Can the First Amendment Stop Content Restriction in State Film Incentive Programs?

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I. INTRODUCTION

The real destroyer of the liberties of the people is he who spreads among them bounties, donations, and benefits. – Plutarch

The film production industry spends billions of dollars every year in the United States.[1] Those billions of film industry dollars significantly affect individual state economies' total economic output, tax revenue, labor, local business income, and tourism.[2] In order to attract filmmakers and maximize in-state film industry spending, an overwhelming majority of states offer filmmakers generous financial incentives.[3] In fact, forty-two states offer some form of film incentive

[1] According to the Motion Picture Association of America, the film production industry spent $60 billion dollars in 2005 alone on motion picture and television productions in the United States. MOTION PICTURE ASSOCIATION OF AMERICA, THE ECONOMIC IMPACT OF THE MOTION PICTURE & TELEVISION PRODUCTION INDUSTRY ON THE UNITED STATES 5 (2006), *available at* http://www.mpaa.org/press_releases/mpa%20us%20economic%20impact%20report_final.pdf [hereinafter MPAA Report]. Additionally, between 1998 and 2005, the film production industry spent approximately $27.43 billion making major theatrical films in the United States ($3.93 billion in 1998, $3.55 billion in 1999, $3.37 billion in 2000, $3.24 billion in 2001, $3.44 billion 2002, $3.55 billion in 2003, $2.97 billion in 2004, and $3.38 billion in 2005). *See* THE CENTER FOR ENTERTAINMENT INDUSTRY DATA AND RESEARCH, THE GLOBAL SUCCESS OF PRODUCTION TAX INCENTIVES AND THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO THE WORLD 7 (2006), *available at* http://www.ceidr.org/2005CEIDRReport.pdf [hereinafter CEIDR 2006 Report].

[2] According to the Motion Picture Association of America, the motion picture and television industry generated over 1.3 million American jobs, $30.24 billion in taxable wages to American workers, $30.20 billion in revenue to American vendors and suppliers, and $10 billion in income and sales taxes. *See* MPAA Report, *supra* note 1, at 5.

In addition, at least ten states have conducted and published economic analysis reports of the film industry's impact on their respective economies, including detailed findings of the positive economic impacts of film production. *See* NATIONAL GOVERNORS ASSOCIATION CENTER FOR BEST PRACTICES, PROMOTING FILM AND MEDIA TO ENHANCE STATE ECONOMIC DEVELOPMENT app. A (2008), *available at* http://www.nga.org/Files/pdf/0807promotingfilmmedia.pdf [hereinafter NGA Report]. For instance, the State of Oregon reported that in 2007 the film industry contributed $709.6 million in output, $294.3 million in wages and business income (labor income), and 6,325 jobs. *See* ROBERT WHELAN & ALEC JOSEPHSON, AN ECONOMIC IMPACT ANALYSIS OF THE OREGON FILM AND VIDEO INDUSTRY IN 2007 2 (2008), *available at* http://www.econw.com/reports/ECONorthwest_Economic-Impacts-Film-Industry-Oregon_2008.pdf [hereinafter Oregon Impact Report]. Similarly, the State of Louisiana reported that in 2005 the film production industry added $343 million in total economic value to the State and created 13,445 jobs. *See* ECONOMICS RESEARCH ASSOCATES, TRENDS IN FILM, MUSIC, & DIGITAL MEDIA 3 (2006), *available at* http://www.lafilm.org/images/docs/00%20ERA%20Trends%20Paper.pdf [hereinafter ERA Film Report]. Likewise, the State of Virginia reported that in 2004 the film industry had a total economic impact of $510 million, generated $19.8 million in state tax revenue, and employed 5,959 people. *See* VIRGINIA COMMONWEALTH UNIVERSITY, AN ECONOMIC ANALYSIS OF VIRGINIA'S FILM AND VIDEO PRODUCTION-DISTRIBUTION INDUSTRY 19 (2005), *available at* http://www.hrp.org/publications/VCU%20Film% 20Industry% 20Report.pdf. Thus, it is quite clear that the film industry can, and does, have a significant impact on state economies.

[3] *See* NGA Report, *supra* note 2, at 1 ("Today, states compete to attract film productions and reap economic rewards.").

program.[4] In addition, at least two states are currently trying to enact film incentive programs.[5]

Filmmakers and film production companies benefit substantially from film incentives. A strong film incentive can save a filmmaker millions of dollars on filming and production costs.[6] But, as the saying goes, there is no such thing as a free lunch. Many, if not all, of the film incentive programs contain provisions that restrict, or can be interpreted to restrict, film content.[7]

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[4] *See* Alaska Film Production Tax Credit, ALASKA STAT. § 43.98.030 (2009); Arizona Motion Picture Production Tax Incentives Program, ARIZ. REV. STAT. ANN. § 41-1517 (2009); CAL. REV. & TAX CODE §§ 6006, 6006.1, 6006.3, 6007, 6010, 6010.4, 6010.6 (West 2009); COLO. REV. STAT. § 24-46-105.8 (2008); Connecticut Film Production Tax Credit, CONN. GEN. STAT. § 12-217jj (2009); Florida Entertainment Industry Financial Incentive Program, FLA. STAT. § 288.1254 (2009); Georgia Entertainment Industry Investment Act, GA. CODE ANN. § 48-7-40.26 (West 2009); Hawaii Motion Picture, Digital Media, and Film Production Income Tax Credit, HAW. REV. STAT. § 235-17 (2008); Idaho Film and Television Production Business Rebate Fund, IDAHO CODE ANN. § 67-4728 (2009); Illinois Film Production Services Tax Credit Act, 35 ILL. COMP. STAT. 16/5 (2009); Indiana Media Production Expenditure Tax Credit, IND. CODE § 6-3.1-32 (2009); Iowa Film, Television, and Video Project Promotion Program, IOWA CODE § 15.391 (2009); KAN. STAT. ANN. § 79-32,258 (2007); Kentucky Motion Picture Production Company Refundable Credits, KY. REV. STAT. ANN. § 139.538 (2008); Louisiana Motion Picture Incentive Act, LA. REV. STAT. ANN. § 47:1123 (2008); Maine Media Production Reimbursement, ME. REV. STAT. ANN. tit. 36, § 6901 (2006); Maryland Film Production Rebate Fund, MD. CODE ANN., ECON. DEV. § 4-401 (2009); MASS. GEN. LAWS ch. 62 § 6 (West 2009); MICH. COMP. LAWS § 208.1455 (2009); Minnesota Film Jobs Production Program, MINN. STAT. ANN. § 116U.26 (2009); Mississippi Motion Picture Incentive Act, MISS. CODE ANN. § 57-89-1 (2008); MO. REV. STAT. § 135.750 (2009); MONT. CODE ANN. § 15-31-901 (2007); N.J. STAT. ANN. § 54:10A-5.39 (2009); New Mexico Film Production Tax Credit, N.M. STAT. ANN. § 7-2F-1 (2008); New York Empire State Film Production Credit, N.Y. TAX LAW § 24 (2009); N.C. GEN. STAT. ANN. § 105-130.47 (2008); Oklahoma Compete With Canada Film Act, OKLA. STAT. ANN. tit. 68, § 3623 (West 2008); OR. REV. STAT. § 284.368 (2007); Pennsylvania Film Production Tax Credit, 72 PA. CONS. STAT. ANN. § 8702-D (2008); Rhode Island Motion Picture Production Tax Credits, R.I. GEN. LAWS § 44-31.2-2 (2009); South Carolina Motion Picture Incentive Act, S.C. CODE ANN. § 12-62-20 (2008); S.D. CODIFIED LAWS § 10-46D-1 (2007); Tennessee Visual Content Act, TENN. CODE ANN. § 4-3-4902, 67-4-2109 (2009); Texas Moving Image Industry Incentive Program, TEX. GOV'T CODE ANN. § 485.022 (Vernon 2009); Utah Motion Picture Incentive Fund, UTAH CODE ANN. § 63M-1-1802 (2008); Vermont Film Production Incentive Program, VT. STAT. ANN. tit. 10, § 650 (2009); Virginia Governor's Motion Picture Opportunity Fund, VA. CODE ANN. § 2.2-2320 (2009); Washington Motion Picture Competitiveness Program, WASH. REV. CODE § 43.365 (2009); West Virginia Film Industry Investment Act, W. VA. CODE § 11-13X-1 (2008); Wisconsin Film Production Services Credit, WIS. STAT. ANN. § 71.47(5f) (2009); Wyoming Film Industry Financial Incentive Program, WYO. STAT. ANN. § 9-12-403 (2008).

[5] Both Nebraska and Ohio are in the process of trying to get film incentive legislation passed. *See* Nebraska Independent Film Projects, *First Approval Given To Film Incentive – KEEP IT GOING!*, http://www.nifp.org/node/478 (Jan. 22, 2008); Julie E. Washington, *Proposed Legislation Billed As Means of Luring Film Industry into State*, The Plain Dealer Politics Blog, (Oct. 20, 2008).

[6] NGA Report, *supra* note 2, at 9.

[7] *See infra*, Section II.

The presence of content restrictions in state film incentive programs raises the following question: Whether, or to what extent, the First Amendment permits states to restrict content when distributing film incentives? In order to fully understand, examine, and answer this important question, this article is structured as follows: Section II explores the past, present, and future of state film incentives. Section III identifies the four categories of content restrictions that exist within state film incentive schemes: (1) categorical, (2) negative image, (3) implicit, and (4) carte blanche. Section IV tracks the shift in First Amendment law, which initially prohibited content based government benefit denials, and which now applies one of three categorical rules, the *Rust*, *Rosenberger*, and *Finley* rules to content based government benefit denials. Section V explores the arguments for applying, and the resulting implications of applying, the *Rust*, *Rosenberger*, or *Finley* rules to state film incentives. Finally, Section VI argues that the answer to the question of whether the First Amendment can stop content restriction in state film incentives is no.

II. The Economics of State Film Incentives

A. *A Relatively New Phenomenon*

From the inception of the film industry in the early 20th century, the United States dominated the international market for film production dollars.[8] By 1998, 71 percent of all feature films were produced in the U.S.[9] The U.S. dominated the market for three reasons. First, the U.S. possessed a deep labor pool of talented and experienced individuals.[10] Second, the U.S. production infrastructure was both extensive and state-of-the-art.[11] Third, the U.S. locations, facilities, and resources were world renowned.[12]

In 1998, though, Canada began offering generous film incentives in the form of tax credits in order to attract big budget U.S. feature film productions.[13] Needless to say, Canada's experiment was extremely successful. Between 1998 and 2001, gross film production expenditures

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[8] *See* The Center for Entertainment Industry Data and Research, The Migration of Feature Film Production from the U.S. to Canada and Beyond (Year 2001 Production Report) 2 (2002), *available at* http://www.ceidr.org/y2k1report.pdf [hereinafter CEIDR 2002 Report].

[9] *See* CEIDR 2006 Report, *supra* note 1, at 2, 7.

[10] *See* CEIDR 2002 Report, *supra* note 8, at 2.

[11] *See id.*

[12] *See id.*

[13] The Canadian Production Services Tax Credit offered an 11% rebate on qualified Canadian labor expenses. *See* CEIDR 2006 Report, *supra* note 1, at 34. At the same time, many Canadian provinces offered an additional rebate on regional labor expenses. *Id.* The

in the U.S. dropped $683 million, from $3.93 billion to $3.24 billion.[14] During the same period, gross film production expenditures in Canada correspondingly grew by $617 million.[15] Overall, between 1998 and 2001, Canada's film incentive program cost the U.S. economy an estimated $4.1 billion and 100,000 jobs.[16]

Canada's successful program demonstrated two important things. First, the talented labor, production infrastructure, and other resources that allowed the U.S. to dominate the film production market until 1998 were no longer material.[17] Canada had established a strong and competent workforce and production infrastructure that was at least comparable to that of the U.S. film industry.[18] Second, a successful incentive program targets the big fish, i.e. major feature productions with budgets of at least $10 million.[19]

Not surprisingly, Canada's successful film incentive program opened the floodgates for imitators and eventually changed the dynamic of the film production market.[20] By 2006, at least eight other countries had enacted film tax incentive programs.[21] Worldwide production dollars spent on theatrical releases correspondingly increased 30 percent, from $5.56 billion in 1998 to $7.21 billion in 2005.[22] Moreover, as the international film production market swelled, the U.S. share in the film production market decreased substantially.[23] The U.S. market share dropped from 71 percent to 47 percent between 1998 and 2005.[24]

In an effort to stay competitive, U.S. states began enacting their own film incentive programs based on the Canadian tax incentive

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incentives combined with a favorable exchange rate at the time offered film companies a 10 to 25 percent discount against the total film budget. *Id.*

[14] *See* CEIDR 2006 Report, *supra* note 1, at 7, 34.

[15] *See* CEIDR 2006 Report, *supra* note 1, at 1, 34.

[16] *See* CEIDR 2002 Report, *supra* note 8, at 3.

[17] *See* CEIDR 2002 Report, *supra* note 8, at 3-4; *see also* MPAA Report, *supra* note 1, at 7-8.

[18] *See* CEIDR 2002 Report, *supra* note 8, at 3-4; *see also* MPAA Report, *supra* note 1, at 7-8.

[19] The U.S. productions most affected by the Canadian rebates were feature films with gross budgets between $10 million and $50 million. CEIDR 2002 Report, *supra* note 8, at 3-4.

[20] *See* CEIDR 2006 Report, *supra* note 1, at 1.

[21] Between 1998 and 2006, Australia, Fiji, Germany, Hungary, Ireland, New Zealand, South Africa, and the United Kingdom offered film incentives similar to Canada. CEIDR 2006 Report, *supra* note 1, at 2.

[22] *See* CEIDR 2006 Report, *supra* note 1, at 2.

[23] *See id.*

[24] *See id.*

model.[25] By 2006, approximately ten states had enacted significant film tax incentive programs similar to that of Canada.[26] Today, forty-two states offer some form of film incentive program.[27]

In sum, the history of film tax credits is relatively short. What started out in 1998 as a competitive tactic by Canada to lure film production dollars out of the U.S. became the model that countries and U.S. states followed to attract billions of film industry dollars.

B. *The Booming Present*

Today, states and filmmakers alike recognize and embrace film incentives as an integral part of selecting a production location. From the state perspective, the competition for film production dollars is stiff.[28] States compete not only with one another, but with the rest of the world as well.[29] States realize that film incentives are a major, if not the primary, factor in luring filmmakers and film production companies to their states.[30]

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[25] *See id.*

[26] *See id.*

[27] *See* ALASKA STAT. § 43.98.030; ARIZ. REV. STAT. ANN. § 41-1517; CAL. REV. & TAX CODE §§ 6006, 6006.1, 6006.3, 6007, 6010, 6010.4, 6010.6; COLO. REV. STAT. § 24-46-105.8; CONN. GEN. STAT. § 12-217JJ; FLA. STAT. 288.1254; GA. CODE ANN. § 48-7-40.26; HAW. REV. STAT. § 235-17; IDAHO CODE ANN. § 67-4728; 35 ILL. COMP. STAT. 16/5; IND. CODE § 6-3.1-32; IOWA CODE § 15.391; KAN. STAT. ANN. § 79-32,258; KY. REV. STAT. ANN. § 139.538; LA. REV. STAT. ANN. § 47: 1123; ME. REV. STAT. ANN. TIT. 36, § 6901; MD. CODE ANN., ECON DEV. § 4-401; MASS. GEN. LAWS CH. 62 § 6; MICH. COMP. LAWS § 208.1455; MINN. STAT. ANN. § 116U.26; MISS. CODE ANN. § 57-89-1; MO. REV. STAT. § 135.750; MONT. CODE ANN. § 15-31-901; N.J. STAT. ANN. § 54:10A-5.39; N.M. STAT. ANN. § 7-2F-1; N.Y. TAX LAW § 24; N.C. GEN. STAT. ANN. § 105-130.47; OKLA. STAT. ANN. TIT. 68, § 3623; OR. REV. STAT. § 284.368; 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2; S.C. CODE ANN. § 12-62-20; S.D. CODIFIED LAWS § 10-46D-1; TENN. CODE ANN. §§ 4-3-4902, 67-4-2109; TEX. GOV'T CODE ANN. § 485.022; UTAH CODE ANN. § 63M-1-1802; VT. STAT. ANN. TIT. 10, § 650; VA. CODE ANN. § 2.2-2320; WASH. REV. CODE § 43.365; W. VA. CODE § 11-13X-1; WIS. STAT. ANN. § 71.47(5F); WYO. STAT. ANN. § 9-12-403.

[28] *See* NGA Report, *supra* note 2, at 1.

[29] *See* Theo Emery, *Tenn. Went Extra Mile To Land "Hannah Montana" Movie*, THE TENNESSEAN, June 15, 2008 [hereinafter Emery Article]; *see also* NGA Report, *supra* note 2, at 1.

[30] *See, e.g.*, Press Release, Illinois Government News Network, Gov. Blagojevich Signs Film Tax Credit Legislation (May 27, 2008) ("The Film Tax Credit put Illinois back on the film industry's map. . . . By renewing this tax credit, we're holding on to our competitive position and ensuring that filmmakers will continue coming here to make their movies."), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=35&RecNum=6857 [hereinafter Illinois Film Office May 2007 Press Release]. *See also* BOISE STATE UNIVERSITY, BUILDING A SUSTAINABLE FILM INDUSTRY: WHAT IDAHO CAN LEARN FROM BRITISH COLUMBIA AND AUSTIN 9 (2006) ("In the past, filmmakers called Idaho's Film Commission to ask for good locations to shoot. Today, filmmakers call the Idaho Film Commission for information on its State tax incentives." (quoting an anonymous Hollywood actress)), *available at* http://cobe.boisestate.edu/Create!Idaho/idaho%20film%20industry

From the filmmakers' perspective, there is a wide selection of film production incentives in the U.S. and the world.[31] In choosing a location, in addition to creative considerations, filmmakers consider which incentive will maximize saving on production costs, allow them to hire and maintain a competent crew, and realize an adequate return on their investment.[32]

1. The Economic Impact of the Film Industry on States

States today realize the economic benefits that flow from the film industry.[33] A study by the Motion Picture Association of America showed that in 2005 the direct economic benefits of filmmaking in the

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%20study%20final%20revised%2012.17.06._1.pdf [hereinafter Idaho Film Report]; LOS ANGELES COUNTY ECONOMIC DEVELOPMENT CORPORATION, WHAT IS THE COST OF RUN-AWAY PRODUCTION? JOB, WAGES, ECONOMIC OUTPUT AND STATE TAX REVENUE AT RISK WHEN MOTION PICTURE PRODUCTIONS LEAVE CALIFORNIA 16-17 (2005), *available at* http://www.film.ca.gov/pdf/press_release/California_Film_Commission_Study.pdf [hereinafter California Film Report].

Moreover, a handful of states with film incentives in place even face pressure from within to increase their competitive position by enacting stronger incentives. In an interview with the Dallas Morning News, the head of the Texas Film Commission, Bob Hudgins, voiced the need to stay competitive for film production dollars via stronger incentives. *See Shot in Texas: More Wrangling Over Film Incentives*, THE DALLAS MORNING NEWS, Oct. 24, 2008, http://www.dallasnews.com/sharedcontent/dws/ent/stories/DN-shotintexas_1024gd.ART.State.Edition1.4b12260.html [hereinafter Dallas Morning News Article]. Hudgins stated, "What is a problem . . . is the size (five percent) of the state's incentives . . . If we don't deliver the goods . . . we're going to lose the competitive edge." *Id.*; *see also* Benjamin Sarlin, *Take Two: Expansion Is Sought of Film Production Tax Credits*, THE N.Y. SUN, Sept. 17, 2008; *see also* Scott E. Pacheco, *Film Industry Players Say Better Film Incentives Needed To Lure Projects*, MIAMI TODAY, Oct. 16, 2008; Brice Wallace, *Lawmakers Seek To Remove Film Incentive Cap*, DESERET MORNING NEWS, May 22, 2008.

Not surprisingly, states without any incentives face pressure to enact competitive film incentive legislation. *See* Nebraska Independent Film Projects, *First Approval Given To Film Incentive – KEEP IT GOING!*, http://www.nifp.org/node/478 (Jan. 22, 2008); Julie E. Washington, *Proposed Legislation Billed As Means of Luring Film Industry into State*, The Plain Dealer Politics Blog, Oct. 20, 2008, http://bolg.cleveland.com/openers/2008/10/proposed_legislation_billed_as.html (last visited Dec. 10, 2008); Lauren Horwitch, *CA Film-TV Tax Credits Defeated, Not Dead*, BACK STAGE, July 26, 2007, http://www.backstage.com/bso/news_reviews/film/article_display.jsp?vnu_content_id=1003617293.

[31] Idaho Film Report, *supra* note 30, at 9.

[32] *See* Sara Vahabi, *What Do American Film Productions Look For When Choosing Film Locations?*, Beyond Blond, Apr. 10, 2008, http://beyond-blond.blogspot.com/2008/04/why-choose-sweden-to-shoot-your-next.html (last visited Dec. 10, 2008) ("[T]he top questions that come up when deciding on choosing a location were . . . how skilled is the production force and how deep is the crew base; stage facilities; possibilities for simultaneous shooting . . . and certainly not least what are the tax incentives.").

[33] *See* NGA Report, *supra* note 2, at 3: *see also* Press Release, Illinois Department of Commerce & Economic Opportunity, Governor Blagojevich Announces Batman Movie The Dark Knight Generates Nearly $40 Million in Revenue for the Illinois Economy (May 27, 2008), *available at* http://www.commerce.state.il.us/dceo/Bureaus/Film/News/pr07162008.htm [hereinafter Dark Knight Press Release].

U.S. exceeded $60 billion.[34] More specifically, the film industry benefits states in at least four important ways.[35] First, the film industry attracts out-of-state investment.[36] The successful production of a motion picture requires expenditures on many goods and services, such as hardware, lumber, catering, and security, which are provided by state vendors and suppliers.[37] Those goods and services expenditures are, in turn, taxed by the state.[38] In fact, in 2005 the film industry spent approximately $30.2 billion on goods and services.[39] The sales taxes on those goods and services generated $700 million in new tax revenue for states.[40]

Second, the film industry creates a diverse range of high wage employment opportunities for state residents.[41] Film production requires more than just actors and directors.[42] The majority of film production work is performed by a wide array of employees such as technicians, truck drivers, caterers, construction crews, architects, and attorneys.[43] 70 to 80 percent of those film production workers are hired locally.[44] Most importantly, direct employees of the film industry earned an average salary of $73,000 in 2005, while the average American worker earned an average annual salary of $40,677.[45]

Third, the film industry stimulates film-related state tourism.[46] Film tourism is the economic phenomenon of tourism visits stimulated by a particular location or region being featured on film.[47] One study found that the number of tourists to a community is approximately 54

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[34] *See* MPAA Report, *supra* note 1, at 5; *see also* NGA Report, *supra* note 2, at 1.

[35] *See* NGA Report, *supra* note 2, at 2.

[36] *See* Glenn Rifkin, *Lights, Camera, Generous Tax Credit*, N.Y. TIMES, June 5, 2008; *see also* NGA Report, *supra* note 2, at 4.

[37] *See* THE MONTANA FILM OFFICE & THE MONTANA DEPARTMENT OF COMMERCE, THE BIG SKY ON THE BIG SCREEN ACT 8 (2005), *available at* http://montanafilm.com/PDF08/Big_Sky_Big_Screen_%20instructions.pdf ("In any given week, a film crew will be landing at a Montana airport, renting cars, and heading out to location. They will be hiring local crew, doing post-production work on-site, and making frequent purchases of significant construction and other materials."); *see also* Dark Knight Press Release, *supra* note 33 ("The Dark Knight is evidence of the film industry's huge economic impact . . . this movie production purchased goods and services from over 300 Illinois vendors including hardware, lumber, catering and security.") *see also* NGA Report, *supra* note 2, at 4.

[38] *See* NGA Report, *supra* note 2, at 4.

[39] *See* MPAA Report, *supra* note 1, at 5.

[40] *See* NGA Report, *supra* note 2, at 4.

[41] *See id.* at 5.

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See* MPAA Report, *supra* note 1, at 6.

[46] *See* NGA Report, *supra* note 2, at 5-6.

[47] *See* Oregon Impact Report, *supra* note 2, at 22-23.

percent higher four years after a location is featured in a successful film.[48] A great example of this phenomenon was demonstrated in California's Santa Barbara County, the film location for the major motion picture *Sideways*.[49] One year after the film's release, visits to Santa Barbara County increased by 300 percent.[50] In some instances, the effects can last even longer. 65,000 tourists a year visit the cornfield in Iowa where the 1989 movie *Field of Dreams* was set.[51]

Finally, the film industry stimulates the economic and civic vitality of local communities within states.[52] Filmmakers and production companies in a particular area or region often invest significant resources to develop communities in order to create the right look for a film.[53] In that process, they make many improvements, including building repair, road pavement, and garden planting.[54] The improvements remain long after the filming ends.[55] According to the National Governors Association, the film industry has been the key to economic recovery in Louisiana after the devastation caused by Hurricane Katrina in 2005.[56]

2. The Relationship Between Film Incentives and In-State Film Spending

States have undoubtedly enticed filmmakers and benefited through the use of film incentives. That being said, the precise relationship between film incentives and film industry dollars is difficult to accurately quantify and ascertain. While film incentives are unquestionably persuasive, the choice of a film location involves a variety of factors that may outweigh the value of a particular incentive. For instance, foreign currency exchange rates fluctuate and can accordingly make the value of filming in a particular country more or less appealing.[57] Also, labor costs, regulations, or disputes can vary from country

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[48] *See* Hudson, Simon, & J.R. Brent Richie, *Film Tourism and Destination Marketing: The Case of Captain Corelli's Mandolin*, 12 J. OF VACATION MARKETING 256, 261 (July 2006).

[49] *See* NGA Report, *supra* note 2, at 9.

[50] *See* NGA Report, *supra* note 2, at 9. In fact, the Santa Barbara wineries have become so popular as a result of the movie *Sideways* that there are maps and tours available for tourists who only want to visit the specific wineries and locations featured in the movie. *See* Valerie Herman, *A Scene Knocked 'Sideways'*, LOS ANGELES TIMES, Dec. 9, 2004.

[51] Oregon Impact Report, *supra* note 2, at 22.

[52] *See* NGA Report, *supra* note 2, at 6-7.

[53] *See id.* at 6.

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] In 1998, when Canada enacted its film tax credit incentive, the exchange rate was $1.47 for every $1.00 U.S. which, in turn, substantially raised the value of the Canadian film tax credits. *See* CEIDR 2006 Report, *supra* note 1, at 34.

to country, or even from state to state, making a particular country or state more or less appealing.[58]

Some state lawmakers have sought to ensure that filmmakers are coming to their states primarily because of the incentive, as opposed to filmmakers incidentally receiving the incentive after already making the decision to film in their states. For instance, Illinois, in deciding whether to award an incentive, considers the following: "That, if not for the credit, the applicant's production would not occur in Illinois."[59]

Two things are certain, though. First, states have seen significant rises in film industry growth after enacting film incentive programs.[60] Second, they attribute those rises to the use of film incentives.[61] For instance, in 2008 Illinois issued the following statement in a press release:

> In 2000, Illinois began suffering a mass exodus of the film industry as other states began enacting film incentives. By 2003, the Illinois film industry had fallen to an all-time low of $23 million. In response, Gov. Blagojevich enacted the Illinois Film Tax Credit. Since its passage, the film industry has rebounded dramatically. The film industry reached an all-time record of nearly $155 million in 2007. This represents the single best year in the state's history - and an 80 percent increase over 2006.[62]

Other states that have also reported significant film industry growth after enacting film production incentives include Arizona, Connecticut, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, and Utah.[63]

3. The Economic Impact of Film Incentives on Filmmakers

Filmmakers and film production companies today realize the importance of film incentives. Film incentives benefit filmmakers and film production companies in two important ways. First, and perhaps most obviously, film incentives can significantly and positively affect the bottom line of a film production.[64] After all, filmmaking is a busi-

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[58] For instance, labor union disputes in Canada between 2003 and 2006 caused some filmmakers to film elsewhere. *See* CEIDR 2006 Report, *supra* note 1, at 37-38.

[59] 35 ILL. COMP. STAT. 16/30(a)(5) (2008).

[60] *See* MPAA Report, *supra* note 1, at 13-14; *see also* Dark Knight Press Release, *supra* note 33.

[61] *See* MPAA Report, *supra* note 1, at 13-14; *see also* Dark Knight Press Release, *supra* note 33.

[62] Illinois Film Office May 2007 Press Release, *supra* note 30.

[63] *See* MPAA Report, *supra* note 1, at 13-14.

[64] *See* SUGIT M. CANAGARETNA, LIGHTS! CAMERA! ACTION! SOUTHERN STATES' EFFORTS TO ATTRACT FILMMAKERS' BUSINESS 5 (2007) ("[C]ost considerations often are the most dominant variable in the calculations of movie producers . . . .") [hereinafter CanagaRetna Article]; *see also* NGA Report, *supra* note 2, at 9.

ness. A large profit is the goal of any business. Lower costs, through film incentives that help filmmakers cut costs, equal more profit.[65]

Second, filmmakers and film production companies gain non-monetary benefits by liaising with states. From a long-term competitive advantage perspective, states have an incentive to build a good rapport with filmmakers.[66] Nearly every state, even some without film incentive programs, have film offices that assist filmmakers in obtaining necessary permits, recommending reliable vendors, and generally making sure that filming goes as smoothly as possible for all involved parties.[67]Thus, as states compete for film industry dollars, filmmakers benefit both directly and indirectly.

4. Types of Film Incentives Offered

State film incentives currently fall into five categories: (1) production expense rebates or exemptions; (2) labor expense rebates or exemptions; (3) lodging expense rebates or exemptions; (4) state property use exemptions; and (5) other financial incentives such as grants, loans, or fuel tax vouchers.[68] Many states offer multiple categories of incentives.[69] These incentives generally target big-budget feature films.[70]

First, production expense incentives usually apply to taxes normally assessed for goods, services, and other production related expenses.[71] Filmmakers are awarded a cash rebate or exemption, usually capped at a statutorily prescribed amount, based on the amount of qualified taxable production costs incurred in the state.[72] Such costs

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[65] *See* NGA Report, *supra* note 2, at 9.

[66] Tennessee, for example, used some personal ties and "the power of handshakes" to persuade Disney to make *Hanna Montana: The Movie* in the State. *See* Emery Article, *supra* note 29.

[67] *See* NGA Report, *supra* note 2, at 11; *see also, e.g.*, Louisiana Film & Television Office, http://www.lafilm.org/film_services/ (last visited Dec. 11, 2008) ("Everyone in Louisiana believes in going the extra mile to make sure all of your production needs are met.").

[68] *See* NGA Report, *supra* note 2, at 9.

[69] *See id.*

[70] *See e.g.* ALASKA STAT. § 44.33.233(a)(1) (2008) ("A film production is eligible for a tax credit . . . if the producer has $100,000 or more in qualified expenditures . . . ."); *see also, e.g.* IDAHO CODE ANN. § 67-4728(2)(h) (2008) ("'Qualified production' means a feature film . . . that spends a minimum of two hundred thousand dollars ($200,000) on Idaho goods and services."); OR. REV. STAT. § 284.368(2)(c) (2007) ("In order to qualify for reimbursement . . . total expenses paid for the film must equal or exceed $750,000.").

The incentives target big budget productions based on the Canadian film incentive model, which experienced major success by targeting big-budget feature films, as opposed to lower budget, non-studio produced independent films. *See* CEIDR 2002 Report, *supra* note 8, at 3-4 and accompanying text.

[71] *See* NGA Report, *supra* note 2, at 9.

[72] *See id.*

may include equipment rental, catering, and security.[73] Oregon, for instance, offers a 20 percent reimbursement for all film production expenses paid in Oregon, excluding labor.[74] The Oregon statute defines actual expenses to include costs such as the rental or purchase of equipment and food.[75] Likewise, in Pennsylvania, filmmakers who incur 60 percent of total production expenses in the state are eligible to receive a 25 percent credit on all of their in-state production expenses.[76] The Pennsylvania statute defines production expenses to include anything purchased from a Pennsylvania resident or from an entity subject to Pennsylvania taxation.[77]

Second, labor expense incentives apply to the compensation of production workers.[78] Filmmakers are awarded a cash rebate or exemption, usually capped by statute, based on the amount of wages paid to film production workers.[79] Typically, states require that those workers be state residents.[80] Labor incentives work to directly reduce production costs for filmmakers while directly increasing statewide employment.[81] For instance, Illinois offers a 25 percent credit on the first $25,000 in wages paid to Illinois residents.[82]

Third, lodging expense incentives apply to production companies that must provide lodging for out-of-town production workers and staff.[83] As with production and labor cost rebates and exemptions, filmmakers are awarded a cash rebate or exemption for all costs related to housing production crews.[84] Georgia, for example, offers a 20 percent tax credit on all lodging costs incurred in the State.[85]

Fourth, state property use incentives apply to production companies seeking to rent or use state property or building facilities.[86] The state property use incentives reduce the costs involved with using state properties such as parks, government buildings, and historical sites.[87]

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[73] *See id.*

[74] OR. REV. STAT. § 284.368(2)(b)(B).

[75] *Id.* at § 284.368(1)(a).

[76] 72 PA. CONS. STAT. ANN. § 8702-D; *see also* NGA Report, *supra* note 2, at 9.

[77] 72 PA. CONS. STAT. ANN. § 8702-D.

[78] *See* NGA Report, *supra* note 2, at 10.

[79] *See id.*

[80] *See id.*

[81] *See id.* at 10-11.

[82] 35 ILL. COMP. STAT. 16/5; *see also* NGA Report, *supra* note 2, at 10

[83] *See* NGA Report, *supra* note 2, at 11.

[84] *See id.*

[85] GA. CODE ANN.. § 48-7-40.26(b)(5), (c)(1) (2008).

[86] *See* NGA Report, *supra* note 2, at 11.

[87] *See id.*

For instance, Pennsylvania allows approved filmmakers to use state-owned property free of charge.[88]

Finally, some states offer financial incentives other than cash rebates and tax exemptions, like grants, loans, and vouchers.[89] For instance, New Mexico offers 0% interest loans of up to $15 million for qualifying feature films.[90] Michigan offers an almost identical loan program.[91]

C. *The Uncertain Future*

While state film incentives currently stand as an integral means of attracting film production dollars, their future is not so certain. In a report for the State of New York, Cornell University researchers predicted the following about the future of film production incentives:

> As cities, states, provinces and nations vie to offer each new iteration of tax-supported backing for production, their differences – and the attention of each to marketing their unique assets and appeal – recede. Caught up in the spirit of competition, each trumpets their wins or bemoans their losses of the most prestigious projects – the high-profile feature films – which, as we have documented, are a decreasing proportion of available production projects.
>
> Overall, there is the danger that incentives will become too much of a good thing. With so many players in the game, the more they spread out the available action in a few product segments, the less the chance that anyone will build a sustainable industry – unless they already have one, like Los Angeles, or Canada, or New York.[92]

Also, some states, such as Michigan, Louisiana, Rhode Island, and New York, have been criticized by their own legislators and citizens for giving away "too much" in state resources in order to attract filmmakers.[93] Louisiana, for instance, expended approximately $27 million

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[88] *See* Pennsylvania Film Office, Economic Incentives, *available at* http://www.filminpa.com/filminpa/econIncentives.jsp (last visited Dec. 10, 2008) ("Except for extraordinary activities, no department or agency of the Commonwealth may charge a fee or other cost, except the actual costs incurred by the affected department or agency, for the use of State-owned property for the purpose of making commercial motion pictures."); *see also* NGA Report, *supra* note 2, at 11.

[89] *See* NGA Report, *supra* note 2, at 11.

[90] New Mexico Film Office, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Dec. 10, 2008); *see* NGA Report, *supra* note 2, at 11.

[91] *See* Michigan Film Incentives and Digital Media Incentives, http://www.michiganfilmproduction.com/michigan_film_incentive (last visited Dec. 10, 2008).

[92] CORNELL UNIVERSITY, NEW YORK'S BIG PICTURE: ASSESSING NEW YORK'S POSITION IN FILM, TELEVISION AND COMMERCIAL PRODUCTOIN 61 (2006), *available at* http://www.fiscalpolicy.org/publications2006/FPI_TelevisionFilmCommercial_Aug2006.pdf.

[93] *See* April MacIntrye, *Brad Pitt's Louisiana Tax Credit*, PEOPLE NEWS, Oct. 13, 2008, *available at* http://www.monstersandcritics.com/people/news/article_1436692.php; *see also* Michael Cieply, *States' Film Production Incentives Cause Jitters*, N.Y. TIMES, Oct. 11, 2008

in state tax credits and resources in order to attract the production of *The Curious Case of Benjamin Button*.[94] Proponents of the legislation, on the other hand, argue that critics fail to look at the significant economic benefits that flow from the incentives.[95]

For now, state film incentive programs are probably safe as an integral tool in attracting filmmakers. But perhaps the incentives are just enjoying their brief ascendancy before the next gimmick comes along that will allow states to better attract the billions of film production dollars available each year.

III. IDENTIFYING CONTENT RESTRICTIONS WITHIN STATE FILM INCENTIVE PROGRAMS

A. *Why States Restrict Content in Film Incentive Programs*

In 1999, the high school football comedy *Varsity Blues* was filmed at a high school in Texas.[96] The movie features scenes of high school football players drinking to excess and patronizing topless bars.[97] State officials voiced concern that, before and during production, the filmmakers were not completely honest with the State regarding the content of the film.[98] The officials were further concerned that the movie negatively portrayed Texas and its citizens.[99]

In 2007, the State of Texas enacted the Texas Moving Image Industry Incentive Program[100] with the following content provisions:

> (e) The office is not required to act on any grant application and may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the office, in a moving image project. In determining whether to act on or deny a grant application, the office shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas.
>
> (f) Before a grant is awarded under this subchapter, the office must:
>
> (1) require a copy of the final script; and

("Already on the hook for billions to bail out Wall Street, taxpayers are also finding themselves stuck with a growing tab for state programs intended to increase local film production."); Steve Peoples, *Review for State's Film Tax Credit Aren't Good*, THE PROVIDENCE JOURNAL, Aug. 12, 2008; Bill Shea, *"Cut!" Cry Critics of Film Law: Payouts, Exemptions Stir Drive for Rewrite*, CRAIN'S DETROIT BUSINESS, June 9, 2008.

[94] *See* MacIntyre, *supra* note 93; *see also* Cieply, *supra* note 93.

[95] *See* MacIntyre, *supra* note 93; *see also* Cieply, *supra* note 93.

[96] *See* Dallas Morning News Article, *supra* note 30.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] TEX. GOV'T CODE ANN. § 485.022 (2007).

> (2) determine if any substantial changes occurred during production on a moving image project to include content described by Subsection (e).[101]

While Texas is the "Lone Star State," it is by no means alone when it comes to restricting content in film incentive programs. At least thirty-seven of the forty-two states with incentive programs restrict content in some way.[102]

The fact that the overwhelming majority of states with film incentives choose to restrict content demonstrates two very important points. First, state lawmakers care about the content of the projects they sponsor.[103] Second, state lawmakers feel that it is perfectly appropriate, and not inconsistent with the First Amendment, to restrict content while awarding incentives to filmmakers.[104] This is more likely than not because of the conditional nature of the funding. In other words, the programs neither directly prohibit content nor criminalize certain content. Instead, the programs simply forbid certain types of content as a condition of accepting state funds.[105] This point is best summarized in the following statement by Dallas producer and filmmaker Todd Simms discussing the Texas incentive program's content restrictions: "No one

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[101] *Id.* § 485.022(e)-(f).

[102] Of the forty-two states with film incentive programs, only California, Kansas, Kentucky, Louisiana, and Maryland do not restrict content. *See* ALASKA STAT. § 43.98.030; ARIZ. REV. STAT. ANN. § 41-1517; CAL. REV. & TAX CODE §§ 6006, 6006.1, 6006.3, 6007, 6010, 6010.4, 6010.6; COLO. REV. STAT. § 24-46-105.8; CONN. GEN. STAT. § 12-217JJ; FLA. STAT. 288.1254; GA. CODE. ANN. § 48-7-40.26; HAW. REV. STAT. § 235-17; IDAHO CODE ANN. § 67-4728; 35 ILL. COMP. STAT. 16/5; IND. CODE § 6-3.1-32; IOWA CODE § 15.391; KAN. STAT. ANN. § 79-32,258; KY. REV. STAT. ANN. § 139.538; LA. REV. STAT. ANN. § 47: 1123; ME. REV. STAT. ANN. TIT. 36, § 6901; MD. CODE ANN., ECON. DEV. § 4-401; MASS. GEN. LAWS CH. 62 § 6; MICH. COMP. LAWS § 208.1455; MINN. STAT. ANN. § 116U.26; MISS. CODE ANN. § 57-89-1; MO. REV. STAT. § 135.750; MONT. CODE ANN. § 15-31-901; N.J. STAT. ANN. § 54:10A-5.39; N.M. STAT. ANN. § 7-2F-1; N.Y. TAX LAW § 24; N.C. GEN. STAT. ANN. § 105-130.47; OKLA. STAT. ANN. TIT. 68, § 3623; OR. REV. STAT. § 284.368; 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2; S.C. CODE ANN. § 12-62-20; S.D. CODIFIED LAWS § 10-46D-1; TENN. CODE ANN. §§ 4-3-4902, 67-4-2109; TEX. GOV'T CODE ANN. § 485.022; UTAH CODE ANN. § 63M-1-1802; VT. STAT. ANN. TIT. 10, § 650; VA. CODE ANN. § 2.2-2320; WASH. REV. CODE § 43.365; W. VA. CODE § 11-13X-1; WIS. STAT. ANN. § 71.47(5F); WYO. STAT. ANN. § 9-12-40.

[103] *See* Hilary Hylton, *Filming Texas in a Good Light*, TIME, July 2, 2007 [hereinafter Time Article].

[104] *Id.* Interestingly, some filmmakers, while not happy about the regulation, think that content regulation in film incentives is not a major concern. *See id.* For instance, one filmmaker stated, "I wasn't happy with the language, but overall I don't think it's going to be a problem." *Id.* Another entertainment industry executive went even further, stating, "I actually tend to agree [with Texas], in general. The state does not need to be supporting pornography. If it clearly besmirched the state, the public would be outraged that it was funded with Texas dollars." *Id.*

[105] *Id.*; *see also* TEX. GOV'T CODE ANN. § 485.022.

is saying you can't shoot a movie in Texas that makes Texas look bad. All we are saying is you are not going to get a grant."[106]

B. *The Four Categories of Content Restrictions in State Film Incentive Programs*

Content restrictions in state film incentive programs generally fall into four categories: (1) categorical; (2) negative image; (3) implicit; and (4) carte blanche. Some states engage in multiple categories of content restriction.

1. Categorical Content Restrictions

The first type of content restriction can be termed "categorical content restriction." With categorical content restriction, a state restricts an entire kind or category of content altogether within its film incentive program. States that engage in categorical content restriction typically restrict three categories of content: political, commercial, and pornographic content.[107] Thirty-four States engage in categorical

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[106] Time Article, *supra* note 103.

[107] Six states restrict political content. *See* ALASKA STAT. § 44.33.232; FLA. STAT. 288.1254(1)(e); MO. REV. STAT.. § 135.750(1)(2)(g); N.C. GEN. STAT. ANN. § 105-130.47(f)(1); WASHINGTON FILM WORKS, GUIDELINES AND CRITERIA 4 (2008), *available at* www.washingtonfilmworks.org/guidelines.html [hereinafter WASHINGTON FILM WORKS]; W. VA. CODE § 11-13X-2(b)(9). Nineteen states restrict commercial content. *See* ALASKA STAT. § 44.33.233(C)(3); ARIZ. REV. STAT. ANN. § 41-1517(V)(2); CONN. GEN. STAT. § 12-217JJ(A)(B); FLA. STAT. 288.1254(1)(E); HAW. REV. STAT. § 235-17(L); IDAHO CODE ANN. § 67-4728(H); 35 ILL. COMP. STAT. 16/10(6); IND. CODE § 6-3.1-32-5(A)(4); GG-1.5 ME. CODE R § 13090-L(2)(A)(5); MASS. GEN. LAWS CH. 62 § 6(L)(1); MINN. STAT. ANN. § 116U.26(B)(2); MO. REV. STAT. § 135.750(1)(2)(F); MONT. CODE ANN. § 15-31-903(2)(A); N.J. STAT. ANN. § 54:10A-5.39 (E); N.Y. TAX LAW § 24(B)(3); 72 PA. CONS. STAT. ANN. § 8702-D; VT. STAT. ANN. TIT. 10, § 650(4)(D)-(E); WASHINGTON FILM WORKS, GUIDELINES AND CRITERIA 4 (2008); W. VA. CODE § 11-13X-2(B)(9); WIS. STAT. ANN. § 71.47(5f)(f). Thirty-three states prohibit pornographic content. *See* ALASKA STAT. § 43.22.233(C)(5); ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, FILM INCENTIVE PROGRAM PROCEDURES & DEFNINITIONS 2 (2008), *available at* http://www.colorado.gov/cs/Satellite/OEDIT/OEDIT/1165009699801 (follow "Film Incentive Program Procedures and Definitions" hyperlink) [hereinafter COLORADO FILM COMMISSION]; CONN. GEN. STAT. § 12-217JJ(A)(3)(B); FLA. STAT. 288.1254(1)(E); HAW. REV. STAT. § 235-17(L); IDAHO CODE ANN. § 67-4728(2)(H); 35 ILL. COMP. STAT. 16/10(7); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS CH. 62 § 6(L)(1); ME. CODE. R. § 13090-L(2)(A)(6); MICH. COMP. LAWS § 208.1455(3)(D); MICH. COMP. LAWS § 208.1455(12)(K)(I); MINN. STAT. ANN. § 116U.26(B)(2); MISS. CODE ANN. § 57-89-3(C); MO. REV. STAT. § 135.750(1)(2)(H); MONT. CODE ANN. § 15-31-903(2)(B)(I) (2007); N.J. STAT. ANN. § 54:10A-5.39 (E); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(F)(3); N.Y. TAX LAW § 24(B)(3); OKLA. STAT. ANN. TIT. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN. § 12-62-20(3); S.D. CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(K)(1)(A); TENNESSEE FILM AND MUSIC COMMISSION, REQUIREMENTS FOR 13/15/17% FILM % TELEVISION PRODUCTION INCENTIVE 1 (2008), *available at* http://www.tn.gov/film/incentives/htm [herein-

content restriction, with some restricting multiple categories of content.[108]

Six states prohibit political content within their film incentive programs – Alaska, Florida, Missouri, North Carolina, Washington, and West Virginia.[109] These six states generally prohibit political content by defining "film" or "certified production" as a project that neither has nor advertises a political message.[110] Florida, for instance, expressly excludes "political programs," "political documentaries," and "political advertising" from the definition of "production."[111] The other primary way that political content is prohibited is by simply stating that political productions are ineligible for funding.[112] For example, Alaska's film incentive statute provides: "The following productions are not eligible, regardless of production costs . . . a political advertisement."[113]

Nineteen states prohibit commercial content within their film incentive programs.[114] To name a few, Arizona, Hawaii, Illinois, Idaho,

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after TENNESSEE 13/15/17]; TENNESSEE FILM AND MUSIC COMMISSION, REQUIREMENTS FOR 15% HEADQUARTERS FUND 1 (2008), *available at* http://www.tn.gov/film/incentives/htm [hereinafter TENNESSEE 15]; 13 TEX. ADMIN. CODE § 121.4(2); VA. CODE ANN. § 2.2-2320; VT. STAT. ANN. TIT. 10, § 650(4)(F); WASHINGTON FILM WORKS, GUIDELINES AND CRITERIA 4 (2008); WIS. STAT. ANN. § 71.47(5F)(G).

[108] *See* ALASKA STAT. § 44.33.232; ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, *supra* note 107; CONN. GEN. STAT. . § 12-217JJ(A)(3)(B); FLA. STAT. . 288.1254(1)(E); HAW. REV. STAT. § 235-17(L); IDAHO CODE ANN. § 67-4728(2)(H); 35 ILL. COMP. STAT. 16/10(7); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS CH. 62 § 6(L)(1); ME. CODE R. § 13090-L(2)(A)(6); MICH. COMP. LAWS § 208.1455(3)(D); MICH. COMP. LAWS § 208.1455(12)(K)(I); MINN. STAT. ANN. § 116U.26(B)(2); MISS. CODE ANN. § 57-89-3(C); MO. REV. STAT. § 135.750(1)(2)(H); MONT. CODE ANN. § 15-31-903(2)(B)(I); N.J. STAT. ANN. § 54:10A-5.39 (E); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(F)(3); N.Y. TAX LAW § 24(B)(3); OKLA. STAT. ANN. TIT. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN. § 12-62-20(3); S.D. CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(K)(1)(A); TENNESSEE 13/15/17, *supra* note 107, Tennessee 15, *supra* note 107; 13 Tex. Admin. Code § 121.4(2); VA. Code Ann. § 2.2-2320; Vt. Stat. Ann. tit. 10, § 650(4)(F); Washington Film Works, Guidelines and Criteria 4 (2008); W. Va. Code § 11-13X-2(b)(9); Wis. Stat. Ann. § 71.47(5f)(g).

[109] ALASKA STAT. § 44.33.232; FLA. STAT. 288.1254(1)(E); MO. REV. STAT. § 135.750(1)(2)(G); N.C. GEN. STAT. ANN. § 105-130.47(F)(1); WASHINGTON FILM WORKS, *supra* note 107; W. VA. CODE § 11-13X-2(B)(9).

[110] *See* ALASKA STAT. § 44.33.232; *see also* Fla. Stat. 288.1254(1)(e); Mo. Rev. Stat. § 135.750(1)(2)(g); N.C. Gen. Stat. Ann. § 105-130.47(f)(1); Washington Film Works, *supra* note 107; W. VA. CODE § 11-13X-2(b)(9).

[111] FLA. STAT. 288.1254(1)(e).

[112] *See* ALASKA STAT. § 44.33.232; *see also* FLA. STAT. 288.1254(1)(e); MO. REV. STAT. § 135.750(1)(2)(g); N.C. GEN. STAT. ANN. § 105-130.47(f)(1); WASHINGTON FILM WORKS, *supra* note 107, W. VA. CODE § 11-13X-2(b)(9).

[113] ALASKA STAT. § 43.22.233(c)(4).

[114] *See* ALASKA STAT. § 44.33.232; ARIZ. REV. STAT. ANN. § 41-1517(V)(2); CONN. GEN. STAT. § 12-217jj(a)(B); FLA. STAT. 288.1254(1)(e); HAW. REV. STAT. § 235-17(I); IDAHO CODE ANN. § 67-4728(h); 35 ILL. COMP. STAT. . 16/10(6); IND. CODE § 6-3.1-32-5(a)(4); GG-

and Massachusetts are five of the nineteen states that prohibit commercial content within their respective film incentive programs.[115] The overwhelming majority of states that restrict commercial content focus their efforts on films or productions that solicit funds.[116] As with political content restriction, commercial content is restricted either by excluding it from the definition of "motion picture" or "production," or by simply stating that certain specified categories of commercial content are ineligible.[117] Massachusetts, for instance, excludes any "production whose sole purpose is fundraising" or any "long-form production that primarily markets a product or service" from the definition of "motion picture" within its incentive statute.[118]

While most states that restrict commercial content target productions that solicit funds, some states have focused on other types of commercial content. Montana, for example, prohibits any film or production that advertises tobacco products.[119] Similarly, Florida and West Virginia prohibit home shopping programs.[120]

1.5 ME. CODE R. § 13090-L(2)(A)(5); MASS. GEN. LAWS ch. 62 § 6(l)(1); MINN. CODE ANN. . § 116U.26(b)(2); MO. REV. STAT. § 135.750(1)(2)(f); MONT. CODE ANN. § 15-31-903(2)(a); N.J. STAT. ANN. § 54:10A-5.39 (e); N.Y. TAX LAW § 24(b)(3); 72 PA. CONS. STAT. ANN. § 8702-D; VT. STAT. ANN. tit. 10, § 650(4)(D)-(E); WASHINGTON FILM WORKS, *supra* note 107; W. VA. CODE § 11-13X-2(b)(9); WIS. STAT. ANN. § 71.47(5f)(f).

[115] ARIZ. REV. STAT. ANN. § 41-1517(V)(2); HAW. REV. STAT. § 235-17(l); IDAHO CODE ANN. § 67-4728(h); 35 ILL. COMP. STAT. 16/10(6); MASS. GEN. LAWS ch. 62 § 6(l)(1).

[116] *See* ALASKA STAT. § 44.33.232 (no advertisements, infomercials, or any program that directly solicits funds); ARIZ. REV. STAT. ANN § 41-1517(V)(2)(sole purpose cannot be soliciting funds); CONN. GEN. STAT § 12-217jj(a)(B) (no production whose sole purpose is fundraising, no long form production that primarily markets a product or service); FLA. STAT. 288.1254(1)(e) (no production that solicits funds, no home shopping programs); HAW. REV. STAT. § 235-17(l) (no production that solicits funds); IDAHO CODE ANN. § 67-4728(h) (no production that solicits funds); 35 ILL. COMP. STAT. 16/10(6); IND. CODE § 6-3.1-32-5(a)(4) (no advertising message broadcast on radio or television); GG-1.5 ME. CODE R. § 13090-L(2)(A)(5) (no finished production that solicits funds); MASS. GEN. LAWS ch. 62 § 6(l)(1) (no production whose sole purpose is to solicit funds, no long form production that primarily markets a product or service); MINN. STAT. ANN. § 116U.26(b)(2) (no finished production that solicits funds); MO. REV. STAT § 135.750(1)(2)(f) (no infomercials or any production that directly solicits funds); MONT. CODE ANN. § 15-31-903(2)(a)(no advertising tobacco products); N.J. STAT. ANN § 54:10A-5.39 (e) (no production that solicits funds); N.Y. TAX LAW § 24(b)(3) (no commercial or program that directly solicits funds); 72 PA. CONS. STAT. ANN. § 8702-D (no production that solicits funds); VT. STAT. ANN.. tit. 10, § 650(4)(D)-(E) (no productions that solicit funds or market a product or service); WASHINGTON FILM WORKS, *supra* note 107 (no production that solicits donations); W. VA. CODE § 11-13X-2(b)(9) (no productions that solicit funds, no home shopping programs, no program that primarily markets a product or service); WIS. STAT. ANN. § 71.47(5f)(f) (no finished production that solicits funds).

[117] *Id.*

[118] Mass. Gen. Laws ch. 62 § 6(l)(1).

[119] MONT. CODE ANN. § 15-31-903(2)(a).

[120] FLA. STAT. 288.1254(1)(e); W. VA. CODE § 11-13X-2(b)(9).

Thirty-three states prohibit pornographic content within their film incentive programs.[121] These states prohibit pornographic content in various ways and with varying degrees of specificity. The most general form of pornographic content restriction is accomplished by explicitly excluding "pornography," "adult films," or "productions for which records are required to be maintained under 18 U.S.C. 2257"[122] from the incentive program.[123] Twelve states, including Arizona, Connecticut, and Florida, engage in pornographic content restriction via this method.[124] The other common form of pornographic content restriction specifically targets obscene productions, child pornography, or both.[125] Twenty-three states, including Iowa, Oklahoma, and

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[121] ALASKA STAT. § 44.33.232; ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, *supra* note 107; CONN. GEN. STAT. § 12-217jj(a)(3)(B); FLA. STAT. 288.1254(1)(e); HAW. REV. STAT. § 235-17(l); IDAHO CODE ANN. § 67-4728(2)(h); 35 ILL. COMP. STAT. 16/10(7); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS ch. 62 § 6(l)(1); ME. CODE R. § 13090-L(2)(A)(6); MICH. COMP. LAWS § 208.1455(3)(d); MICH. COMP. LAWS § 208.1455(12)(k)(i); MINN. STAT. ANN. § 116U.26(b)(2); MISS. CODE ANN. § 57-89-3(c); MO. REV. STAT. § 135.750(1)(2)(h); MONT. CODE ANN. § 15-31-903(2)(b)(i); N.J. STAT. ANN. § 54:10A-5.39 (e); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(f)(3); N.Y. TAX LAW § 24(b)(3); OKLA. STAT. ANN. tit. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN. § 12-62-20(3); S.D. CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(k)(1)(A); TENNESSEE 13/15/17, *supra* note 107; TENNESSEE 15, *supra* note 107; 13 TEX. ADMIN. CODE § 121.4(2); VA. CODE ANN. § 2.2-2320; VT. STAT. ANN. tit. 10, § 650(4)(F); WASHINGTON FILM WORKS, *supra* note 107; WIS. STAT. ANN. § 71.47(5f)(g).

[122] 18 U.S.C. 2257 is The Child Protection and Obscenity Enforcement Act. *See* 18 U.S.C. 2257 (2009). The Act requires producers of sexually explicit productions to obtain, make, and keep records proving the age of every model, actor, or actress they shoot. *See id.* Since the Act broadly applies to roughly all sexually explicit material, states that exclude productions subject to the Act's reporting requirements effectively ban all sexually explicit material within their incentive program.

[123] ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); CONN. GEN. STAT. . § 12-217jj(a)(3)(B); FLA. STAT. 288.1254(1)(e); 35 ILL. COMP. STAT. 16/10(7); GG-1.5 ME. CODE R. § 13090-L(2)(A)(6); MICH. COMP. LAWS § 208.1455(12)(k)(i); MINN. STAT. ANN. § 116U.26(b)(2); N.Y. TAX LAW § 24(b)(3); R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN. § 12-62-20(3); TENNESSEE 15, *supra* note 107; VA. CODE ANN. § 2.2-2320; WIS. STAT. ANN. § 71.47(5f)(g).

[124] ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); CONN. GEN. STAT. § 12-217jj(a)(3)(B); FLA. STAT. 288.1254(1)(e); 35 ILL. COMP. STAT. 16/10(7); GG-1.5 ME. CODE R. § 13090-L(2)(A)(6); MICH. COMP. LAWS § 208.1455(12)(k)(i); MISS. CODE ANN. § 116U.26(b)(2); N.Y. TAX LAW § 24(b)(3); R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN.. § 12-62-20(3); TENNESSEE 15, *supra* note 107; VA. CODE ANN. § 2.2-2320; WIS. STAT. ANN. § 71.47(5f)(g).

[125] ALASKA STAT. § 44.33.232; ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, *supra* note 107; HAW. REV. STAT. § 235-17(l); IDAHO CODE ANN. § 67-4728(2)(h); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS ch. 62 § 6(l)(1); MICH. COMP. LAWS § 208.1455(3)(d); MISS. CODE ANN. § 57-89-3(c); MO. REV. STAT. § 135.750(1)(2)(h); MONT. CODE ANN. § 15-31-903(2)(b)(i); N.J. STAT. ANN. § 54:10A-5.39 (e); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(f)(3); OKLA. STAT. ANN. tit. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; S.D.

Tennessee, employ this form of pornographic content restriction.[126]

2. Negative Image Content Restrictions

The second type of content restriction can be termed "negative image content restriction." With negative image content restriction, a state prohibits a production when its content does not portray the state in a positive way. Unlike categorical content restrictions that specifically target certain forms of speech, negative image content restrictions are extremely broad. The focus is not on the category of speech but instead on whether the production portrays the state in a negative way. Also unlike categorical content restrictions, negative image restrictions cannot always be found in a particular film incentive statute. Instead, negative image content restrictions may be located in the administrative program rules and guideline manuals for a film incentive program.

Six states - Pennsylvania, Texas, Utah, West Virginia, Wisconsin, and Wyoming - engage in negative image content restriction.[127] While the statutory placement of negative image content restrictions can vary, the restrictive language is largely the same.[128] For example, Penn-

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CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(k)(1)(A); TENNESSEE 13/15/17, *supra* note 107; 13 TEX. ADMIN. CODE § 121.4(2); VT. STAT. ANN. tit. 10, § 650(4)(F); WASHINGTON FILM WORKS, *supra* note 107.

[126] ALASKA STAT. § 43.22.233(c)(5); ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, *supra* note 107; HAW. REV. STAT. § 235-17(l); IDAHO CODE ANN. § 67-4728(2)(h); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS ch. 62 § 6(l)(1); MICH. COMP. LAWS § 208.1455(3)(d); MISS. CODE ANN. § 57-89-3(c); MO. REV. STAT. § 135.750(1)(2)(h); MONT. CODE ANN. § 15-31-903(2)(b)(i); N.J. STAT. ANN. § 54:10A-5.39 (e); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(f)(3); OKLA. STAT. ANN. tit. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; S.D. CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(k)(1)(A); TENNESSEE 13/15/17, *supra* note 107; 13 TEX. ADMIN. CODE § 121.4(2); VT. STAT. ANN. tit. 10, § 650(4)(F); WASHINGTON FILM WORKS, *supra* note 107.

[127] PENNSYLVANIA DEPARTMENT OF COMMUNITY & ECONOMIC DEVELOPMENT, FILM TAX CREDIT PROGRAM GUIDELINES 6 (2007), *available at* http://www.newpa.com/find-and-apply-for-funding/funding-and-program-finder/funding-detail/index.aspx?progId=181 [hereinafter PENNSYLVANIA DEPARTMENT]; TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, STATE OF UTAH MOTION PICTURE INCENTIVE FUND APPLICATION 2 (2008), *available at* http://film.utah.gov/mpif.htm [hereinafter UTAH GOVERNOR'S OFFICE]; W. VA. CODE § 11-13X-2(b)(9)(F); WIS. ADMIN. CODE Comm. 133.30(4); WYO. STAT. ANN. § 9-12-403(a)(v).

[128] PENNSYLVANIA DEPARTMENT, *supra* note 127 ("The Pennsylvania Film Office may consider the following criteria in its review of applications . . . whether the project will tend to foster a positive image of Pennsylvania."); TEX. GOV'T CODE ANN. § 485.022(e) ("The office . . . may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the office, in a moving image project. In determining whether to . . . deny a grant application, the office shall consider the standards of decency and respect for the diverse beliefs and values of the citizens of Texas."); UTAH GOVERNOR'S OFFICE, *supra* note 127 ("The State of Utah is not required to incent projects that include 'inappropriate content' or 'content that portrays Utah or Utahns in a

sylvania states in its film incentive program guidelines that one of the criteria for eligibility is "whether the project will tend to foster a positive image of Pennsylvania.[129] Similarly, Utah states in its funding application that it may reject a film project that "portrays Utah or Utahns in a negative way."[130]

3. Implicit Content Restrictions

The third category of content restriction can be termed "implicit content restriction." With implicit content restriction, a state uses facially content neutral statutory or regulatory language to restrict content. Implicit content restrictions can be extremely difficult to identify for three reasons. First, because implicit content restrictions are embedded in content neutral language, there is simply no way of telling with absolute certainty whether a statutory or regulatory provision can possibly be used to restrict content. Second, unlike categorical or negative image content restrictions, implicit content restrictions are very broad. Thus, in some instances a particular statutory provision could be used to restrict speech while in other instances it could be used for content neutral purposes such as ensuring that the production is going to hire a sufficient amount of state workers or spend a certain minimum amount of money within the state. Third, implicit content restrictions do not necessarily make content an outcome determinative factor in determining whether an applicant will receive funding. Instead, content is implicitly one factor among many in determining eligibility, but not necessarily the sole factor.

Six states - Alaska, Illinois, Iowa, Maryland, Oregon, and Washington - engage in or potentially employ implicit content restriction.[131] For

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negative way.'"); W. VA. CODE § 11-13X-2(b)(9)(F) ("A qualified project . . . [d]oes not contain content that portrays the State of West Virginia in a significantly derogatory manner."); WIS. ADMIN. CODE Comm. 133.30(4) ("The department shall consider whether . . . [t]he production would not hurt the reputation of the state of Wisconsin."); WYO. STAT. ANN. § 9-12-403(a)(v) ("'Qualified production' means filmed entertainment . . . that would have widespread public appeal and would likely encourage members of the public to visit the state of Wyoming.").

[129] PENNSYLVANIA DEPARTMENT, *supra* note 127.

[130] UTAH GOVERNOR'S OFFICE, *supra* note 127.

[131] *See* ALASKA STAT. § 44.33.232 ("A film production is eligible for a tax credit . . . if the film office determines that the production is not contrary to the best interests of the state."); ILL. ADMIN. CODE tit. 14, § 528.50(b)(5) (2007) ("In evaluating applications, the Department shall determine [whether] awarding the credit will result in an overall positive impact to the State."); IOWA CODE § 15.393(1)(c)-(d) (2007) ("The department shall not register a project unless the department determines . . . [t]he project will further tourism, economic development, and population retention or growth in the state or locality . . . [or] other criteria established by rule relating to the economic impact and promotional aspects of the project on the state or locality."). The Maryland film incentive statute does not facially

instance, Alaska requires its film office to determine whether a "production is not contrary to the best interests of the state."[132] Similarly, Illinois's film office is required to determine, among several factors, whether awarding a film incentive credit "will result in an overall positive impact to the State."[133]

4. Carte Blanche Content Restrictions

The fourth category of content restriction can be termed "carte blanche content restriction." With carte blanche content restrictions, a state broadly restricts content, or expressly reserves the right to restrict content, that it deems in its discretion to be inappropriate or offensive. Carte blanche content restrictions, while similar to negative image and implicit content restrictions, are broader and more elusive than both negative image and implicit content restrictions.

Unlike negative image content restriction which is concerned with content that may hurt the reputation of the state, or implicit content restriction which considers content in the context of the incentive program's purpose, carte blanche content restriction is concerned with any content that the state determines to be offensive or inappropriate. Thus, the scope of carte blanche content restriction is virtually unlimited.

Further, carte blanche content restrictions do not lay out well-defined standards for determining what is offensive or inappropriate. In fact, carte blanche content restrictions cannot always be found in film incentive statutes or administrative program rules. Sometimes the restrictions are located on state film office Web sites and tax credit applications. Even worse, sometimes carte blanche content restrictions do not even appear anywhere in writing. Thus, carte blanche content restrictions essentially leave state officials implementing film incentive

discriminate against speech. *See* MD. CODE ANN., ECON. DEV. § 4-401. However, the Maryland Film Office's Web site indicates otherwise. *See* Maryland Film Office, http://www.marylandfilm.org/productionrebate.htm (last visited Nov. 23, 2008) ("Grant recipients will be selected by the Secretary of the Department based upon merit and economic benefit to the state."); OR. ADMIN. R. 951-002-0010(2)(d) (2009) ("The following productions are not eligible: . . . [p]roductions that the OFVO determines are unlikely to further the purposes of the Oregon Production Investment Fund."); WASH. REV. CODE § 43.365.020(1)(e), (i), (k) (2006) ("The department shall consider . . . [t]he intangible impact on the state and local communities that comes with motion picture projects . . . the vitality of the state's motion picture industry as a necessary and critical factor in promoting the state as a premier tourist and cultural destination . . . [and] other factors the department may deem appropriate for the implementation of this chapter."). Given the elusive nature of implicit content regulation, this list is almost certainly not exhaustive.

[132] ALASKA STAT. § 44.33.232.

[133] ILL. ADMIN. CODE tit. 14, § 528.50(b)(5).

programs with unfettered discretion to determine what is offensive or inappropriate.

Given the elusive nature of carte blanche content restrictions, particularly the fact that they can exist completely behind the scenes, identifying instances of carte blanche content restriction is difficult. However, five states - Georgia, New Mexico, Texas, Utah, and Florida - provide useful examples.[134]

Georgia does not facially discriminate against content in its incentive statute or its corresponding administrative rules.[135] However, the brochure for incentive applicants indicates otherwise. The brochure states, "Pornographic content or sexually explicit content does not qualify. Any content rated greater than 'R,' such as NC-17 or unrated products, may not qualify."[136]

New Mexico facially prohibits only obscene material.[137] But its film office Web site also contains the following paragraph:

> ELIGIBILITY REQUIREMENT: The State of New Mexico's incentive program is limited by statute and regulation to avoid excessive or gratuitous violence or sexual content, severe language, drug abuse, culturally sensitive material (glorification of drugs, suicide, irresponsibility with racial or religious subject matter, etc. . .) or a combination of some of the above. The [New Mexico Film Office] will determine eligibility based upon these elements.[138]

Texas and Utah, in addition to engaging in negative image restriction, reserve the right to deny any incentives for films deemed to contain "inappropriate content."[139] Utah does not prescribe any standards for identifying inappropriate content.[140] Texas, on the other hand, requires its film office to consider "general standards of decency and respect for the diverse beliefs and values of the citizens of Texas" in order to determine what is inappropriate.[141]

Florida has a particularly interesting carte blanche content restriction. Florida offers two percent extra in incentives to productions de-

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[134] *See* GA. CODE ANN. § 48-7-40.26; GA. COMP. R. & REGS. 560-7-8-.45; GEORGIA FILM, MUSIC, & ENTERTAINMENT OFFICE, GEORGIA FILM, MUSIC, & DIGITAL ENTERTAINMENT TAX INCENTIVES 5 (2008), *available at* http://www.georgia.org/EntertainmentIndustry/AboutTheIndustry/Incentives.htm [hereinafter GEORGIA FILM]; N.M. STAT. ANN. § 7-2F-2(D)(3); TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127; FLA. STAT. 288.1254(4)(f).

[135] *See* GA. CODE ANN. § 48-7-40.26; *see also* GA. COMP. R. & REGS. 560-7-8-.45 (2008).

[136] GEORGIA FILM, *supra* note 134.

[137] N.M. STAT. ANN. § 7-2F-2(D)(3).

[138] New Mexico Film Office, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Dec. 10, 2008).

[139] TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127.

[140] New Mexico Film Office, *supra* note 138.

[141] TEX. GOV'T CODE ANN. § 485.022(e).

termined by its film office to be "family-friendly."[142] The Florida incentive statute states:

> A certified production determined by the Commissioner of Film and Entertainment, with the advice of the Florida Film and Entertainment Advisory Council, to be family friendly based on review of the script and an interview with the director is eligible for an additional 2 percent of its actual qualified expenditures. Family friendly productions are those that have cross-generational appeal; would be considered suitable for viewing by children age 5 and older; are appropriate in theme, content, and language for a broad family audience; embody a responsible resolution of issues; and do not exhibit any act of smoking, sex, nudity, or vulgar or profane language.[143]

IV. The Law of the First Amendment Regarding Content Restrictions in Government Benefit Schemes

First Amendment law regarding content restriction in government benefits is largely unsettled. The law has concurrently developed three categorical rules for content restrictions in government benefit schemes depending on the identity of the speaker and the type of benefit. Those rules are (1) the *Rust* rule; (2) the *Rosenberger* rule; and (3) the *Finley* rule.

A. *Relevent Preliminary Principles*[144]

The First Amendment states, in relevant part, "Congress shall make no law . . . abridging the freedom of speech . . . ."[145] The First Amendment generally forbids content restriction.[146] Content restriction is the government prohibition of discussion of an entire topic or subject.[147] A government prohibition on discussing politics or religion would be an example of content restriction.

Even more repugnant to the First Amendment is viewpoint restriction.[148] As stated by Justice Brennan, "If there is a bedrock principle underlying the First Amendment, it is that the government may not

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[142] Fla. Stat. 288.1254(4)(f).

[143] *Id.*

[144] This preliminary principles discussion is in no way meant to exhaustively summarize First Amendment law. The countless doctrines, theories, and cases that underlie First Amendment law could fill a library. Instead, this section, while even perhaps overgeneralizing some principles, simply provides a short background and some working principles relevant to introduce the topic of content restriction in government benefits.

[145] U.S. Const. amend. I.

[146] *See* Texas v. Johnson, 491 U.S. 397, 406 (1989); *see also* Boos v. Barry, 485 U.S. 312, 318-19 (1988); Consol. Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980); Cantwell v. Connecticut, 310 U.S. 296, 309-311, 60 (1940).

[147] *Boos*, 485 U.S. at 319.

[148] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382-85 (1992).

prohibit expression of an idea simply because society finds the idea offensive or disagreeable."[149] While content restriction targets an entire subject or topic, such as politics or religion, viewpoint restriction favors a side within that subject or topic.[150] A prohibition on advocating for, but not against, striking workers in a labor dispute would be an example of viewpoint restriction.

The First Amendment seeks to protect against the vast majority of content and viewpoint restriction by imposing strict scrutiny on governmental regulations that facially restrict content or viewpoint and intermediate scrutiny on content neutral regulations that incidentally burden content or viewpoint.[151] Strict scrutiny burdens the government with showing that the regulation is narrowly tailored to further a compelling interest.[152] In practice, strict scrutiny means that the government regulation will almost certainly fail.[153] Intermediate scrutiny burdens the government with showing that the law restricts no more speech than necessary to serve an important or substantial government interest that is unrelated to expression.[154] In practice, intermediate scrutiny means that the government regulation has a good chance of passing constitutional muster.[155]

Two equally important doctrines to First Amendment law are the substantial overbreadth and vagueness doctrines. Under the substantial overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."[156] Substantially overbroad laws are considered facially invalid and subjected to strict scrutiny.[157]

Similarly, the vagueness doctrine seeks to protect speakers from prohibitions that are not precisely defined.[158] The vagueness doctrine asks whether a statute or regulation is specific enough so that speakers

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[149] *Johnson*, 491 U.S. at 414.

[150] *See RAV*, 505 U.S. at 382-85.

[151] *See* Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 661-662 (1994); *see also R.A.V.*, 505 U.S. at 395; *Johnson*, 491 U.S. at 412; United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[152] *RAV*, 505 U.S. at 395.

[153] *See Johnson*, 491 U.S. at 412.

[154] *O'Brien*, 391 U.S. at 376-377.

[155] *See id.*

[156] Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). *See also* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[157] *Jews for Jesus*, 482 U.S. at 569-572.

[158] Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

will not refrain from engaging in constitutionally protected speech for fear of arbitrary enforcement of vague standards.[159] Vague laws, like substantially overbroad laws, are considered facially invalid and subjected to strict scrutiny.[160]

However, the freedom of speech, like all rights, is not absolute. In fact, some narrowly and specifically defined categories of speech are constitutionally proscribable as long as the proscriptions are not viewpoint specific.[161] Such categories of speech include fighting words,[162] obscenity,[163] child pornography,[164] and intentional incitement of imminent lawless action.[165]

B. Speiser *and the Absolute Rule Against Content Restriction in Government Benefits*

At its inception, First Amendment law regarding content restriction in government benefits was clear and settled. Speech could only be restricted in government benefits to the extent it could be restricted directly.[166]

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[159] *Id.*

[160] *See* Houston v. Hill, 482 U.S. 451, 458-59 (1987).

[161] *See RAV*, 505 U.S.at 382-85.

[162] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[163] Miller v. California, 413 U.S. 15 (1973) (Obscenity is defined using the following three-part test: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.)

[164] New York v. Ferber, 458 U.S. 747, 764-65 (1982) ("There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed . . . [and] [t]he category of 'sexual conduct' proscribed must also be suitably limited and described.")

[165] Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

[166] *See* Speiser v. Randall, 357 U.S. 513, 518-19 (1958) (holding that the denial of a property exemption for failure to sign a loyalty oath was unconstitutional under the First Amendment); Am. Commc'ns Assoc. et al. v. Douds, 339 U.S. 382, 399-404 (1950) (holding that conditioning recognition of a labor organization on non-Communist oaths was constitutional under the First Amendment because Congress could directly regulate the behavior at that time); Hannegan v. Esquire, 327 U.S. 146, 156 (1946) (holding that a denial of mailing privileges because the content was "literature" or "arts" was unconstitutional under the First Amendment because Congress could not have placed such restrictions directly); United States ex rel. Milwaukee Social Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 430-31 (1921) (Brandeis, J. dissenting).

Speiser v. Randall[167] best articulates this rule. In *Speiser*, California enacted a property tax exemption for veterans.[168] But, in order to qualify for the exemption, all applicants had to sign a loyalty oath stating that they would not advocate for the overthrow of the Federal or California governments by unlawful means.[169] Several honorably discharged U.S. Army veterans applied for an exemption and refused to sign the oath.[170] Their applications were denied because of their refusal.[171] They then brought an action against the State of California asserting that the denial violated their First Amendment right to freedom of speech.[172] California argued that because a tax exemption was a privilege or benefit, its denial did not infringe speech.[173] The Court, by a 7-1 majority,[174] and citing nearly forty years worth of precedent, rejected California's argument that a content based benefit denial did not infringe speech.[175] Justice Brennan, for the majority, wrote:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. [California is] plainly mistaken in [its] argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech. . . . It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. This Court has similarly rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, or the opportunity for public employment. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is "frankly aimed at the suppression of dangerous ideas."[176]

In *Speiser*, the Court thought that the rule against content restriction in government benefits was clear and established. Speech could only be restricted in government benefits to the extent it could be restricted directly. The justifications underlying the *Speiser* rule were two-fold according to the Court. First, a content based denial of a gov-

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[167] 357 U.S. 513, 518-19 (1958).
[168] *Id.*
[169] *Id.* at 515.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 518.
[174] Chief Justice Earl Warren did not participate. *See id.* at 514.
[175] *Id.* at 518-19.
[176] *Id.* (citations omitted).

ernment benefit was no different than directly penalizing the content.[177] Second, a content based denial of a government benefit would necessarily have the effect of coercing the speaker to refrain from espousing the content altogether.[178]

C. *The* Speiser *Rule's Erosion During the 1960s, 1970s, and 1980s*

The Court and lower federal courts' stance on content restrictions in government benefits wavered between 1958, when *Speiser* was decided, up until the late 1980s. Professor Kathleen Sullivan said of this time period: "Supreme Court decisions on challenges to unconstitutional conditions seem[ed] a minefield to be traversed gingerly. Just when the doctrine appear[ed] secure, new decisions ar[ose] to explode it."[179]

In a number of cases, the Court and lower federal courts respected and applied the *Speiser* rule. In *Perry v. Sinderman*,[180] the Court held that the denial of tenure to a junior college professor who spoke out against several school policies violated the First Amendment.[181] According to the Court, even where a person has no "right" to a governmental benefit such as tenure, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."[182] Similarly, in *Big Mama Rag, Inc. v. United States*,[183] the U.S. Court of Appeals for the District of Columbia held that the denial of a tax exemption to a nonprofit organization for its feminist viewpoint violated the First Amendment.[184] Likewise, in *FCC v. League of Women Voters*,[185] the Court invalidated Section 399 of the Public Broadcasting Act which forbade non-commercial educational broadcasting stations that received federal funds from "editorializing."[186] Finally, in *Arkansas Writers Project v. Ragland*,[187] the Court invalided an Arkansas sales tax scheme which taxed general interest magazines, but exempted newspapers and religious, professional, trade and sports journals.[188]

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[177] *See id.*
[178] *See id.*
[179] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415-16 (1989).
[180] 408 U.S. 593, 597 (1972).
[181] *Id.*
[182] *Id.*
[183] 631 F.2d 1030, 1034-35 (1980).
[184] *Id.*
[185] 468 U.S. 364, 399-401 (1984).
[186] *Id.*
[187] 481 U.S. 221, 227-233 (1987).
[188] *Id.* at 227-232.

At the same time, contrary to the *Speiser* rule, the Court and lower federal courts held in a number of cases that content restrictions in government benefits were not abridgements on the freedom of speech. In *Cammarano v. United States*,[189] the Court unanimously upheld a series of treasury regulations that exempted all business expenses except those spent for lobbying for the defeat of legislation.[190] According to the Court, *Speiser* was of no relevance because the petitioners were not being denied an exemption for engaging in constitutionally protected activity, but instead were simply being required to "pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code."[191] Similarly, in *Regan v. Taxation Without Representation*,[192] the Court upheld a tax exemption for nonprofit organizations that excluded otherwise qualifying organizations for propagandizing or otherwise attempting to influence legislation.[193] Likewise, in *DKT Memorial Fund v. Agency for International Development*,[194] the U.S. Court of Appeals for the District of Columbia upheld the Agency for International Development's policy of prohibiting funding for family planning organizations which promoted abortion.[195]

These cases made the First Amendment law of content restriction in government benefits uncertain and unpredictable. In all of these cases, the operative facts were essentially the same. The government created a fund or exemption but denied funding or exemptions based on content. Yet there was simply no way of telling whether or not the Court or lower federal courts would follow the *Speiser* rule. By the end of the 1980s, the law regarding content restriction in government benefits was essentially "wait and see."

D. Rust, Rosenberger, *and* Finley*: Three Categorical Rules Emerge*

In the 1990s, the Court decided three government benefits cases, *Rust v. Sullivan*,[196] *Rosenberger v. Rector and Visitors of the University of Virginia*,[197] and *National Endowment for the Arts v. Finley*.[198] *Rust, Rosenberger,* and *Finley* effectively destroyed the *Speiser*/no-*Speiser* di-

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[189] 358 U.S. 498, 512-13 (1959).
[190] *Id.*
[191] *Id.*
[192] 461 U.S. 540, 545-47 (1983).
[193] *Id.*
[194] 887 F.2d 275, 287-89 (D.C. Cir. 1989).
[195] *Id.*
[196] 500 U.S. 173 (1991).
[197] 515 U.S. 819 (1995).
[198] 524 U.S. 569 (1998).

chotomy and established three new categorical rules to govern content restriction in governmental benefits.

1. The *Rust* Rule

In *Rust,* the Court upheld a statute that prohibited hospital physicians receiving federal funds from advocating for abortion or disseminating any pro-abortion materials.[199] The Court advanced five justifications for its holding. First, the government can, consistent with the First Amendment, establish a fund to support a government viewpoint on a particular subject or topic.[200] In this case, the government's viewpoint was that abortion was not an acceptable method of family planning.[201] Second, the government can use private speakers to convey its own message or policy by requiring fund recipients to speak only the government's viewpoint while using the funds.[202] Third, fund recipients remain free to speak their own view on restricted subjects or topics while acting outside the scope of government funding programs.[203] In this case, the hospital physicians could still advocate and promote abortion while not at work.[204] Fourth, the government is not denying a benefit when it refuses to subsidize applicants who will not speak the government's message.[205] The government is "simply insisting that public funds be spent for the purposes for which they were authorized."[206] Fifth, the government cannot impose its message in either a "traditional public forum" or a "traditional sphere of free expression so fundamental to the functioning of our society."[207] According to the Court, hospitals were neither "traditional public forums" nor "traditional spheres of free expression so fundamental to the functioning of our free society."[208]

The rule that emerges from *Rust* is the following: The government can establish a benefit program to fund its own message or viewpoint and require benefit recipients to carry the government's message or viewpoint under two conditions: (1) the recipients must be free to speak their own views on the subject outside the scope of the program; and (2) the government cannot use the benefit program to impose its

199 *Rust*, 500 U.S. at 192-93.
200 *Id.* at 193-94.
201 *Id.* at 192-94.
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.* at 196.
207 *Id.* at 199-200.
208 *Id.*

message in a traditional public forum or in a traditional sphere of free expression so fundamental to the functioning of our free society.[209]

2. The *Rosenberger* Rule

In *Rosenberger*, the Court invalidated the University of Virginia's policy of subsidizing student newspapers' printing costs while excluding publications that "primarily promote[d] or manifest[ed] a particular belief in or about the deity of an ultimate reality."[210] The University argued that, pursuant to *Rust*, it was not engaging in viewpoint discrimination but instead simply funding one activity to the exclusion of another.[211] The Court disagreed, holding that the *Rust* rule only applies when the government uses a private speaker to promote the Government's own message.[212] That was not the case here, according to the Court, because the funding policy explicitly stated that grant recipients were neither the University's agents nor subject to its control.[213] The fund was created to subsidize printing costs, not to convey the University's message.[214]

The Court then held that by creating a generally available fund to subsidize student newspapers' printing costs, the University had created a "metaphysical" limited purpose public forum.[215] A limited purpose public forum is a space opened by the government for speech.[216] Pre-*Rosenberger*, limited purpose public forums were usually only created in a spatial or geographical sense.[217] However, the *Rosenberger* Court recognized for the first time that a "metaphysical" limited purpose public forum could be created by the establishment of generally available government benefit funds.[218] Under limited purpose public forum doctrine, the government can make content restrictions but not viewpoint restrictions inside the forum.[219] Thus, prohibiting funds to publications that promoted or manifested a particular belief in or about the deity of an ultimate reality was unconstitutional because it favored a particular religious viewpoint, the promotion or manifestation of a belief in or about the deity of an ultimate reality.[220]

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[209] *Id.* at 191-200.
[210] *Rosenberger*, 515 U.S. at 819.
[211] *Id.* at 833.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.* at 828-29.
[216] *Id.* at 829-830.
[217] *Id.* at 830-31.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 830-32.

The rule that emerges from *Rosenberger* is the following: When the government creates a generally available fund to subsidize a particular activity or private speech, as opposed to creating a fund to promote its own message, *Rust* is inapplicable and limited purpose public forum principles apply instead.[221] In such cases, content restriction is permissible, but viewpoint restriction is prohibited.[222]

3. The *Finley* Rule

In *Finley*, the Court upheld the National Endowment for the Arts's policy of considering general standards of "decency and respect" for diverse the beliefs and values of the American public in awarding highly selective and competitive art grants.[223] The petitioners argued that by creating the fund the government had created a metaphysical limited purpose public forum.[224] As such, the petitioners contended that considering "decency and respect" was unconstitutional viewpoint discrimination in a limited purpose public forum because the regulation favored decent and respectful art over indecent and disrespectful art.[225] The Court rejected the argument that the fund was a limited purpose public forum as well as the argument that "decency and respect" as a consideration was a viewpoint restriction.[226] The Court distinguished *Rosenberger*-type funds created to indiscriminately encourage a diversity of views from private speakers from highly selective funds for activities such as art which inherently require that content be considered in selecting recipients.[227] Furthermore, the Court held that the "decency and respect" provision was not viewpoint based because it would not necessarily lead to one viewpoint being favored over the other.[228] "[D]ecency and respect" was only a factor to be considered in determining eligibility, as opposed to an outcome determinative element.[229]

The rule that emerges from *Finley* is the following: When the government creates a highly selective and competitive fund for an activity that inherently requires content to be considered in selecting recipients, the *Rosenberger* metaphysical limited purpose public forum rule is inapplicable.[230] In such cases, content restrictions are permissible.[231]

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[221] *Id.* at 828-831.
[222] *Id.*
[223] *Finley*, 524 U.S. at 580-87.
[224] *Id.*
[225] *Id.* at 580-81.
[226] *Id.* at 581-83, 586.
[227] *Id.* at 586-87.
[228] *Id.* at 581-84.
[229] *Id.*
[230] *Id.*

Additionally, viewpoint considerations like "decency and respect" are acceptable so long as they are not outcome determinative.[232]

By the end of 1990s, the Court had significantly altered the framework for analyzing the constitutionality of content restrictions in government benefits in *Rust*, *Rosenberger*, and *Finley*. The Court essentially abandoned any remaining notion that content restrictions in government benefits were indistinguishable from direct taxes on speech. The Court focused instead on the identity of the speaker and the nature of the government benefit in determining the permissible level of content regulation.

The *Rust*, *Rosenberger*, and *Finley* rules have for the most part carried the day. Although broadening the scope of permissible content and viewpoint restriction in government benefits, the *Rust*, *Rosenberger*, and *Finley* rules made the law more predictable.

V. THE ARGUMENTS FOR APPLYING, AS WELL AS THE CORRESPONDING IMPLICATIONS OF APPLYING, THE *RUST*, *ROSENBERGER*, AND *FINLEY* RULES TO CONTENT RESTRICTIONS IN STATE FILM INCENTIVE PROGRAMS

A. *The Rust Rule*

1. The Arguments for Applying the *Rust* Rule to State Film Incentive Programs

Of the *Rust*, *Rosenberger*, and *Finley* rules, the strongest arguments can be made for applying the *Rust* rule to film incentive programs. There are at least eight arguments that the *Rust* rule is the proper rule for state film incentives. First, the purpose of state film incentives is to stimulate state economies, attract filmmakers and tourists, and gain a competitive edge in the film industry both domestically and internationally.[233] In other words, film incentives are a money

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[231] *Id.*

[232] *Id.*; *see also* Barbara A. Sanchez, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463 (2005); Alicia M. Choi, *National Endowment for the Arts v. Finley: A Dispute over the "Decency and Respect" Provision*, 32 AKRON L. REV. 327 (1999).

[233] *See* NGA Report, *supra* note 2, at 2; *see also, e.g.*, IDAHO CODE ANN. § 67-4728(1) ("The purpose of the fund is to simulate new film and television business expenditures in the state of Idaho."); KY. REV. STAT. ANN. § 139.538(1) ("It is the intent and purpose of the General Assembly . . . to encourage the motion picture industry to choose locations in the Commonwealth for the filming or production of motion pictures . . . ."); LA. REV. STAT. ANN. § 47:1122(B) ("It is recognized that the motion picture industry brings with it a much needed infusion of capital into areas of the state which may be economically depressed and the multiplier effect of the infusion of capital resulting from the filming of a motion picture

making enterprise for states. But in administering film incentive programs consistent with this purpose, states have a message that recipients must carry. The states' message is that their state is an ideal place to film, work, visit, and live. To that end, *Rust* allows states to restrict content and viewpoint in film incentives in order to ensure that state funded films portray their state as an ideal place to film, work, visit, and live.

Second, the *Rust* Court recognized that the government enjoys broad discretion in defining the scope of programs that fund government speech, including the decision to restrict both content and viewpoint.[234] Therefore, to the extent states determine that content and viewpoint restrictions are a necessary and appropriate way of ensuring that film incentives only fund projects that portray their state as an ideal place to film, work, visit, and live, states' decisions to restrict content and viewpoint are entitled to substantial deference.

Third, pursuant to *Rust*, content and even viewpoint restrictions in state film incentives are not penalties on speech.[235] The restrictions are simply the government's insistence that funds be spent in accordance with the purposes of the program.[236] Similarly, states are not penalizing speech by refusing to fund certain content and viewpoints.States are simply insisting that film incentive funds be spent to ensure that their state is portrayed as an ideal place to film, work, visit, and live.

Fourth, unlike *Rosenberger* where the funding policy made clear that private speakers being funded were neither agents of the University nor carrying the University's message, states have overtly and affirmatively attached themselves to the films they sponsor. Florida's film incentive program, for instance, has the following requirement:

> The Office of Film and Entertainment shall ensure that, as a condition of receiving funding . . . , marketing materials promoting this state as a tourist destination or film and entertainment production destination are included . . . , which must . . . include placement in the end credits of a "Filmed in Florida" logo with size and place commensurate to other logos included in the end credits or, if no logos are used, the statement "Filmed in Florida using Florida's Entertainment Industry Financial Incentive," or a similar statement approved by the Office of Film and Entertainment before such placement.[237]

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or television program serves to stimulate economic activity beyond that immediately apparent on the film set.").

[234] *Rust*, 500 U.S. at 191-200.

[235] *Id.*

[236] *Id.*

[237] FLA. STAT. § 288.1254(3)(g).

Many other states, including Colorado, New Mexico, and North Carolina, have similar requirements to that of Florida.[238]

Fifth, state film incentive programs exert a high degree of control at every stage of the filmmaking process, including control of content. Nearly every state requires that incentive applicants submit a script along with their application.[239] Further, nearly every state requires applicants to submit regular progress reports at various stages of production.[240] Also, some states such as Texas even compare the initial script submitted with the completed production script before making a final funding determination.[241] State film incentive programs exert such a high degree of control over the filmmaking process, including control of content, because states are funding their own messages and policies in film incentive programs.

Sixth, states, and not filmmakers, are ultimately accountable for the content and viewpoints in films that receive incentives. As the Court pointed out in *Board of Regents of University of Wisconsin System v. Southworth*,[242] when the government pays for a message, it ultimately must answer to the electorate and the political process for its actions and choices.[243] Likewise, state officials and agencies will be held accountable to their electorates and political processes should they fund projects that do not portray their state as an ideal place to film, work, visit, and live.

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[238] *See* COLORADO FILM COMMISSION, *supra* note 107 ("[T]he production company agrees that the closing credits will contain an acknowledgement that the production was filmed in Colorado . . . ."); *see also* N.M. STAT. ANN. § 7-2f-1(E) ("A long-form narrative film production for which the tax credit is claimed . . . shall contain an acknowledgment that the production was filmed in New Mexico."); NEW MEXICO GOVERNOR'S OFFICE FOR MOTION PICTURE & TELEVISION DEVELOPMENT, NEW YORK STATE EMPIRE STATE FILM PRODUCTION CREDIT FINAL APPLICATION 7 (2008) ("[A]n applicant for the State program agrees to acknowledge The New York Governor's Office for Motion Picture & Television Development in the screen credits . . . ."), *available at* http://www.nylovesfilm.com/tax/; N.C. GEN. STAT. ANN. § 105-130.47("For productions that have production credits, a taxpayer claiming a credit under this section must acknowledge in the production credits both the North Carolina Film Office and the regional film office responsible for the geographic area in which the filming of the production occurred.").

[239] *See, e.g.*, WASHINGTON FILM WORKS, *supra* note 107.

[240] *See, e.g.*, 35 ILL. COMP. STAT. 16/15(f) ("[A]n applicant must at all times keep proper books of record and account in accordance with generally accepted accounting principles consistently applied, with books, records, or papers related to the accredited production in the custody or control of the taxpayer open for reasonable Department inspection and audits, and including, without limitation, the making of copies of the books, records, or papers, and the inspection of appraisal of any of the assets of the applicant or the accredited production.").

[241] TEX. GOV'T CODE ANN. § 485.022(f).

[242] 529 U.S. 217, 235 (2000).

[243] *Id.*

Seventh, consistent with *Rust,* film incentive recipients are free to pursue speech-related activities on restricted subject matter outside the scope of film incentive programs. No state incentives restrict content outside the scope of the film incentive program.[244] Filmmakers are free to portray states in privately funded projects in any manner they choose. While using the states' funds, though, filmmakers are required to stay within the scope of the programs' content and viewpoint requirements.

Finally, states are not imposing their message in a "traditional public forum" or "traditional sphere of expression so fundamental to the functioning of our society" through their film incentive schemes.[245] While the Court in *Rosenberger* recognized that state subsidies can be "metaphysical" limited purpose public fora,[246] the Court has never recognized, or even implied, that state subsidies could be considered a "traditional public forum." Arguably, the filmmaking industry could be considered a "traditional sphere of expression so fundamental to the functioning of our society."[247] However, the Court has only recognized "traditional sphere[s] of expression" in a handful of instances (like the university), the film industry never being one of those instances.[248] Furthermore, filmmaking, while concededly an important form of expression, is a relatively new phenomenon that only began in the 20th century.[249] Accordingly, the film industry's relatively short history cuts against its recognition as a "*traditional* sphere of expression."[250]

2. The Implications of Applying the *Rust* Rule to Film Incentive Programs

Once inside the ambit of the *Rust* rule, states can engage in both content and viewpoint restriction because the government is speaking its own message.[251] Accordingly, the categorical, negative image, implicit, and carte blanche content restrictions that exist in state film incentive programs are all probably constitutional under *Rust.* The restrictions are in place to ensure that film incentives are only awarded to films that portray states as an ideal place to film, work, visit, and live.

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[244] *See supra* note 4.

[245] *See Rust,* 500 U.S. at 199-200.

[246] *See Rosenberger,* 515 U.S. at 830.

[247] *See Rust,* 500 U.S. at 199-200.

[248] *See id.*; *see also* Keyishian v. Bd. of Regents, State Univ. of N.Y., 385 U.S. 589, 603, 605-606 (1967).

[249] NGA Report, *supra* note 2, at 3.

[250] *See Rust,* 500 U.S. at 200 (emphasis added).

[251] *See id.* at 191-200.

In other words, consistent with *Rust*, the restrictions ensure that state funds are spent for the purposes for which they are authorized.

B. *The Rosenberger Rule*

1. The Arguments for Applying the *Rosenberger* Rule to State Film Incentive Programs

Of the *Rust*, *Rosenberger*, and *Finley* rules, the case for applying the *Rosenberger* rule to film incentive programs is the weakest. There are, however, some arguments for the proposition that *Rosenberger* is the proper rule for state film incentives. First, the purpose of state film incentives is to stimulate state economies, attract filmmakers and tourists, and gain a competitive edge in the film industry both domestically and internationally by encouraging a diversity of private film ideas and views and subsidizing the costs involved in producing major motion pictures. As in *Rosenberger*, states are not speaking when issuing film incentives. They are encouraging a diverse range of private film ideas and views and generally subsidizing the costs involved in producing major motion pictures, similar to the University of Virginia's subsidy for student newspapers in *Rosenberger*.[252] In fact, some states, like Washington, even expressly acknowledge their intention to promote arts and culture through their film incentive programs.[253]

Second, as a practical matter, states would never claim ownership in the content of the films they sponsor because of the unwanted corresponding legal liabilities that may arise. By claiming a message as their own or exerting control or ownership rights over a film, states would be subjecting themselves to peripheral liabilities such as defamation, libel, and copyright infringement actions. If a state were named a party in a defamation action, for instance, its defense would almost certainly be that it merely subsidizes the costs of filmmaking and that it had no control or ownership over the film's message or production activities. Thus, as a liability shield, states never intend to be associated with the message of the films they sponsor.

Third, given the current economics of film incentives, filmmakers would never agree to carry a state's message. States compete hard to lure filmmakers to their states.[254] The reality is that the states need filmmakers, and not the other way around.[255] As a result, the filmmakers enjoy a majority of the bargaining power over states when de-

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[252] *See, e.g.*, WASH. REV. CODE ANN. § 43.365.005 ("The legislature also recognizes the inherent educational value of promoting arts and culture . . . .").

[253] *Id.*

[254] *See e.g.*, Emery Article, *supra* note 29; *see also* NGA Report, *supra* note 2, at 1.

[255] *See e.g.*, Emery Article, *supra* note 29; *see also* NGA Report, *supra* note 2, at 1.

ciding where to film.[256] If a state was imposing its message on a filmmaker through a film incentive program, the filmmaker would simply choose to film in another less restrictive state or country. Accordingly, the content and viewpoints expressed in state-funded films are always that of the private filmmakers.

2. The Implications of Applying the *Rosenberger* Rule to State Film Incentive Programs

The application of the *Rosenberger* rule to state film incentives would mean that film incentive programs are metaphysical limited purpose public fora.[257] In limited purpose public fora, states can restrict content, but not viewpoint.[258]

First, almost all of the current categorical content restrictions are probably facially constitutional under *Rosenberger*. States that engage in categorical content restriction generally restrict political, commercial, and pornographic content without reference to viewpoint.[259] These restrictions are almost all facially permissible under *Rosenberger* because they do not favor one viewpoint over the other. They simply exclude entire subjects or topics, like politics. Alaska, for example, excludes all political advertisements without favoring any particular viewpoint, like pro-Republican.[260] Only if a state used a categorical content restriction to exclude certain viewpoints from the metaphysical limited purpose public forum would the state run afoul of the *Rosenberger* rule.

That being said, Montana expressly excludes films that advertise tobacco products.[261] Arguably, Montana's exclusion of tobacco adver-

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[256] *See e.g.*, Emery Article, *supra* note 29.

[257] *See Rosenberger*, 515 U.S. at 828-837.

[258] *Id.*

[259] *See* ALASKA STAT. § 44.33.232; ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, *supra* note 107 ; CONN. GEN. STAT. § 12-217jj(a)(3)(B); FLA. STAT. 288.1254(1)(e); HAW. REV. STAT. § 235-17(l); IDAHO CODE ANN. § 67-4728(2)(h); 35 ILL. COMP. STAT. 16/10(7); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS ch. 62 § 6(l)(1); ME. CODE R. § 13090-L(2)(A)(6) (Weil 2008); MICH. COMP. LAWS § 208.1455(3)(d); MICH. COMP. LAWS § 208.1455(12)(k)(i); MINN. STAT. ANN. § 116U.26(b)(2); MISS. CODE ANN. § 57-89-3(c); MO. REV. STAT. § 135.750(1)(2)(h); MONT. CODE ANN. § 15-31-903(2)(b)(i); N.J. STAT. ANN. § 54:10A-5.39 (e); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(f)(3); N.Y. TAX LAW § 24(b)(3); OKLA. STAT. ANN. tit. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN. § 12-62-20(3); S.D. CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(k)(1)(A); TENNESSEE 13/15/17, *supra* note 107; TENNESSEE 15, *supra* note 107; 13 TEX. ADMIN. CODE § 121.4(2); VA. CODE ANN. § 2.2-2320; VT. STAT. ANN. tit. 10, § 650(4)(F); WASHINGTON FILM WORKS, *supra* note 107; W. VA. CODE § 11-13X-2(b)(9); WIS. STAT. ANN. § 71.47(5f)(g).

[260] *See* ALASKA STAT. § 44.33.232.

[261] MONT. CODE ANN. § 15-31-903(2)(a) (2007).

tisements is not viewpoint specific because it simply excludes all discussion of tobacco as a topic or subject. However, like the regulation in *Rosenberger* that expressly disfavored certain religious viewpoints, the Montana regulation expressly disfavors the promotion of tobacco, as opposed to the discussion of tobacco as a general subject or topic. Therefore, the Montana exclusion is probably facially unconstitutional viewpoint discrimination under *Rosenberger*.

Second, all of the negative image content restrictions are probably facially unconstitutional under *Rosenberger* because they are viewpoint specific. The states that engage in negative image content restriction - Pennsylvania, Texas, Utah, West Virginia, Wisconsin, and Wyoming - explicitly disfavor films that negatively portray their state.[262] For instance, both Texas and Utah explicitly disfavor films that negatively portray their states or their states' citizens.[263] Similarly, West Virginia explicitly disfavors films that "portray[ ] the State of West Virginia in a significantly derogatory manner."[264] Pursuant to *Rosenberger*, negative image content restrictions almost certainly amount to unconstitutional viewpoint discrimination in a limited purpose public forum.

Third, essentially all of the implicit content restrictions are facially constitutional under *Rosenberger* because they are not viewpoint specific.[265] Iowa, for instance, states in its film incentive statute that a project shall not be eligible unless it "will further tourism, economic development, and population retention or growth in the state or locality."[266] Similarly, Maryland states on its film incentive Web site that "grant recipients will be selected . . . based on merit and economic benefit to the state."[267] Only if a state used an implicit content restriction to exclude particular viewpoints would the state run afoul of the *Rosenberger* rule.[268]

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[262] PENNSYLVANIA DEPARTMENT *supra* note 127; UTAH GOVERNOR'S OFFICE, *supra* note 127; W. VA. CODE § 11-13X-2; WIS. ADMIN. CODE Comm. 133.30(4); WYO. STAT. ANN. § 9-12-403(a)(v).

[263] TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127.

[264] W. VA. CODE § 11-13X-2.

[265] *See* ALASKA STAT. § 44.33.232; ILL. ADMIN. CODE tit. 14, § 528.50(b)(5) (2009); IOWA CODE § 15.393(1)(c)-(d); Maryland Film Office, http://www.marylandfilm.org/productionrebate.htm (last visited Nov. 23, 2008); OR. ADMIN. R. 951-002-0010(2); WASH. REV. CODE § 43.365.020(1)(e), (i), (k).

[266] IOWA CODE § 15.393(1)(c).

[267] Maryland Film Office, http://www.marylandfilm.org/productionrebate.htm (last visited Nov. 23, 2008).

[268] At first glance, implicit content restrictions seem like they may be ripe for a vagueness or overbreadth challenge because of their broad and unclear language. However, the Court has noted its reluctance in the subsidy content to facially invalidate statutes for overbreadth or vagueness because subsidies do not criminalize certain content or viewpoints. *See Finley*, 524 U.S. at 588. As such, according to the Court, content restrictions in subsidies will not

Finally, the carte blanche content restrictions are almost all unconstitutional under *Rosenberger* because they are viewpoint specific.[269] New Mexico, for instance, reserves the right to deny funding to films that glorify drugs or films that show irresponsibility with religious or racial subject matter.[270] New Mexico thus expressly acknowledges a disfavored view toward films that glorify drugs or convey particular views about religious or racial subject matters. Therefore, New Mexico's restriction is probably unconstitutional viewpoint discrimination under *Rosenberger*.

Similarly, Florida's "family friendly bonus" is probably facially unconstitutional under *Rosenberger*. The Florida film incentive statute defines family friendly productions as "those that are appropriate in theme, content, and language for a broad family audience; embody a responsible resolution of issues; and do not exhibit any act of smoking, sex, nudity, or vulgar or profane language."[271] Florida's bonus program is viewpoint specific because it undoubtedly disfavors viewpoints that Florida believes are not "appropriate in theme [or] content."[272] Therefore, Florida's bonus program is probably unconstitutional viewpoint discrimination under *Rosenberger*.

In sum, should the *Rosenberger* rule be applied to state film incentives, almost all of the categorical and implicit content restrictions are likely facially constitutional because they are not viewpoint specific. The negative image and carte blanche content restrictions, on the other hand, are all probably facially unconstitutional because they are viewpoint specific.

C. *The* Finley *Rule*

1. The Arguments for Applying the *Finley* Rule to State Film Incentive Programs

As with the *Rosenberger* rule, the application of the *Finley* rule to state film incentive programs requires that the government be funding private speech or a particular activity as opposed to the government

force speakers to refrain from speaking their message altogether as would a direct restriction or criminal penalty on the message. *Id.*

[269] *See* GA. CODE ANN. § 48-7-40.26; GA. COMP. R. & REGS 560-7-8-.45; GEORGIA FILM, *supra* note 134; N.M. STAT. ANN. § 7-2F-2(D)(3); TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127; FLA. STAT. 288.1254(4)(f); New Mexico Film Office, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Dec. 10, 2008).

[270] New Mexico Film Office, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Dec. 10, 2008).

[271] FLA. STAT. 288.1254(4)(f).

[272] *Id.*

funding its own message.[273] Accordingly, the three reasons advanced above for the application of the *Rosenberger* rule to state film incentive programs equally apply for the *Finley* rule.[274] Furthermore, there are several additional arguments that the *Finley* rule is the proper rule for state film incentive programs.

First, like the art grants in *Finley*, and unlike the generally available printing subsidies in *Rosenberger*, state film incentives are highly selective and competitive funds. State film incentives are not generally available to all filmmakers. They are only available to big budget major motion picture filmmakers.[275] Accordingly, state film incentives are more akin to *Finley* than *Rosenberger* in this respect.

Second, just like distributing the art grants in *Finley*, distributing film incentives inherently requires the consideration of content and viewpoint.[276] In distributing film incentives, states must ensure that only the most qualified films are funded. It is simply unimaginable to think that content and viewpoint will not at least be a consideration in deciding what films are the most qualified to receive incentives from the limited pool of taxpayer money.

2. The Implications of Applying the *Finley* Rule to State Film Incentives

The application of the *Finley* rule to state film incentives would mean states can restrict content in film incentive programs.[277] States could also consider viewpoint in selecting incentive recipients as long as viewpoint is not outcome determinative.[278] The *Finley* Court noted its reluctance to facially invalidate content restrictions in the subsidy context unless the statute's express language poses a realistic danger that it will be utilized to "punish the expression of particular *views*."[279]

First, almost all of the categorical content restrictions are probably facially constitutional under *Finley*. Again, states that engage in cate-

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[273] *See Finley*, 524 U.S. at 580-87.

[274] *See supra* Section III(B)(ii)(a).

[275] *See e.g.* ALASKA STAT. § 44.33.232 ("A film production is eligible for a tax credit . . . if the producer has $100,000 or more in qualified expenditures . . . ."); *see also, e.g.,* IDAHO CODE ANN. § 67-4728(2)(h) ("'Qualified production' means a feature film . . . that spends a minimum of two hundred thousand dollars ($200,000) on Idaho goods and services."); OR. REV. STAT. § 284.368(2)(c) ("In order to qualify for reimbursement . . . total expenses paid for the film must equal or exceed $750,000.").

[276] *See Finley*, 524 U.S. at 598 (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . .").

[277] *Id.* at 580-87.

[278] *Id.* at 582-83.

[279] *Id.* at 582-83 (emphasis added).

gorical content restriction generally restrict political, commercial, and pornographic content without reference to specific viewpoints.[280] These restrictions are almost all permissible on their face because they do not favor one viewpoint over the other. Only if a state used a categorical content restriction to punish a particular viewpoint would the state's categorical content restriction run afoul of the *Finley* rule.

That being said, Montana's exclusion of films that advertise tobacco is probably unconstitutional under *Finley* because it is viewpoint specific and makes viewpoint outcome determinative in funding decisions. Montana's exclusion is viewpoint specific because it expressly disfavors the promotion of tobacco as opposed to the discussion of tobacco as a general subject or topic.[281] Montana's exclusion also makes the promotion of tobacco outcome determinative in funding decisions because it categorically excludes any production that promotes tobacco, even if the production is otherwise qualified.[282] Thus, the Montana restriction is unconstitutional under *Finley* because it makes a pro-tobacco viewpoint outcome determinative in determining funding eligibility.

Second, the negative image content restrictions are particularly tricky. They are all viewpoint specific because they expressly disfavor films that negatively portray their states.[283] Their constitutionality under *Finley*, though, will depend on whether the viewpoint restrictions are outcome determinative. Wisconsin, for instance, states in its administrative rules that *one of the criteria* for eligibility is whether "the production would not hurt the reputation of the state of Wisconsin."[284]

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[280] *See* ALASKA STAT. § 44.33.232; ARIZ. REV. STAT. ANN. § 41-1517(M)(2)-(4); COLORADO FILM COMMISSION, *supra* note 107; CONN. GEN. STAT. § 12-217jj(a)(3)(B); FLA. STAT. 288.1254(1)(e); HAW. REV. STAT. § 235-17(l); IDAHO CODE ANN. § 67-4728(2)(h); 35 ILL. COMP. STAT. 16/10(7); IND. CODE § 6-3.1-32-5; IOWA CODE § 15.393(4); MASS. GEN. LAWS ch. 62 § 6(l)(1); ME. CODE R. § 13090-L(2)(A)(6); MICH. COMP. LAWS § 208.1455(3)(d); MICH. COMP. LAWS § 208.1455(12)(k)(i); MINN. STAT. ANN. § 116U.26(b)(2); MISS. CODE ANN. § 57-89-3(c); MO. REV. STAT. § 135.750(1)(2)(h); MONT. CODE ANN. § 15-31-903(2)(b)(i); N.J. STAT. ANN.. § 54:10A-5.39 (e); N.M. STAT. ANN. § 7-2F-2(D)(3); N.C. GEN. STAT. ANN. § 105-130.47(f)(3); N.Y. TAX LAW § 24(b)(3); OKLA. STAT. ANN. tit. 68, § 3623(3); 72 PA. CONS. STAT. ANN. § 8702-D; R.I. GEN. LAWS § 44-31.2-2(4); S.C. CODE ANN.. § 12-62-20(3); S.D. CODIFIED LAWS § 10-46D-1(4); TENN. CODE ANN. §§ 4-3-4902, 67-4-2109(k)(1)(A); TENNESSEE 13/15/17, *supra* note 107; TENNESSEE 15, *supra* note 107; 13 TEX. ADMIN. CODE § 121.4(2); VA. CODE ANN. § 2.2-2320; VT. STAT. ANN. tit. 10, § 650(4)(F); WASHINGTON FILM WORKS, *supra* note 107; W. CODE § 11-13X-2(b)(9); WIS. STAT. ANN. § 71.47(5f)(g).

[281] *See* MONT. CODE ANN. § 15-31-903(2)(b)(i).

[282] *See id.*

[283] *See* PENNSYLVANIA DEPARTMENT, *supra* note 127; TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127; W. VA. CODE § 11-13X-2(b)(9)(F); WIS. ADMIN. CODE Comm. 133.30(4); WYO. STAT. ANN. § 9-12-403(a)(v).

[284] WIS. ADMIN. CODE. Comm. 133.30(4).

The Wisconsin restriction is probably constitutional under *Finley* because viewpoint is merely a consideration and will not necessarily lead to the denial of funding. Only if Wisconsin denied an incentive application *solely* because a film's viewpoint would hurt the reputation of Wisconsin would Wisconsin run afoul of the *Finley* rule. Texas, on the other hand, expressly reserves the right to reject film projects that "portray[ ] Texas or Texans in a negative fashion."[285] The Texas restriction is probably facially unconstitutional under *Finley* because it allows, and perhaps even requires, funding to be denied *solely* because of anti-Texas viewpoints.

Third, all of the implicit content restrictions are probably facially constitutional under *Finley* because they neither expressly disfavor certain viewpoints nor pose a realistic danger that they will be used to punish particular viewpoints.[286] For example, consistent with *Finley,* Illinois's film office is required to determine, among several factors, whether awarding a film incentive "will result in an overall positive impact to the State."[287] Similarly, Maryland states on its film incentive Web site that "grant recipients will be selected . . . based on merit and economic benefit to the state."[288] Likewise, Washington states in its film incentive statute that, in determining whether to award an incentive, the film office has to consider, among other things, "the intangible impact on the state and local communities that comes with motion picture projects . . . [and] the vitality of the state's motion picture industry as a necessary and critical factor in promoting the state as a premier tourist and cultural destination."[289] Considerations such as "overall positive impact to the State" and "merit and economic benefit" do not expressly favor any particular viewpoints. Moreover, they are simply one of several considerations in determining funding eligibility and will not necessarily lead to invidious viewpoint discrimination. Only if a state used an implicit content restriction to punish a particular viewpoint would an implicit content restriction run afoul of the *Finley* rule.

Finally, the carte blanche content restrictions are probably facially unconstitutional under *Finley* because they are both viewpoint specific and pose a realistic threat that they could be used to punish particular

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[285] TEX. GOV'T CODE ANN. § 485.022(e).

[286] *See* ALASKA STAT. § 44.33.232; ILL. ADMIN. CODE tit. 14, § 528.50(b)(5); IOWA CODE § 15.393(1)(c)-(d); Maryland Film Office, http://www.marylandfilm.org/productionrebate.htm (last visited Nov. 23, 2008); OR. ADMIN. R. 951-002-0010(2); WASH. REV. CODE § 43.365.020(1)(e), (i), (k).

[287] ILL. ADMIN. CODE tit. 14, § 528.50(b)(5).

[288] Maryland Film Office, http://www.marylandfilm.org/productionrebate.htm (last visited Nov. 23, 2008).

[289] WASH. REV. CODE § 43.365.020(1)(e), (i), (k).

viewpoints.[290] New Mexico's carte blanche content restriction, for instance, is viewpoint specific because it expressly disfavors films that glorify drugs or convey particular racial or religious viewpoints.[291] The regulation also expressly states that applicants can be denied *solely* for their viewpoints.[292] Therefore, New Mexico's regulation is probably unconstitutional under *Finley*.

Similarly, Florida's "family friendly bonus" is probably facially unconstitutional under *Finley*. The statute defines family friendly productions as "those that are appropriate in theme, content, and language for a broad family audience; embody a responsible resolution of issues; and do not exhibit any act of smoking, sex, nudity, or vulgar or profane language."[293] Florida's bonus program is viewpoint specific because it expressly disfavors films with viewpoints that Florida believes are not family friendly. Also, viewpoint is outcome determinative because non-family friendly viewpoints are not eligible for the bonus, even if otherwise qualified.[294]

Likewise, Texas and Utah's "inappropriate content" provisions are probably facially unconstitutional under *Finley*. The Texas and Utah provisions are viewpoint specific because they expressly disfavor viewpoints that Texas and Utah believe are "inappropriate."[295] Moreover, both states' provisions expressly reserve the right to deny funding *solely* because those states determine that the content is "inappropriate,"[296] making viewpoint outcome determinative.

In sum, should the *Finley* rule be applied to state film incentive programs, almost all the categorical and implicit content restrictions are probably facially constitutional because they are neither viewpoint specific nor make viewpoint outcome determinative in funding decisions. The negative image restrictions, while all viewpoint specific, will only pass muster in the instances where viewpoint is not outcome determinative in funding decisions. Finally, almost all the carte blanche content restrictions are facially unconstitutional because they are viewpoint specific and allow funding denials based solely on viewpoint.

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[290] *See* GA. CODE ANN. § 48-7-40.26; GA. COMP. R. & REGS. 560-7-8-.45; GEORGIA FILM, *supra* note 142; N.M. STAT. ANN. § 7-2F-2(D)(3); TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127; FLA. STAT. 288.1254(4)(f); New Mexico Film Office, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Dec. 10, 2008).

[291] New Mexico Film Office, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Dec. 10, 2008).

[292] *Id.*

[293] FLA. STAT. 288.1254(4)(f).

[294] *See id.*

[295] TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127.

[296] TEX. GOV'T CODE ANN. § 485.022(e); UTAH GOVERNOR'S OFFICE, *supra* note 127.

VI. ANSWERING THE ULTIMATE QUESTION: CAN THE FIRST AMENDMENT STOP CONTENT RESTRICTION IN STATE FILM INCENTIVES PROGRAMS?

This article asks whether the First Amendment can stop content restriction in state film incentives. The short answer is, in all likelihood, no. First, whether the government is speaking as in *Rust* or funding private speech as in *Rosenberger* or *Finley*, the inescapable reality is that all three rules permit a significant amount of speech to be restricted within film incentive programs. If the *Rust* rule applies, states can broadly and discriminately restrict both content and viewpoint in their incentive programs free of First Amendment concerns. If the *Rosenberger* or *Finley* rules apply, content can still be substantially restricted to the extent the restrictions are viewpoint neutral. And the *Finley* rule allows viewpoint to be considered in determining funding eligibility as long as viewpoint is not outcome determinative. Additionally, neither the *Rosenberger* nor *Finley* rules can prevent the perhaps unfixable problem of "wink wink, nudge nudge" funding denials where states use content neutral language pretextually to deny incentive applications for films that convey particular ideas or views.[297]

Second, as explained in Section IV, of the *Rust*, *Rosenberger*, and *Finley* rules, the strongest arguments seem to support the application of the *Rust* rule to state film incentives.[298] If that is the case, and the *Rust* rule applies, states would be left free to restrict content and viewpoint in film incentives to the extent they see fit. While that may seem harsh, broad, and discriminatory, content and viewpoint restriction in government funding programs is exactly what the *Rust* rule contemplates and allows.

Third, subsequent decisions by the Court have favored the *Rust* rule over the *Rosenberger* and *Finley* rules, affirmed broad governmental discretion in regulating content in benefit schemes, and demonstrated a reluctance to apply the *Rosenberger* or *Finley* rules to content based benefit denials. For instance, in *United States v. American Library Association*,[299] the Court upheld the Children's Internet Protection Act under which a public library could not receive funds for Internet access unless it installed software to block obscenity and child pornography.[300] The American Library Association, in order to avoid the broad discretion to restrict content and viewpoint allowed to the

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[297] *See* Transcript of Oral Argument at 24, *Finley*, 524 U.S. 569 (No. 97-371).

[298] *See* Section III, *supra*.

[299] 539 U.S. 194, 123 S.Ct. 2297 (2003).

[300] *Id.* at 214.

government under *Rust*, argued that the libraries were traditional public fora and thus protected from content restriction.[301] The Court disagreed.[302] The Court noted both its reluctance to apply forum analysis in the context of government benefits and the government's broad discretion in making content based judgments when deciding what private speech to make available to the public.[303] Furthermore, the Court held that, consistent with *Rust*, Congress could establish a fund to subsidize Internet costs for libraries and attach content restrictions as part of implementing its program, even content restrictions that would be unconstitutional as direct government regulations.[304]

Fourth, in recent years, the Court has strengthened and affirmed the notion that the Government can, consistent with the First Amendment, require private speakers to carry its message or even take ownership in private messages. In *Johanns v. Livestock Marketing Association*,[305] the Court upheld the Beef Promotion and Research Act of 1985, which established a policy of promoting and marketing beef and beef products.[306] The Act imposed an assessment on all sales and importation of cattle.[307] A group of private individuals that were assessed under the Act sued, arguing that the assessment forced them to support a message that they did not agree with, particularly the promotion of beef.[308] The Court held that compelled support of government speech, in this case promoting beef, was valid under the First Amendment.[309]

Similarly, in a very recent case, *Pleasant Grove City v. Summum*,[310] the Court unanimously upheld a city's placement of a privately donated and created religious monument in a public park against a free speech challenge.[311] According to the Court, the monument, even though the result of a private donation and creation, was government speech when accepted and controlled by the government and displayed in the park.[312] As a result, like in *Rust*, the city was permitted under the First

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[301] *Id.* at 205-06.
[302] *Id.* at 214.
[303] *Id.* at 204-05.
[304] *Id.* at 210-12.
[305] 544 U.S. 550 (2005).
[306] *Id.* at 553-54.
[307] *Id.*
[308] *Id.* at 555-56.
[309] *Id.*
[310] 555 U.S. __ (2009).
[311] *Id.*
[312] *Id.*

Amendment to speak the viewpoint or message of its choice in displaying the monument.[313]

Fifth, in writing the *Rust* opinion, the Court essentially wrote a "how to" article for government funding programs that want to have complete control over content and viewpoint within their programs.[314] All the government has to do is make clear that funding program recipients are carrying the government's message.[315] Many state film incentive statutes have already done this by requiring filmmakers to include the sponsoring state in the film's credits.[316] In the future, in order to avoid First Amendment litigation altogether, states may go even further to ensure the *Rust* rule's application. For instance, the following hypothetical provision in a film incentive statute almost certainly would ensure the *Rust* rule's application:

> The State's message in awarding film incentives is that the State is an ideal place to film, work, visit, and live. The State is not seeking to encourage the message of private speakers under this incentive program. The State will only fund content that it deems to be in accordance with the purposes of this section. By accepting these funds, Grantee hereby acknowledges that he or she is carrying the message of the State while using State funds to make a particular production. Grantee remains free to exercise control of all content in productions outside the scope of this program.

Finally, the *Speiser* rule has essentially been eradicated. It is perhaps worth noting that the Court has, on at least one recent occasion, in *Rumsfeld v. Forum for Academic and Institutional Rights*,[317]mentioned *Speiser* in passing, although it neither applied it nor commented on its current relevance.[318] In *Forum for Academic and Institutional Rights*,

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[313] *Id.*

[314] *See generally Rust*, 500 U.S. at 191-200.

[315] *See id.*

[316] *See* FLA. STAT. 288.1254(4)(g); *see also* COLORADO FILM COMMISSION, FILM INCENTIVE PROCEDURES & DEFINITIONS 2 (2008) ("[T]he production company agrees that the closing credits will contain an acknowledgement that the production was filmed in Colorado . . . ."); *see also* N.M. STAT. ANN. § 7-2f-1(E) ("A long-form narrative film production for which the tax credit is claimed . . . shall contain an acknowledgment that the production was filmed in New Mexico."); NEW YORK STATE GOVERNOR'S OFFICE FOR FILM & TELEVISION DEVELOPMENT, NEW YORK STATE EMPIRE STATE FILM PRODUCTION CREDIT FINAL APPLICATION 7 (2008), *available at* http://www.nylovesfilm.com/tax/ ("[A]n applicant for the State program agrees to acknowledge The New York Governor's Office for Motion Picture & Television Development in the screen credits . . . ."); N.C. GEN. STAT. ANN. § 105-130.47("For productions that have production credits, a taxpayer claiming a credit under this section must acknowledge in the production credits both the North Carolina Film Office and the regional film office responsible for the geographic area in which the filming of the production occurred.").

[317] *See* 547 U.S. 47, 59-60 (2006) ("It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." (citing *Speiser*, 357 U.S. at 526)).

[318] *Id.*

the Court rejected a First Amendment challenge to a federal funding program that withheld funds from colleges and universities that refused to allow military recruiters access to students.[319] For all practical purposes, *Speiser* is dead.

VII. CONCLUSION

In sum, content restrictions in state film incentive programs, even those that are viewpoint-based, probably do not violate the First Amendment. State film incentive programs fall quite neatly into the ambit of the *Rust* rule. Also the modern trend of the law favors the *Rust* rule over the *Rosenberger* and *Finley* rules. Accordingly, states can restrict film content and viewpoint to the extent they deem necessary to further the purposes of their incentive programs.

Alternatively, even if the *Rosenberger* or *Finley* rules apply to film incentive programs, content can still be substantially restricted. Moreover, *Finley* allows viewpoint to be considered in selecting funding recipients so long as viewpoint is not outcome determinative. Finally, neither the *Rosenberger* nor *Finley* rules can prevent the problem of "wink wink, nudge nudge" viewpoint discrimination in state film incentives.

[319] *Id.*