74. *See id.* at 193.

75. *See id.* at 196-99.

to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.⁷⁶

4. *Rosenberger v. Rector & Visitors of the University of Virginia*

The *Rust* Court's dicta regarding universities as a traditional sphere of free expression became the focus of the Court's direct holding in *Rosenberger*. In *Rosenberger*, the University of Virginia refused to fund a Christian student journal, while other student publications had received funds from the University's Student Activities' Fund (SAF).⁷⁷ The Supreme Court, stating that religion was a viewpoint like any other, held that the University had violated WAP's members constitutional free speech rights. The University thus could not exclude such viewpoints from SAF's neutral entitlement program.⁷⁸ The University regulations prohibited the funding of any "religious organization," defining it as one whose purpose "is to practice a devotion to an acknowledged ultimate reality or deity."⁷⁹ The Court explained that religion provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal [to provide University support]."⁸⁰ Because the University, which cre-

76. *Id.* at 199-200 (citations omitted).

77. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). *Rosenberger* entailed the Supreme Court being forced to construct a hierarchy among two First Amendment rights. The University's attempt to maintain a separation of church and State implicated the Establishment Clause. Simultaneously, the petitioners' challenge of a government policy which denied benefits on a speaker's message involved the Free Speech Clause. The Supreme Court finally applied the Free Speech Clause to prohibit the University from making content-based distinctions. See Mark Daniel Salzberg, Comment, *Rosenberger v. Rector & Visitors of the University of Virginia: The Myth of the Content Neutral Establishment Clause*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 871, 871-73 (1996).

78. See *Rosenberger*, 515 U.S. at 833-37. The University examined the Wide Awake Production (WAP) organization's publication, *Wide Awake: A Christian Perspective at the University of Virginia* ("Wide Awake") and found that the journal contained an invocation of religious—specifically Christian—themes. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 272 (4th Cir. 1994).

79. *Rosenberger*, 515 U.S. at 826 (citing University Regulations).

80. *Id.* at 831.

ated a limited public forum, refused to fund based on a broadly-defined “religious viewpoint,” the Supreme Court held that the exclusion was an unconstitutional abridgment of First Amendment rights.⁸¹

The *Rosenberger* Court noted that “[W]hen the State is the speaker, it may make content-based choices.”⁸² On the other hand, when the government “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers,” viewpoint-based restrictions are improper.⁸³

5. *National Endowment of the Arts v. Finley*

In 1998, the Supreme Court decided *Finley*, upholding a congressional mandate that the National Endowment for the Arts (NEA) consider “general standards of decency and respect for the diverse beliefs and values of the American public” when making grant decisions.⁸⁴ The Court distinguished *Rosenberger*, since in that case there was no competitive process according to which grants were allocated.⁸⁵ The subsidy in *Rosenberger* was available to all student organizations that were “related to the educational purpose of the University [of Virginia].”⁸⁶ The *Finley* Court stated:

In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately ‘encourage a diversity of views from private speakers.’ . . . The NEA’s mandate is to make aesthetic judgments, and the inherently content-based “excellence” threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*. . .⁸⁷

The Court further explained that the selectivity inherent in arts

81. *Id.* at 835-37.

82. *Id.* at 833.

83. *Id.* at 834.

84. *National Endowment of the Arts v. Finley*, 524 U.S. 569, 576 (1998) (quoting 20 U.S.C. § 954(d)(1)(1990)).

85. *See id.* at 586.

86. *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824 (1995)).

87. *See id.* (quoting *Rosenberger*, 515 U.S. at 834).

subsidies made this activity completely different “from comparably objective decisions on allocating public benefits, such as access to . . . the second class mailing privileges available to ‘all newspapers and other periodical publications’” in *Hannegan*.⁸⁸ It noted that the NEA grants are awarded according to artistic worth and that absolute neutrality is simply “inconceivable.”⁸⁹ In noting unique role of government in this case, the *Finley* Court explained that the government may do things as a patron that it could not do via “direct regulation of speech or a criminal penalty at stake.”⁹⁰

Viewing the statute as merely hortatory, the Supreme Court found hypothetical the risk of actual viewpoint discrimination that the respondents emphasized.⁹¹ The Court cautioned, however, that it would have faced a more pressing constitutional question had government funding caused “the imposition of a disproportionate burden calculated to drive ‘certain ideas or viewpoints from the marketplace.’”⁹²

The Supreme Court was never faced with a case involving the precise issue in *Brooklyn Institute of Arts & Sciences*, that is, what speech and press conditions may government constitutionally attach to its subsidies, with specific reference to museums. The Court in *Rust* cautioned against government control over the content of expression only in universities, or areas that have “been traditionally open to the public for expressive activity.”⁹³ Similarly, the Court’s decision in *Rosenberger* was predicated on the fact that the University of Virginia created a limited public forum for stu-

88. *Id.* (quoting *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148, n.1 (1946)).

89. *National Endowment of the Arts v. Finley*, 524 U.S. 569, 585 (1998) (quoting *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795-96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976)).

90. *Id.* at 587-88.

91. *See id.* at 586-87. (“Respondents do not allege discrimination in any particular funding decision . . . Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination.”).

92. *Id.* at 587 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). “Unless and until § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision.” *Id.*

93. *Rust*, 500 U.S. at 199-200.

dent expression.⁹⁴ In addition to the Supreme Court, lower courts have also consistently held that viewpoint discrimination is unconstitutional in public forums which are “traditionally open for the most unregulated expression.”⁹⁵

Notably, the Supreme Court has cautioned, however, against “mechanical” application of forum analysis in contexts removed from the doctrine’s historic roots, namely, setting the principles for regulating expression in “streets and parks.”⁹⁶ “The hallmark of a forum is openness,” and arts subsidies are one such context which cannot be subject to forum analysis.⁹⁷ In *Finley*, the Court differentiated the selectivity that is at the heart of arts subsidies from “comparably objective decisions on allocating public benefits . . . such as access to . . . the second class mailing privileges available to ‘all newspapers and other periodical publications’” in *Hannegan*,⁹⁸ as well as “access to a school auditorium or a municipal theater.”⁹⁹ In this case, the Brooklyn Museum is not open to any artist desiring to display his or her works; rather, the board of directors make discretionary judgments when selecting exhibitions for display.¹⁰⁰

II. CONTROVERSY: *BROOKLYN INSTITUTE OF ARTS & SCIENCES V. CITY OF NEW YORK*

As a result of the Brooklyn Museum’s First Amendment action commenced pursuant to 42 U.S.C. section 1983, the United States District Court issued a preliminary injunction barring the City from withdrawing funds from the Brooklyn Museum, equating the loss of their subsidy with censorship and viewpoint discrimination.¹⁰¹

94. See *Rosenberger*, 515 U.S. at 834.

95. *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 278-79 (2d Cir. 1997) (discussing different types of forums).

96. See *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 672 (1998) (explaining that television station owners must “exercise substantial editorial discretion” in selecting programming, and such stations are not “open on a non-selective basis to all persons wishing to talk about public issues.” *Id.* at 673 (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 105 (1973)).

97. Appellant’s Brief at 21.

98. *Finley*, 524 U.S. at 586 (quoting *Hannegan*, 327 U.S. at 148).

99. *Id.*

100. See Appellant’s Reply Brief at 22.

101. See *Brooklyn Instit. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d

The District Court analogized this case to *Cuban Museum of Arts & Culture, Inc. v. City of Miami*.¹⁰² In that case, the City of Miami was enjoined from refusing to renew an expired lease with the Cuban Museum because the court held that the City had violated the Museum's First Amendment rights.¹⁰³

Due to the City's opposition to a number of works in an exhibition of Cuban artists who were either living in Cuba or who had not denounced Fidel Castro, the City refused to renew the lease.¹⁰⁴ A large segment of Miami's Cuban population had found these works to be offensive.¹⁰⁵ The Court found that the City of Miami's arguments of lease violations were "pretextual," and held that the controversial exhibition was fully protected by the First Amendment: "the City would not have acted to deny plaintiffs' continued use and possession of the premises but for the plaintiffs' controversial exercise of their First Amendment rights."¹⁰⁶

In *Brooklyn Institute of Arts & Sciences*, Judge Gershon narrowed the Holmesian position on the unconstitutional conditions doctrine and opined that although a person has no 'right' to a valuable government benefit, there are some reasons upon which the government may not rely when denying such a benefit.¹⁰⁷ One such reason is for the potential beneficiary's exercise of constitutionally protected speech.¹⁰⁸ The Court did not view the City's operating subsidy to the Brooklyn Museum as largesse that the Museum could choose to forego in displaying the "Sensation" Exhibit.¹⁰⁹ Rather, it held that the Museum could not even be put in a position to choose between Option A: exercising First Amendment rights, and Option B: obtaining the benefit.¹¹⁰ Judge Gershon, in relying on Supreme Court precedent, noted that denial of a benefit in this fashion is no different than a penalty—actually

184, 200 (E.D.N.Y. 1999).

102. 766 F.Supp. 1121 (S.D. Fla. 1991).

103. See *Brooklyn Inst. of Arts & Sciences*, 64 F. Supp. 2d at 200.

104. See *id.*

105. See *id.*

106. *Id.* (citing *Cuban Museum*, 766 F.Supp. at 1129).

107. See *id.* at 199; see also Roth, *supra* note 48.

108. See *Brooklyn Instit. of Arts & Sciences*, 64 F. Supp. 2d at 199.

109. See Roth, *supra* note 48.

110. See 64 F. Supp. 2d at 199-200.

“fining” the Brooklyn Museum for displaying the exhibit.¹¹¹ The effect on the Museum’s exercise of First Amendment rights would be inhibited, and thus the City would be “produc[ing] a result that it could not command directly.”¹¹²

Judge Gershon found that the City’s purpose, which was directly related to the content of the “Sensation” Exhibit, and not to the violations of the Museum’s lease and contract, was the “controlling consideration” in determining that its restriction on the Museum’s speech was viewpoint discriminatory.¹¹³ As in *Cuban Museum of Arts and Culture*, the District Court stated that the City’s argument that it was trying to vindicate its contractual rights was pretextual.¹¹⁴

Although the City argued that “Sensation” could be shown privately where “the taxpayers don’t have to pay for it,” Judge Gershon dismissed this contention as a “fallacy.”¹¹⁵ She pointed out that federal taxpayers in effect pay for the mailing costs of periodicals that many of them may find offensive, and that state taxpayers pay salaries of professors whom the State wishes to terminate for speaking out against the State college.¹¹⁶ In relying on *Buckley v. Valeo*¹¹⁷ and *F.C.C. v. League of Women Voters*,¹¹⁸ the Court rejected the proposition that this case entailed requiring taxpayers to “support” a particular viewpoint, and said that this could not be a

111. *See id.* at 199 (quoting *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

112. *See id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

113. *See id.* at 200 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

114. *See id.* Judge Gershon stated:

[T]he City here threatened to withhold funding if the Museum continued with its plans to show the Exhibit. When the Museum resisted, the City withheld its funding and filed a suit for ejectment. While initially the City engaged in various claims of a violation of the Lease and Contract, unrelated to the content of the Exhibit, the City has now admitted the obvious; it has acknowledged that its purpose is directly related, not just to the content of the Exhibit, but to the particular viewpoints expressed. There can be no greater showing of a First Amendment violation.

115. *Id.*

116. *See id.*

117. 424 U.S. 1 (1976) (per curiam).

118. 468 U.S. 364 (1984) (striking down section 399 of the Communications Act of 1934 that forbade noncommercial educational broadcasting stations, who receive a grant from the Corporation for Public Broadcasting, to “engage in editorializing.”).

justification for suppressing speech.¹¹⁹ Judge Gershon noted that the Museum's lease has no provision for the City to review and approve exhibits, temporary or permanent, nor does the lease require every exhibit to be suitable for schoolchildren.¹²⁰ She also found that the Museum's lease does not condition the City's duty to pay the operating subsidy based upon the suitability or content of any exhibit.¹²¹

III. LOOKING FORWARD

In issuing a preliminary injunction against the City for invidiously discriminating against ideas the City administration found offensive, the District Court essentially held that the First Amendment precludes *any* content-based decision to withdraw a government subsidy.¹²² Even assuming *arguendo*, that the judge arrived at the "correct" decision in this case—that denial of an already allocated operating subsidy based on *one* painting (Ofili's "Holy Virgin Mary") in *one* temporary exhibit ("Sensation") in *one* city-funded art museum (Brooklyn Museum) constituted viewpoint discrimination—her opinion lacks qualification.

Judge Gershon dismissed as "absurd" the City's argument that if it is not permitted to cut off financial support to the Museum as a result of the "Sensation" Exhibit, then there will be no limit on what the public is required to fund in the name of the First Amendment.¹²³ Taking the absolutist "content-based denial of subsidy equals censorship" view to its logical extreme, a city-funded, broad-based museum could easily transform itself into a museum of pornography at the whim of its board of directors.¹²⁴

Under this view, the city would be powerless to respond and would have to just stand by while its dollars are being spent.¹²⁵

119. See *Brooklyn Inst. of Arts & Sciences*, 64 F. Supp. 2d at 201.

120. See *Current Development: Public Space: Free Speech: Museum Prevails in "Sensation" Case*, 5 CITY LAW 130 (Nov.-Dec. 1999).

121. See *id.* at 130.

122. See 64 F. Supp. 2d at 200; see also Appellant's Brief at 56-57.

123. See *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp 2d 184, 204 (E.D.N.Y. 1999).

124. See *id.*; see also Appellant's Brief at 56-57.

125. See Appellant's Brief at 56-57.

The District Court treated this scenario as a remote possibility, stating that it would arise from vastly different facts than those in the instant case.¹²⁶ The Court also responded by taking an almost all-or-nothing position that the City is not obligated to fund particular forms of expression, such as museums, and so it has the right to stop funding all art museums in general, but not one particular art museum because it decided to utilize its subsidies to display objectionable material.¹²⁷

Although *Brooklyn Institute of Arts & Sciences*¹²⁸ is a case of first impression, the Court relied upon a long line of “penalty” cases in a manner that suggested quite the opposite.¹²⁹ Furthermore, Judge Gershon’s treatment of *Rust v. Sullivan*¹³⁰ and *FCC v. League of Women Voters*¹³¹ was cursory. The cases are undoubtedly applicable to this case and deserve greater analysis.

At first blush, a reading of *Rust* supports the Justice Department’s position that government is free to restrict speech whenever its money is at issue.¹³² Under this argument, if the government can bar federally-funded family-planning counselors from men-

126. See 64 F. Supp. 2d at 204.

127. See *id.* at 201-02; see also Appellant’s Brief at 57 (The Court stated that had the Brooklyn Museum been operating as a pornography museum it would have been a different case since as things stood, the City “h[ad] not shown that the funding provided has not been spent for the purpose authorized [in the statutes, lease, and contract].” 64 F. Supp. 2d at 201-02. The City argued that the Court, by stating this, implicitly accepted the legal premise underlying the City’s position; and that it was a question of state law. See Appellant’s Brief at 57).

128. 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

129. The term “penalty” cases refers to what the Court calls an “overwhelming” body of First Amendment case law establishing that government cannot suppress ideas indirectly (i.e. by denial of a benefit) any more than it can do so directly (i.e. by physically removing art objects from the Museum). See *id.* at 199 (citing *Speiser v. Randall*, 357 U.S. 513 (1958); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Bd. of County Commissioners, Wabaunsee County, Kansas v. Umbewhr*, 518 U.S. 668 (1996); *Perry v. Sindermann*, 408 U.S. 593 (1972)).

130. 500 U.S. 173 (1991).

131. 468 U.S. 364 (1984).

132. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 678 (Oct. 1992). The Justice Department read *Rust* to authorize the use of political content-based criteria for grants awarded by the National Endowment of the Arts. Many Congresspersons take the identical stance, and view it as their affirmative responsibility to ensure that government funds are not spent on “obscene” or “indecent” expression. See *id.* at 739.

tioning abortion in pre-pregnancy counseling, it can likewise require artists who receive federal grants to refrain from creating indecent art.¹³³ The *Rust* Court, in dictum, proposed that the government could establish the National Endowment for Democracy to encourage democracy without being required to “encourage competing lines of political philosophy.”¹³⁴ This statement, however, does not explain why the government cannot require educators in public universities and colleges to teach only democracy in political philosophy courses.¹³⁵ *Rust* made clear, however, that in public forums and public universities, first amendment dictates restrict the government’s ability to control speech even when the government is subsidizing it.¹³⁶ Additionally, the Court in *Rust* did not overrule prior decisions requiring strict content-neutrality in government subsidies to the press.¹³⁷ The decision in *Rust* notably made no reference to museums or public elementary and secondary schools. *Rust* leaves entirely undecided the basic question in *Brooklyn Institute of Arts & Sciences*: is artistic expression subsidized by the government akin to academic speech in colleges and universities, or is it more akin to the government speaking, and therefore does not have to be neutral, can advocate particular viewpoints, and can choose to oppose others?

In *Rust*, the Court, upholding the constitutionality of the regulations of section 1008 of Title X of the Public Service Act, stated that Title X grant recipients were completely free to advocate abortion as a method of family planning, provided that they kept such activities separate and distinct from the activities of the Title X project.¹³⁸ The *Rust* majority thus affirmed the Court of Appeals’ contention that the regulations did not condition receipt of a benefit on the relinquishment of a constitutional right, since the Title X grantees and employees “remain free to say whatever they wish about abortion outside the Title X project.”¹³⁹ The regulations,

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

139. *Rust*, 500 U.S. at 182-83 (citing *Rust v. Sullivan*, 889 F.2d 401, 412 (2d Cir. 1989)).

which were promulgated to ensure that Title X funds were not used for abortion counseling, required Title X projects to be “physically and financially” separate from prohibited abortion activities.¹⁴⁰ To be deemed physically and financially separate, the regulations provide a list of non-exclusive factors to be taken into consideration by the Secretary on a case-by-case basis (i.e. separate accounting records, separate personnel, and the degree of physical separation of the project from facilities for prohibited activities).¹⁴¹

The Court in *Rust* distinguished the “unconstitutional conditions” cases from the case at bar: the former involved situations in which the government had placed a condition on the recipient of the subsidy, rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.¹⁴² Similarly, in *League of Women Voters*, the Court pointed out that it would have upheld the regulation prohibiting public television stations from “engaging in editorializing” had the FCC permitted such stations to establish non-federally-funded affiliates to engage in editorializing, which the FCC did not.¹⁴³

Both *Rust* and *League of Women Voters* thus seem to establish that it is permissible to “burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression.”¹⁴⁴ These cases clarify that the unconstitutional conditions doctrine seeks to identify only those conditions on funding that have a coercive effect on the recipient’s freedom to exercise his or her constitutionally protected rights on his or her own time with his or her own resources.¹⁴⁵ The crux of the doctrine is on the strain that the dangling financial benefit places on the potential recipient’s free-

140. See *Rust*, 500 U.S. at 181 (citing 42 C.F.R. § 59.9 (1989)).

141. See *id.*

142. See *id.* at 197.

143. See *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

144. Appellant’s Brief at 48 (citing *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 766 (2d Cir. 1999) (Appellant argued that *Velazquez* involved even broader restrictions than those involved in this case, since the statute at issue regulated use of money other than the subsidy, and that the District Court reviewed only a preliminary injunction based on those restrictions. See 164 F.3d at 761).

145. See *Cole*, *supra* note 132, at 680.

doms outside the federally funded program.¹⁴⁶ Thus, no constitutional issue is raised where the conditions do not restrict the would-be recipient on his or her own time.¹⁴⁷ As the Court stated in *Rust*, “[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”¹⁴⁸

Here, it is arguable that the “Sensation” Exhibit could have been displayed at a site not owned by the City or supported with taxpayer funds. However, Judge Gershon dismisses this argument only by reference to two contexts in which taxpayers, rightly or wrongly, pay for goods and services they find objectionable.¹⁴⁹ Neither of these contexts—offensive mail or offensive speech by state funded professors—involved arts subsidies.

Even assuming that the law is clear that the withdrawal of a very small percentage of a subsidy from an art museum, irrespective of whether an exhibit like “Sensation” could have been displayed elsewhere, violates the first amendment, should the Court be so concerned about the “chilling effect” that it would have on art?¹⁵⁰ In other words, potential grant recipients, the argument goes, fearing the loss of the funds, would exercise greater editorial control over the content of their exhibitions or works of art in order to avoid works that might be seen as offensive, et cetera.¹⁵¹ In turn, such works may never be viewed by the public, and many artists would limit their expression so as to avoid having to return the funds.¹⁵² This argument is based on pure speculation. It is unknown just how many artists ponder the prospects of funding when immersed in their creative activities. Furthermore, “although artists have a right to express their feelings as they wish, no artist has

146. *See id.*

147. *See id.*

148. *Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)).

149. *See Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999).

150. *See Georges Nahitchevansky, Free Speech and Government Funding: Does The Government Have to Fund What It Doesn't Like*, 56 BROOK. L. REV. 213, 216 n.12 (Spring 1990) (referring to Senator's reaction to the breadth of amendment number 420 to the Interior Department Appropriations Bill (i.e., Sen. Jesse Helms Amendment)).

151. *See id.*

152. *See id.*

a preemptive claim on the tax dollars of the American people.”¹⁵³ These artists thus have a responsibility to “go out and test the magic of the marketplace.”¹⁵⁴

Although *Finley* stated that government may not use its subsidies for “suppression of disfavored viewpoints,”¹⁵⁵ the Court did not give examples of what it meant. The First Circuit, however, in *Student Government Association v. Board of Trustees of the University of Massachusetts*,¹⁵⁶ has given an example. There, the court held that withdrawal of a public subsidy is not suppression unless it creates the danger that the “idea will be drowned out.”¹⁵⁷ The court found it preposterous that removal of a subsidy would be suppression simply because such expression would be heard less frequently, since if that were the law, it would “handcuff government expenditures,” even preventing discontinuance of a subsidy misused “to advocate racism or sexism.”¹⁵⁸ Similarly, in *General Media Communications, Inc. v. Cohen*,¹⁵⁹ the Second Circuit stated that government has a legitimate interest in disassociating itself from offensive speech or bigotry.¹⁶⁰ Undoubtedly, the Court would equate denigration of religion (as arguably evidenced in *Ofilis*’s “Holy Virgin Mary”) to be among these as well.

To grasp the impact of the District Court’s decision in *Brooklyn Institute of Arts & Sciences*,¹⁶¹ consider the following hypothetical. The Urban Museum (a fictitious name) was established in 1800 in the City of Taxpayer as a broad-based art museum. However, it is still rather small in size. It has only about 100,000 objects in its permanent collection, which include painting and sculpture from Africa, the Americas, Asia, Egypt, and the Pacific. The

153. *Id.* at 215 n.9 (quoting Senator Helms).

154. *Id.* (quoting Senator Helms referring to a statement made by former President Ronald Reagan).

155. *National Endowment of the Arts v. Finley*, 524 U.S. 569, 587 (1998).

156. 868 F.2d 473 (1st Cir. 1989).

157. *Id.* at 479 n.4.

158. *Id.*

159. 131 F.3d 273 (2d Cir. 1997) (upholding a ban on sale of sexually explicit material on military bases).

160. *See id.* at 284 n.15 (“[S]urely the military could decide that bigotry is inconsistent with military professionalism and proper decorum, not to mention honor, and could promote that definition, overriding individual soldiers’ opinions to the contrary.”).

161. 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

Urban Museum does not display any temporary exhibits. The Museum's budget consists of both public and private funding—the City of Taxpayer gives an annual subsidy to the Museum, which is about 60 percent of its funding. The remaining 40 percent is donated by various private art sponsors (foundations, corporations and philanthropic individuals).

The Board of Directors of the Urban Museum, finding that the Museum is not generating as many visitors as it once did, unanimously decides to auction off the 100,000 pieces of its permanent collection. They then decide that neo-Nazi art should replace what once had been broad-based artwork from different countries. Realizing that enough of a supply of artists exists who create this type of work, the Board of Directors fulfill their mission. Within a few months, the Museum is stocked with paintings glorifying Adolf Hitler as an ancient Roman god, documents and memoirs which advocate that the Holocaust was fictitious, and pictures of Holocaust victims befouled with swastikas.

The City of Taxpayer consists of about 90 percent Jews (15 percent orthodox Jews), and the remaining 10 percent consisting of Roman Catholics (5 percent), Muslims (2.5 percent), Buddhists (2 percent), and atheists/non-religion (0.5 percent). All 90 percent of the Jewish population of the City of Taxpayer are offended by and completely opposed to what the Museum has transformed into, as are 4.3 percent of Roman Catholics, 2 percent of Muslims, 1.5 percent of Buddhists, and 0.2 percent of atheists/non religious. The Board of Directors, on the other hand, all neo-Nazis themselves, are delighted. Finally, some recognition is given to their point of view, they all think. Mayor Doogood, a Muslim,¹⁶² has been the Mayor of the City of Taxpayer for four years. He rarely takes a boisterous stance on an issue and is well-respected by all segments

162. Mayor Doogood is intentionally portrayed non-Jewish for two reasons. One reason is that it apparently gives him more credibility than someone who is merely “defending” his own faith, as Mayor Giuliani was. The second, and more significant reason is that art that deeply offends Catholics seems to be entitled to taxpayer support. It is politically correct. Art about blasphemy and support of it (against those things that Christians deem sacred) “is the cause celebre of the moneyed crowd, the chattering classes, the high-powered, high-financed entertainment industry and the movers and shakers of modern culture.” Fielding, *supra* note 7, at A-10.

of the city's population.¹⁶³ Deciding that denigrating a part of history which a majority of his population finds appalling is wrong, the mayor proceeds to withdraw the monthly installment payment that the Urban Museum was to get as part of its annual operating subsidy as provided for in its lease and contract with the City of Taxpayer. All opposed to the Museum supported him on his actions.

Although this hypothetical may seem rather far-fetched, it illustrates that Judge Gershon's decision lacks a limiting principle. She treats as well-settled the issue of subsidization of the arts as it pertains to the first amendment. Moreover, she considers "absurd" the possibility that the board of directors, who have unfettered discretion, will turn a museum into whatever they wish.¹⁶⁴ Not even in dicta does the District Court mention, as courts often do, that there may arise a case with facts more compelling than the one at bar which would warrant a different decision.

If the City may not have content-based strings attached to its subsidy of art museums, as *Brooklyn Institute of Arts & Sciences*¹⁶⁵ seems to hold, then the First Amendment is forcing the City to give a "blank check" to the boards of directors of such museums. The blank is not in terms of dollar amount, but blank in terms of the goals and purposes of the museum. Part of our multitrillion dollar debt is attributable to art funding.¹⁶⁶ After this decision, cities may be beginning to ask themselves, should government be in the business of funding the arts?¹⁶⁷ Nowhere in the United States Constitution does it declare that public tax revenue can be used for such purposes.¹⁶⁸ The Court in *Regan v. Taxation With Representation* stated that "[a]lthough [an organization] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advan-

163. I have intentionally given Mayor Doogood these characteristics, since they too may be perceived as giving him more credibility.

164. See 64 F. Supp. 2d at 200.

165. 64 F. Supp. 2d 184.

166. See Joseph N. Mondello, Sharyn Perlman & James C. Green, *Letters*, *NEWSDAY*, Oct. 15, 1999, at A58.

167. See *id.*

168. See *id.*

tages of that freedom.”¹⁶⁹

Would government’s refusal to fund arts any longer be such a bad idea? Perhaps museums would not be as immense as some of them are now, and perhaps there would be fewer of them, but would this be for the worse? Support for such franchises would necessarily have to be supplied by the private sector, where a natural checks-and-balances system would reward good art and discourage distasteful expression.¹⁷⁰ No cries and accusations of censorship would exist.¹⁷¹ Perhaps the museum’s board itself could create a public/private distinction by making arrangements for what they deem is an upcoming “controversial” exhibit to be shown in a separate wing of the museum, which is kept fiscally and physically separate from the part receiving city subsidies, a la *Rust v. Sullivan*.¹⁷²

Judge Gershon’s opinion leaves many unanswered questions. For example, if what the Brooklyn Museum’s attorneys argued is true, that when city officials give money to museums, they “don’t become the proprietors, they don’t become the moral censors”,¹⁷³ then who does? Does a publicly funded museum “own” the funding it receives or is it merely a trustee, accountable to the public for how it uses this money?¹⁷⁴ If so, such an institution has no right to breach its fiduciary duty to the public by using taxpayer money to

169. *Regan v. Taxation With Representation*, 461 U.S. 540, 550 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

170. *See id.*

171. *See Evelyn Gordon, A Matter of Taste*, JERUSALEM POST, Oct. 26, 1999, at 8 (referring to Israel’s equivalent of the “Sensation” Exhibit, the International Triennale at the Haifa Museum. One exhibit consisted of a nude actress being bound upon a cross while three men in uniform shot paint bullets at her. An Israeli rabbi affiliated with a fringe non-Orthodox movement in the US (the New Age Movement) stood at her side, reading prayers, while people holding torches marched around in the background. A group of Christian Arab youths, “Sons of the Cross,” went to the exhibition site and burned down the cross in opposition. This persuaded the Mayor (who supported the exhibit) and the museum that the outrage was real, and they promptly cancelled the exhibit.

172. 500 U.S. 173 (1991). The Supreme Court has not yet addressed whether and to what degree physical and financial separation would be unduly burdensome. *See Nahitchevansky, supra* note 150, at 245.

173. Fred Kaplan, *Museum, City Clash On Free Expression*, BOSTON GLOBE, Oct. 9, 1999, at A4 (quoting Floyd Abrams, the Brooklyn Museum’s attorney, at oral argument before the District Court).

174. *See Gordon, supra* note 171.

desecrate their most deeply held beliefs.¹⁷⁵

CONCLUSION

Absent a clearly defined standard from the Supreme Court, the line dividing a legitimate decision not to fund a particular activity from a discriminatory intent to not subsidize a particular viewpoint is very difficult to discern.¹⁷⁶ Judge Gershon's decision in *Brooklyn Institute of Arts & Sciences* essentially holds that the First Amendment precludes any offensiveness-based decision to withdraw support for a publicly funded museum. However, her analysis was far too limited. Judge Gershon considered only what she felt was the existence of viewpoint discrimination on the part of the City.¹⁷⁷ In determining the nature of the "penalty" suffered by the Museum, her First Amendment analysis should have also included a determination of the burden placed on the grantee-museum, the availability of alternate sources of funding, the necessity to restrict the use or receipt of funds, and the ability of the museum to otherwise exercise its right of expression.¹⁷⁸

If the First Amendment means what Judge Gershon said it does, then cities just simply will not cut the checks anymore, realizing the potential for such checks to become blank in the hands of potential art subsidy recipients. Boards of Directors of museums subsidized by the City remain unfettered in their discretion to completely skew the entire purpose of a museum. Moreover, such directors may do this with only one goal in mind: to line theirs and other people's pockets. As one young artist, Scott LoBaido, recently put it: "[Boards of directors of publicly funded museums] have your money and you have nothing to do with it—[they are] taking your money that you worked hard for and [they are] going to piss you off—[they are] going to urinate and defecate on your religion with your money."¹⁷⁹ Considering the plethora of private funds, and the possibility that a reliable monthly installment may

175. *See id.*

176. *See Nahitchevansky, supra* note 150.

177. *See id.*

178. *See id.*

179. *See* Interview by TAKE FIVE with Scott LoBaido, artist, in vol. 2, issue 3, at p. 19 (Mar. 2000) (on file with the author).

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easily be taken for granted, cities may be more reluctant to fund art museums, realizing from this decision that they can no longer keep a toe-hold on their money.

Even arguing that a museum committed contract and lease violations will likely be unsuccessful in future cases given Judge Gershon's holding, as they will likely be dismissed as a pretext for viewpoint discrimination. Cities seem to thus be placed in a lose-lose situation as the "unwilling perpetual partners to every form of expression its [museum] subsidy recipients choose to utter"¹⁸⁰ after the check is cut.

180. Appellant's Brief at 57