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### Constitutional Conundrums in the Public Funding of the Arts

Richard A. Epstein

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He's written several books; one of them is *Takings, Private Property, and the Power of Eminent Domain*. He's at work right now on a book on this problem we're talking about today, on constitutional conditions, tentatively entitled, *Bargaining with the State*. Richard Epstein's stories are legion in academia, but my favorite is actually an event that took place right here about five years ago. Richard was debating Bruce Ackerman. The moderator announced that the rules of the debate would be that each side would have an equal amount of time. Ackerman instantly jumps in and says, "That's not fair, I want an equal number of words." If that story doesn't have meaning for you now, I predict it will in 15 minutes.

### CONSTITUTIONAL CONUNDRUMS IN THE PUBLIC FUNDING OF THE ARTS

RICHARD EPSTEIN:

I am going to try to spite you, Vince, by speaking more slowly than I've ever done before, in order to show a side to my character that even I did not know existed.

I should say at the outset that I come as a representative of the same community that I represent at all of these debates — a community of one. As somebody who's a dedicated iconoclast, I pride myself on having no affiliations and no attachments. I am also deeply troubled when I find out that other people agree with much of what I have to say. I hope to keep that reputation intact today, even though it may lead some people to wonder whether or not I've taken extreme positions in order to do so.

### AN ABUNDANCE OF POSITIONS

In order to outline my position, I'm going to step back in order to array three different positions and figure out the plausible preference orderings among them.

The first position is essentially hard-line: "We don't think the government has any business in funding of art or indeed in funding anything else. We adopt the viewpoint of the minimal state, so we think that the control of force, the control of fraud, the provision of national defense are proper state functions. But all this high-minded talk about culture and all its elegant refinements are dubious pleas of special interest, and therefore we want to cut out funding for the arts entirely." That minimalist line is one consistent position that you can take.

A second position says, "As far as we're concerned, it's exceedingly

important that society nurture its cultural values and heroes. Support of art is not only a grant to the artist; art also creates external benefits for those of us now able to live in a culture of beauty and polish. We don't want to have gray halls and steely walls; we don't want the rest of the world to look like the Columbia Law School. We want to make sure that art is funded. And we want that funding on the broadest possible basis, because as far as we're concerned, any time the government gets into the business of picking and choosing, it will always behave badly. So we want the government to supply funding, and we want the professionals to decide the art projects in which that funding is spent." That comprehensive support line is a second position that you can take.

Then there is a third position, "support some art only." Now the rhetoric will shift rather dramatically. "We're willing to fund some kinds of art but only art that does have the kinds of external benefits that good art can generate. But we'll be darned (and now I can reveal my Neanderthal side) if we're prepared to fund the kind of smut and filth that a tiny dubious fraction of the self-appointed elite regard as appropriate today. Better that we fund nothing at all than we fund this trash. But as far as we're concerned, we can have a system of appropriate review that doesn't allow the professionals to pull the wool over the eyes of the common American people. And therefore, what we want is selective and responsible funding of the arts."

So you have three positions on funding: none, all, and some. I think that these approaches exhaust the logical possibilities. Now there is a theory which comes from a very different part of academia, known as the Arrow impossibility theorem. Now this theorem says that it is impossible to hit on a unique group preference when you have three voters and three choices when the individual preferences cycle. So you could easily envision a world in which somebody would say, "My first choice is none, my second choice is all, my third choice is some." Somebody else will say that "My first choice is some, my second choice is none, my third choice is all." And then somebody else could say, "My first choice is all, my second is some, and my third is none."

Indeed, in preparing for this talk when I was brooding on this issue in a slightly fevered way, I said to myself, "How many logical possibilities are there in which to array three choices?" Three factorial is six. Then I wrote all the six possibilities down, and discovered to my chagrin that each of the six rankings is defensible from some respectable intellectual perspective.

So picking at random from my list, I'll just consider one possible

ordering. I will say that X's first choice is "some." What X says is: "Look, I think the offensive nature of certain art is so troublesome that I want it excluded from funding, and if I can't get that, then I would rather get the government out of this business altogether." And so X's second choice is none. By default, "all" is the third choice. But Y who also starts with "some" might choose "all" for second place, leaving "none in third." To be sure, there is a tax on supporting good art when bad art must be supported as well. But some taxes are worth paying. Better there be too much public subsidy than too little.

It takes only a little imagination to sketch out the other patterns. Z could say less is always best, so the order becomes, "none," "some," "all." A could love art and hate discretion, so the pattern is "all," "none," and "some," while B could love art and tolerate discretion for an ordering of "all," "some," "none." And finally someone else could dislike funding of art, but prefer total funding to unprincipled discretion for the order of "none," "all," and "some."

Now the moment you recognize that each of the six rankings could be similarly justified ("if I can't get all, I'll take some, etc."), it is very difficult to figure out how to persuade people with one set of preferences to go along with somebody else's ranking. This puts you, as analyst, into a distinct quandary. How should you respond to that quandary in political terms? How in doctrinal terms?

Let me start with a troublesome political question first. In this particular debate, the libertarians like myself are by philosophical inclination no funding people. Given our categorical small government impulse, we tend by and large to drop out of the mainstream debate. We live today in the world of a welfare state, where stark minimalist arguments tend not to win; so everybody says, "Assuming you're wrong on the premise that you hold most dearly, Epstein, which way are you going to come out on the second tier funding question?" I have faced that problem so many times that essentially I have two parts of my brain. I have the first best part which I have to keep private unto myself, and a second best part which I'm willing to share with an audience.

Well, I look at my second best part, and I realize quickly that the basic positions are essentially intractable. I cannot think of a way to persuade somebody who believes that offensive art should not be funded with their tax dollars to redefine what they regard as obscenity or to accept the argument that government monies don't come out of their pockets. On the other hand, I don't see how I could persuade the adherent to the opposite side, who believes that funding

review of any sort, kind, or description by government agencies is censorship, to moderate his opposition. The moment panels that are politically appointed are charged with art, you are walking down a terrible, slippery slope.

Indeed, I must tell you that if asked to serve on any of these boards, I would run fast and far in the opposite direction, even though I might uphold their constitutionality. Sometimes public service is a disservice. That proposition, of course, is a source of trouble. If high-minded folks like myself won't serve, who will? And you now have an intractable problem of selection, because the people most opposed to instituting these boards are the people you would most like to have serve on them. This tendency, it seems to me, is something you can't fight.

Now the question is what do you do? If you're in the art business, you could either say it's all or it's nothing. To be sure there is always a public subsidy, but of course that doesn't matter in our post-libertarian world because public money is always treated as though it were manna from heaven. So with the all or none choice, you will now necessarily antagonize one of two strong pressure groups. This up or down choice in turn creates the following unpleasant political dynamic: you can only make a decision after everyone's gone to the mat. Both sides are going to get bloodied, and the level of public rhetoric, which I regard as a profound negative externality, is going to increase to fever pitch.

What makes matters even harder is that there is no way to avoid the confrontation by making side-payments in cash, as you can with other kinds of government programs. For example: Where are we going to locate the garbage dump in town? It may be near my property, or it may be near your property. It is often possible to conceive of a situation where those who benefit from a remote dumpsite will have to pay a certain cash exaction to those people who are located nearby, those who are inconvenienced by the dump. Both sides could regard themselves as better off, by taking into account the improvement of their property less the financial cost, or the decline in value of property plus the money paid. These side transactions are just compensation programs, that is, a way in which you can broker and moderate the differences between warring factions. One of the things that is so striking about the arts is nobody seems to think that the social gap between the two sides is negotiable.

To put the point another way, suppose somebody on the "I will fund everything" side makes the following proposal: "We'll have two national art associations, one of those for the "virtuous" and one of

those for the “unconstrained.” With respect to the virtuous, they can receive from Congress a pot of money, which they could allocate to whatever virtuous artists they think appropriate, and the unconstrained artists will do exactly what they did under the previous NEA.”

I don’t think Senator Helms will buy that deal. His attitude is “I’m funding all of these projects, and therefore I have to have my oar in the water for each of them.” Indeed, I don’t think the art establishment on the other side would buy the deal either, because they would regard it as, “Well look, now the government has authorized a certain amount of unprincipled behavior along with a certain amount of principled behavior; that mix is just not good enough.” Well, once it becomes impossible to split the granting agencies through the use of side payments, then all disputes are harder to resolve than before.

#### TWO CONSTITUTIONAL ARGUMENTS

So you agree: “We can’t solve this in a principled fashion by going through the legislative means.” Now we have to invoke a series of high constitutional arguments that will resolve this dispute in accordance with the enduring principles of First Amendment law that we have all come to admire and love over the years. Now I will make two powerful First Amendment arguments. The first indicates quite clearly and persuasively that the “alls” are correct, and that any condition associated with the funding of art amounts to First Amendment unconstitutional censorship. And I will make a second argument, that it is unconstitutional to fund art to the extent that you require people against their will to pay for art they regard as obscene. My First Amendment arguments cut, alas, in both ways.

The first argument on the arts side is the standard argument with respect to the unconstitutional conditions. With a certain degree of power it says, in effect: “There are certain programs that the state needn’t undertake at all, but if it does do them, it cannot subject the recipient of government grants to certain kinds of conditions.” Virtually all scholars accept this in principle as a paradigmatically sound argument. For example, the state may stay out of the art business altogether, but if the state chooses to enter that business it cannot fund only young Republicans, and it cannot fund only whites, or only blacks. The basic intuition is that if the state uses its funding power to redistribute wealth between political factions or social, ethnic or racial groups, it is behaving illegally. The unconstitutional conditions doctrine is an appropriate legal strategy with which to counter these

factional issues. Once the state starts making subject matter distinctions, it is no longer content-neutral between ideas, and hence it is no longer neutral as between the people who hold these ideas. So the condition has to be struck down. It is a respectable First Amendment argument.

There are, however, enormous difficulties here because some conditional grants are acceptable. Do we say in response to Seth Kreimer's provocative example, that if we fund the pointillists, we have to fund the abstract expressionists as well? And if we fund painting, must we fund sculpture as well? Or can we pick and choose among subject matter types, without running afoul of the unconstitutional conditions constraint?

So there is something to be said for the unconstitutional condition argument. I'm not wildly enthusiastic about its prospects, however. My general view is that the unconstitutional conditions argument works much better under those circumstances when the state possesses genuine monopoly power. Even though private funding may not be adequate within the art community—not by me, but by them—still when corporate and private giving are available, you still have enough alternative sources of money, so you really cannot say that unless you have public money, all art, all commerce, and all creativity will cease.

So I've got handy my alternative constitutional argument: here you start with the "dues-check-off" cases. For example, consider a labor situation where the union comes by and says to the workers: "Now you have to contribute dues to the union." Thereafter the union spends the money on political campaigns. An individual worker who is required to contribute to union coffers generally is allowed to say, "Hey, my money can't be used to support political candidates to whom I'm opposed." Generally the First Amendment is read to protect persons from supporting speech causes to which they are opposed, so that union dues cannot be spent for political causes where individual workers opt out.

A parallel argument can be made here. The issue is not whether the artist's work runs afoul of any weird definition of obscenity that on the day happens to be favored by the Supreme Court. Granting is fundamentally different from regulation. The grievance of the dissident is much more pointed. "You're taking my particular money and you're spending it on art that I don't like. All I have to do is register my dissent. And the fact that it may or may not flunk the constitutional test for obscenity is fine for Floyd Abrams, but it's perfectly

irrelevant for anything that I want to do. Don't tax me and spend the proceeds against my will."

Happily, then, it's unconstitutional on the one hand to fund art subject to conditions, but it is also unconstitutional to decree universal funding over powerful political dissent. Now I always like conundrums like this because they throw you back to the political position which I generally hold. I don't regard myself as that much of a Neanderthal when I take the small government position. Nor do I believe that the government should limit itself to the control of force and fraud because these are the only forms of behavior that are socially undesirable. It is not as though I believe that any person who decides not to infringe the rights of some other individual has thereby become a virtuous person whom we ought to praise. The strength of human character, the nature of human decency, the capacity for human creativity are not measured or limited by compliance with the law. It seems to me that we all can and should demand more of other individuals as we ask for more from ourselves. The argument to keep the government out of art comes from a profound if uneasy sense of subjectivity of value with regard to the major controversies of our time. I do not see a way in which actors within the legal system can persuade those who believe one thing about obscenity and art to take the other side. I wish therefore to limit the scope of the political struggle by removing the government from the business of making grants. Am I a complete Philistine? Well, it depends on whether you're talking about the first-best Epstein or the second-best Epstein.

Let me give you the second-best Epstein, the moderate Philistine but not the complete Neanderthal. He is the fellow who takes the following position. He says: "Look, when we are talking about art, we know that it is a mix of a public and of a private good. It's the kind of thing which gives enormous satisfaction to the artist and the art community, and it may have some indirect benefits for the rest of the world. What we want to do is to set up a fund-raising arrangement in which those people who are the primary beneficiaries of art bear most of the associated burden. The remainder of the public, who are incidental beneficiaries, should have only to pay a smaller fraction of the cost."

So I now announce the Epstein-matching plan to deal with this situation. What a fair plan is: To the extent that any artist can raise \$1.00 on his own initiative, we will out of federal funds reimburse the donor with \$.28 of public monies. (The speech was given before last summer's unwise tax increase.) The two sources together will thereby combine for \$1.00 of artistic support, with the government

kicking in 28 percent of that total, no questions asked. It means, therefore, that the fundamentalists can organize their own art shows and the modernists can do their own thing. Across the board, it's 72/28, regardless. Now what I have just outlined is basically an argument on behalf of matching grants — call them charitable deductions. The trick here is to have some modest collective funding in the arts, without having collective deliberation over what the arts are. There are no troublesome panels that are charged with political as well as artistic oversight. But if you want public monies, raise private money first.

This discussion leads us back to the familiar question of what we think 'republicanism' is about. Of all the people in the world, I should be one of the most reluctant to suggest that participation in public political discourse is something that we should never want to squelch. I would be basically killing my own stock in trade. On the other hand, public participation in public debate shares one feature with everything else in the world, namely it is a scarce resource. To the extent that there are certain kinds of questions which are necessarily public in nature, and which require public debate: Do we go to war? Do we stay out of war? What is our position with respect to East Germany? How are we going to handle the question of violence in the streets? And so forth. I would much prefer systematically to take precious public resources and devote them to those issues that indisputably require a collective choice rather than frittering them away on what I regard to be essentially a second order problem: Is X a really great artist or just a fool who managed to graduate with an MFA? I don't want to debate that last question at all. So at bottom my view is that on balance I would not be upset to see the NEA disappear into the mists of history. At the same time I might be willing to increase my own subsidy for the very kind of art that as a public citizen I might declare obscene. So my life is filled with contradictory sentiments, sentiments that match the contradictory arguments in constitutional law.

So I shall leave with the following conclusion. If conditional subsidies for art are unconstitutional, and if total subsidies for art are unconstitutional, then my own preferred position—no public money for art—may just be the source of constitutional wisdom after all.

VINCENT BLASI:

Our final speaker is Kathleen Sullivan, who teaches law at Harvard Law School. She teaches criminal law and constitutional law, has degrees from Cornell University, Oxford University, and from the

Harvard Law School. She has written a number of articles in the last couple of years on the right to privacy, on affirmative action, on AIDS and the criminal law, and on this problem of unconstitutional conditions. I also have a Kathleen Sullivan story. Having slowed Richard down so much, I'm afraid to introduce by anecdote, but I can't resist. Many of you will remember, of course, hearings about the nomination of Robert Bork to be a Supreme Court Justice. For a couple of weeks I actually became a television junkie and watched the hearings live. And what I thought was the moment of highest drama in those hearings involved Kathleen Sullivan. She was on a panel of three law professors who were testifying. Another member of that panel, I thought, was in the process of walking the plank. Senator Simpson was setting a none-too-disguised trap that it looked to me was just about to produce the kind of headline that would have utterly discredited the opponents of the Bork nomination, and would have been, I think, a major factor in at least the battle for public opinion. And just as this witness was walking this plank, Kathleen noticed it, grabbed the microphone literally, jumped in and started putting Senator Simpson on the defensive and completely derailed the tactic. And that panel went, by and large, without incident. And I breathed a heavy sigh of relief and have been grateful to Professor Sullivan ever since. I think that without her efforts, I now couldn't go to sleep at night secure in the knowledge that my civil liberties are being protected by Justice Anthony Kennedy. Professor Sullivan.

### **BRIBES AND ARTISTIC ORTHODOXY**

#### **KATHLEEN M. SULLIVAN:**

Thank you, Professor Blasi. I can't match Richard Epstein word for word, even with Richard slowed down from 78 to 45 rpm. What I'll try to do to compensate is to come up with three models to counter his three models. But my three models are going to be organized around constitutional approaches rather than policy preferences. He talked about "none, all, some" in a preference sense; I'll talk about "none, all, some" in the constitutional sense. Here are three possible constitutional models for approaching the problem of public funding of the arts.

First, that public funding of the arts is constitutionally forbidden. Now we have an analogue for that kind of model in the Constitution, and it's called the Anti-Establishment Clause with respect to religion as it's currently interpreted by the Court. This is controversial, but the Court currently says the Anti-Establishment Clause means gov-