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Federal Arts Funding At What Cost? The Impact Of Funding Guidelines On The First Amendment and The Future Of Art in America

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**FEDERAL ARTS FUNDING AT WHAT COST?
THE IMPACT OF FUNDING
GUIDELINES ON THE FIRST
AMENDMENT AND THE
FUTURE OF ART IN AMERICA**

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FEDERAL ARTS FUNDING AT WHAT COST? THE IMPACT OF FUNDING GUIDELINES ON THE FIRST AMENDMENT AND THE FUTURE OF ART IN AMERICA

In art, immorality cannot exist. Art is always sacred even when it takes for a subject the worst excesses of desire. Since it has in view only the sincerity of observation, it cannot debase itself. A true work of art is always noble, even when it translates the stirrings of the brute, for at that moment, the artist who has produced it had as his only objective, the most conscientious rendering possible of the impression he has felt.¹

I. INTRODUCTION

Among the rights most cherished by Americans is the guarantee of free speech.² We have known for a long time that this guarantee does not protect libelous statements,³ "fighting words",⁴ or such speech as falsely shouting "fire!" in a crowded theatre,⁵ where the police powers⁶ are clearly implicated. The Supreme Court has also made clear that the free speech guarantee does not protect "obscenity".⁷ Recognizing that "obscenity" is an inherently subjective term,⁸ the Court has over the years, struggled to delimit it — not surprisingly, to little avail.⁹ Various governmental attempts of late to make "obscenity" a more inclusive concept, have awakened a fear in many Americans that the guarantee of free speech may not

1. Rodin, *Antee* (1907), reprinted in 1 J. MERRYMAN & A. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* [hereinafter "MERRYMAN & ELSEN"] at 240-41 (2d ed. 1987).

2. The first amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend. I.

3. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

4. Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace". *Id.*

5. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

6. The police powers of a state refer to its interest in and right to enforce laws protecting the health, safety and welfare of its citizens. *See e.g.*, *People v. Radich*, 26 N.Y.2d 114, 119, 308 N.Y.S.2d 846, 849, 257 N.E.2d 30, 32 (1970).

7. *See Roth v. United States*, 354 U.S. 476, 485 (1957) ("[o]bscenity is not within the area of constitutionally protected speech or press").

8. As Justice Stewart asserted in his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964): "[I] know it [obscenity] when I see it."

9. As Justice Brennan exclaimed in his dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973): "No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards" as obscenity. Later in his opinion he referred to the Court's dilemma

be much of a guarantee at all. There is no better illustration of this than the subject of federal funding for the arts.¹⁰

While it is true that stabs at free expression in arts funding have met with less success than the government had hoped,¹¹ it cannot be denied that the repeated attempts to screen for obscenity over the past few years signal a distinct drive by the government to repress — to control the content and form of expression. Worse, whether ultimately upheld or not as "constitutional" invasions of the freedom of expression, this series of governmental encroachments may have already left an indelible mark on the future of American art.

The issue is deserving of study not only for the immediate reason that the constitutionality of portions of the 1989 and 1990 arts funding laws have been challenged in courts across the country,¹² but for the broader reason that the continuing deliberations over and preoccupation with these funding laws makes clear just how tenuous our first amendment guarantees may be.¹³ Indeed, it has been said that this is not simply a battle over obscenity, "[t]his is about the very principles of democracy and the fundamental values of this coun-

of applying "inevitably obscure standards" in judging something "obscene". *Id.* at 92.

Thus, the situation had not changed much since 1957, when in his dissent in *Roth*, 354 U.S. at 512 (which Justice Black joined), Justice Douglas quipped: "If experience in this field teaches anything, it is that 'censorship of obscenity has almost always been both irrational and indiscriminate.'" (citation omitted).

10. This has been viewed by some as a crusade to return to an "officially sanctioned, state-supported, state-approved art." Artist Chuck Close (quoted in *N.Y. Times*, Nov. 19, 1989, at 1, col. 2).

11. In fact, each stroke has engendered such public derision that the government has been pressured to make concessions, and successive funding laws and policies have been tempered. Additionally, several prominent cases challenging aspects of the various laws and policies have been successful. See e.g. *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D.Cal. 1991), *infra* at Sec. II B-C; *Newport Harbor Art Museum v. Nat'l Endowment for the Arts* (companion case to *Lewitzky*); and *New School v. Frohnmayer*, No. 90-3510 (S.D.N.Y. 1990) (settled and suit terminated, Feb. 20, 1991), *infra*, notes 116-118 and accompanying text.

12. *Nat'l L.J.*, Nov. 5, 1990 at 12 (citing, *New School v. Frohnmayer*, *supra* note 11; *Bella Lewitzky Dance Foundation v. Frohnmayer*, *supra* note 11; *Newport Harbor Museum v. NEA*, *supra* note 11; *Fordyce v. Frohnmayer* No. 90-2106 (Charlottesville, Va. 1990); and the "NEA Four", *infra* note 217.

13. Martha Wilson, director of Franklin Furnace, an avant-garde performance space in TriBeCa, learned "how tenuous" these freedoms might be when, after she was promised two arts grants, the General Accounting Office, "acting on a demand by Senator Helms", asked to examine her records. They wanted to see when and how frequently four artists, known for their sexually provocative work, performed there. Wilson commented on the "growing atmosphere of repression," brought about by the government which she believes is "trying to starve organizations and artists that have unwanted ideas." *N.Y. Times*, July 18, 1990, at 11, col. 4.

try."¹⁴ This is a "battle for the soul of America."¹⁵

Clearly, while the debate revolves around defining obscenity, it involves a wide spectrum of issues, such as:

1. Does the federal government have any responsibility to fund art in the first place?
2. Once the government does decide to sponsor art,¹⁶ are content-based restrictions on sponsorship constitutionally permissible?
3. Given the mandate of the National Endowment for the Arts [hereinafter "NEA"], are content-based restrictions for grant applicants/recipients statutorily permissible?
4. How would such restrictions be implemented and supervised even-handedly?
5. Should the legislative branch of the government be permitted to intrude on the grant making process, or should it merely set up the means for sponsorship, leaving the funding decisions to politically insulated panels of art experts?
6. Can artists be required to promise in writing or otherwise, to use their federal grants to further only ends of which the NEA officially approves, or is this a "prior restraint"?¹⁷
7. What sort of chilling effect would such a requirement or a threat of funds being rescinded have on artistic creation?
8. Is it important or even worthwhile to sponsor art which has as its goal "to shock and disturb the public, to attack its conventions and assumptions, to disturb it"?¹⁸

This note attempts to analyze these and other issues in the recent controversy over federal arts funding. The primary focus is on the constitutionality of the various laws and internal policies adopted by the government to screen grant applications for obscenity and to

14. Dr. Mary Schmidt-Campbell, Commissioner of Cultural Affairs for New York City (quoted in *N.Y. Post*, Mar. 24, 1990, at 19, col. 1).

15. Schmidt-Campbell (quoted in *N.Y. Times*, July 12, 1990, at 19, col. 1).

16. The National Council on the Arts, established in 1964, was the nation's first attempt — years behind nearly every other major government in the world — to encourage and nurture the artistic and cultural resources available to its citizens. The Foundation on the Arts and Humanities was created to implement the Council's plans. The Foundation, in turn, is composed of a National Endowment for the Arts, a National Endowment for the Humanities, and a Federal Council on the Arts and the Humanities. MERRYMAN & ELSEN, *supra* note 1, at 341.

The NEA is an independent agency of the United States. Its authorizing legislation mandates that government not enter into the funding process. The idea is that politics and art should be kept separate from one another. See generally, *id.* at 342-48, as discussed *infra*, notes 83-84 and accompanying text. The Supreme Court in *Roth*, 354 U.S. at 488 expressed its support for this notion of freedom from governmental intrusion into the domain of free speech: "The door barring federal and state intrusion into this area [of free speech and press] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." (citation omitted).

17. This term is discussed, *infra* note 74 and accompanying text.

18. *N.Y. Times*, July 18, 1990, at 15, col. 2.

prevent the production of obscene works by grantees once money is awarded. A discussion of the NEA's mandate illustrates why the recent funding laws are, in any case, statutorily impermissible. Part II briefly relates how the original funding law evolved and what constitutional questions it raised. Subsequent actions of Congress and the NEA independently are examined, as is the current focus of the debate. Part III explores the history of political and "perverse" speech in art, and hypothesizes why "obscene" speech has been relegated to its present status by the judicial system and government. This Part also analyzes the first amendment's treatment of non-verbal or "symbolic" speech. Part IV reviews the first amendment's treatment of obscenity and artistic expression, and explains why the Supreme Court's definition as applied by the NEA has been deemed "void for vagueness". Part V considers the after-effects of the law. Finally, Part VI concludes that the NEA is critical to the survival of experimental art in the United States, and that the intrusion of politics into funding decisions interferes greatly with the NEA's mandate and ability to nurture the creative spirit in America.¹⁹ The suggestion is made that should the NEA return to its former merit-based screening practices, it may be that it is too little, too late. To expect the NEA to be able, suddenly, to forget about content when screening applications would be like telling someone not to think about elephants. It is a foregone conclusion that they will fail.

II. THE CONSTITUTIONAL PROBLEM

A. *The Birth of an Issue*

Modern art is Communistic because it is distorted and ugly, because it does not glorify our beautiful country, our cheerful and smiling people, and our material progress. Art which does not glorify our beautiful country in plain, simple terms that everyone can understand breeds dissatisfaction. It is therefore opposed to our government, and those who create and promote it are our enemies.²⁰

The recent arts funding controversy began when, in 1988, the NEA supported an exhibition at a museum in Winston-Salem, N.C. which included a photo by Andres Serrano entitled "Piss Christ". The photo featured a cheap plastic crucifix suspended in a jar of the artist's urine. Just after this, the Corcoran Gallery in Washington, D.C. mounted their NEA funded exhibition of photos by the late Robert Mapplethorpe, an artist whose name has become synonymous with the words "controversial" and "homoerotic".

19. See NEA mandate, *infra* note 83.

20. George Dondero (R-Mich), (quoted in MERRYMAN & EISEN, *supra* note 1, at 268). Dondero was a McCarthy era spokesman who believed that all modern art — in its "depraved", "destructive" forms — was communist inspired.

These exhibits sparked a steamy debate in Congress over the summer of 1988, with Senator Jesse Helms (R-N.C.) leading the drive for expansive funding restrictions.²¹ The bill that was eventually passed in Congress was not as broad as Helms' proposal, but it nevertheless included a "laundry list" of prohibitions.²²

B. *Substance of the Original Funding Law*

In late October of 1989, President Bush signed a new one-year National Arts Funding Law which altered the screening guidelines for awarding federal arts grants through the National Endowment for the Arts.²³ Specifically, the funding law required that federal grants not be used for the promotion, dissemination, or production of "materials considered obscene", such as works depicting "sado-masochism, homoeroticism, sexual exploitation of children or individuals engaged in sex acts" and "which, when taken as a whole, do not have serious literary, artistic, political or scientific value."²⁴

In addition, the NEA — independent of Congress — added a "certification" requirement to the form grant recipients had to submit to the NEA to obtain funding once notified of an award. The grantee had to certify in advance that "none of the funds awarded would be used to promote, disseminate, or produce materials which

21. Helms' bill, rejected by Congress, would have precluded the use of federal monies to: "promote, disseminate or produce obscene or indecent materials, including art which denigrates, debases or reviles a person, group or class of citizens on the basis of race, creed, sex, handicap, age or national origin." N.Y. Times, (editorial page) Nov. 17, 1989.

22. See *infra* note 24 and accompanying text. Although the House-Senate Conference Committee which negotiated the compromise rejected a Senate authorized five-year ban on financial support for the two particular organizations which sponsored the Serrano and Mapplethorpe exhibits, it agreed that if the NEA wished to bestow a grant on either of these organizations in the future, it would have to "notify" the two congressional committees which oversee the Endowment. In addition, all art financed through the hundreds of subgrants given out each year would thereafter have to be screened by the NEA chair and council. Finally, the NEA's budget was cut by \$45,000 — a penalty equal to the combined amount paid in federal grant money to the two arts organizations in question. The NEA was thus penalized — as were the artists whose works were taken from the walls and the patrons who were robbed of the artistic experience — for shows funded before the new mandate was drafted and signed by the President. Similarly, the AIDS show grant was originally given before Congress had even begun debating the funding issue, and was retracted after the law went into effect. See discussion, *infra* notes 27-31 and accompanying text.

23. The NEA, a federally created agency, uses tax dollars to award merit-based grants to certain exceptional artists and arts institutions, through government selected peer review panels.

24. Interior and Related Agencies Appropriation Act of 1990, Pub. L. No. 101-102, Sec. 304(a), 103 Stat. 701, 741 (1989). This law was the result of a "compromise" from the stringent prohibition sought by conservatives.

in the judgement of the NEA . . . [could] be considered obscene' ".²⁵ The fear in the artworld was that these new policies would force the NEA to focus on the *content* of the work in approving funds, rather than on the artistic merit of the piece(s), as was the former practice.²⁶

This fear was realized in the NEA's first actions after the law came into effect. In November of 1989, NEA Chairman John Frohnmayer revoked (and then amidst public pressure eventually re-issued)²⁷ a \$10,000 grant to an art gallery in New York City for its exhibition on AIDS. Though the grant had been promised to the gallery several months prior to the new law's enactment, it was retracted by Frohnmayer because of the exhibit's content.²⁸ According to Frohnmayer, the exhibit had become "primar(il)y . . . political"²⁹ "rather than artistic" in nature;³⁰ and "political discourse ought to be in the political arena and not in a show sponsored by the Endowment."³¹

C. Problems with the Law — The Focus of the Debate

Proponents of the funding law have asserted that: (1) the government is not rendering illegal the production or exhibition of certain art, it is merely denying its support of such art.³² Furthermore, because the federal government has no obligation to fund art in the first place,³³ restrictions on which art is funded cannot by definition

25. *Lewitzky*, 754 F. Supp. at 776 (emphasis added) (citing Paragraph Two of NEA promulgated "General Terms and Conditions for Organizational Grant Recipients". In the *Lewitzky* case, the court found that the defendants, the NEA, were "withholding plaintiffs' grant proceeds as a direct result of plaintiffs' refusal to sign the certification." *Id.* at 779.

26. NEA Chairman John Frohnmayer's own comment made shortly after the law was passed, is revealing: The NEA "make[s] our decision on the artistic *content* [of the work]." *N.Y. Times*, Nov. 19, 1989, sec. 2 at 1, 25, col. 1 (emphasis added).

27. The grant was returned on the contingency that the NEA fund only the exhibition and not the show's "controversial" catalog. Further, a disclaimer would have to be put in the catalog regarding the lack of NEA support for it.

28. See *infra* notes 172-75 and accompanying text. Frohnmayer actually took issue with both the exhibit and its accompanying catalog, which criticized various public figures.

29. *N.Y. Times*, Nov. 10, 1989, at C33, col. 1.

30. *N.Y. Times*, Nov. 18, 1989, at 17, col. 1.

31. *N.Y. Times*, Nov. 19, 1989, sec. 2 at 1, 25, col. 1.

32. See *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) ("[t]he guarantee of freedom of speech 'does not mean that government must be ideologically 'neutral', or . . . prevent government from 'add[ing] its own voice to the many that it must tolerate.'" (quoting L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 588, 590 (1978)); see also, *Advocates for the Arts v. Thomson*, 532 F.2d 792, 796 (1st Cir. 1976) ("[n]eutrality in a program for public funding of the arts is inconceivable . . . [for] the very definition of ['art'] . . . requires an exercise of judgment from case to case."))

33. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540,

involve issues of "censorship"³⁴ and/or "prior restraint";³⁵ (2) in the midst of a recession, conservation of funds for the arts should be encouraged,³⁶ some screening process must be established, and content is as valid a discretionary factor as any;³⁷ and (3) after all, shouldn't taxpayers have a say in how their money is spent?

1. The Obligation to Fund

Screening based on content for funding purposes may not render the creation of certain artwork illegal, i.e. it may not constitute censorship *per se*, but for the NEA to "merely deny" grant money to "troublemakers" is *de facto* censorship — it ultimately results in censorship.

This is largely because of the instrumental role the NEA has set out to and, in fact, does play in the American art world.³⁸ Through the NEA, the government has, in effect, created for itself an obligation to fund. As one court recently held:

550 (1982) ("[t]he Constitution 'does not confer an entitlement to such [government given] funds as may be necessary to realize all the advantages of [the] freedom [of speech].'" (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980))).

34. The notion of censorship will be discussed generally *infra*, at Sec. C 1.

35. The issue of "prior restraint" will be discussed *infra* notes 74-82 and accompanying text.

36. See *Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) ("Congress should have discretion in deciding how to expend necessarily limited resources."). But see *N.Y. Post*, Nov. 18, 1989, wherein it is reported that the U.S. government spends only as much money on the arts, as a whole, as it does on military bands.

37. See *The Alan Guttmacher Institute v. McPherson*, 616 F. Supp. 195, 202 (D.C.N.Y. 1985) ("[b]ecause of the tremendous volume of expression, the government cannot undertake to subsidize any of it without being highly selective — it must be able to base its decision in large part on the content of the publications it chooses to aid.").

38. As the court found in *Lewitzky*, 754 F. Supp. at 783:

[T]he NEA occupies a dominant and influential role in the financial affairs of the art world in the United States. Because the NEA provides much of its support with conditions that require matching or co-funding from private sources [generally the NEA is not permitted to fund more than 50% of the total cost of a project, and usually funds at a ratio of three to one], the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors [M]ost non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient's artistic merit and value. NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources. Grant applicants rely on the NEA well beyond the dollar value of any particular grant.

(quoting amicus Theatre Communications Group) (footnote omitted). NEA grants in 1988 totalled \$119 million, which, due to the NEA's matching funds policy, generated a full \$1.36 billion in private funding. Note, *Free Speech and Government Funding: Does the Government Have to Fund What it Doesn't Like?*, 56 *BROOKLYN L. REV.* 213, 257-58 (citing Rockefeller Foundation statistics in *L.A. Times*, Jul. 20, 1990, at F1, col. 5.).

The NEA's role and influence may mean that if an artist chooses not to be bound by the NEA's obscenity restriction, he will not be able to obtain private funding, and therefore, will be worse off than if he had not applied for an NEA grant at all.³⁹

The court explained that while plaintiffs may not actually be able to claim *rights* to NEA grants,⁴⁰ once the government "moves to subsidize", it cannot deny benefits to applicants on unconstitutional grounds.⁴¹ In other words, by making itself the primary supporter of new talents and struggling institutions in the artworld, the government has, in a sense, preempted or controlled the entire process by which art does or does not become accessible to the American market. Such a role carries with it the obligation to act in comportment with the Constitution.

While "mere refusal" to subsidize a fundamental right is not unconstitutional if it "'places no obstacle in the path' of a plaintiff seeking to exercise that right,"⁴² the *Lewitzky* court found the NEA's certification requirement — especially in view of the extensive

39. *Lewitzky*, 754 F. Supp. at 785.

40. The court was referring to the following statements made by the Supreme Court in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.

See *Taxation with Representation*, 461 U.S. at 548 (Congress may not "discriminate invidiously in its subsidies in such a way as to 'aim] at the suppression of dangerous ideas.'" (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

41. *Lewitzky*, 754 F. Supp. at 784-85. See *Advocates for the Arts v. Thomson*, 532 F.2d 792, 798 n.8 (1st Cir. 1976) ("[d]istribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause, if not the first amendment, by penalizing the exercise of those freedoms"); cf. *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. 530, 533 (the protection afforded speech "does not depend upon the identity of its source, whether corporation, association, union, or individual").

42. *Harris v. McRae*, 448 U.S. 297, 316 (1980), as cited in *Lewitzky* at 784. The Court in *Harris v. McRae* reasoned that:

[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. [Therefore] . . . regardless of whether the freedom of a woman to choose to terminate her pregnancy . . . lies at the core . . . of the due process liberty [interest] . . . it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.

Id. at 316.

role⁴³ the NEA plays in arts funding — to present such an obstacle:⁴⁴

[A]n artist cannot . . . ignore the vague certification requirement and be no worse off than if the NEA had not entered the funding business at all This is the type of obstacle in the path of the exercise of fundamental speech rights that the constitution will not tolerate.⁴⁵

a. *Screening Guidelines*

What the *Lewitzky* court found offensive about the certification requirement can be applied to the screening guidelines in general. Indeed, while the certification requirement remained in place for 1990 grantees until just before this note went to press in March of 1991,⁴⁶ the screening language proved so controversial that it was not included in the 1990 legislation. It was however, incorporated by way of reference into the certification requirement.⁴⁷ The connection between the two was made clear by the court in its ruling on the certification issue. The court held that the government:

[M]ay not place restrictions on disbursement of those grants that require grantees to certify to *obscenity provisions that are vague* in violation of the Fifth Amendment,⁴⁸ and which correspondingly cause a chilling effect in violation of the First Amendment⁴⁹ [It] . . . go[es] well beyond a simple decision not to subsi-

43. See *supra* note 25; *Lewitzky*, 754 F. Supp. at 785.

44. *Id.*

45. *Id.* (emphasis added). As has been pointed out, funding from private sources is not easy to garner. Not only do private sources tend first to look to see if the federal government has given (and not rescinded) its approval of the work (i.e. supplied funds) before supplying additional subsidies, many organizations restrict funding based on, *inter alia*, the activities in question, the subject matter, the tax exempt status of the group (precluding funding to individuals), or the professed ideologies of the applicant. Note, *supra* note 38 at 256-57. Furthermore, private sources are less dependable than the government: whereas the available assets of both are vulnerable to swings in the economic climate from year to year, the government's decision to withdraw funds from programs is subject to debate and compromise, while private sources may withdraw funds without notice as they wish. *Id.*

46. See *infra* notes 115-18 and accompanying text, for a discussion of the Feb. 1991 agreement regarding the certification requirement for 1990 grantees.

47. See *supra* note 25 and accompanying text.

48. See *infra* notes 63-73 and accompanying text discussing the *Lewitzky* court's application of the "void for vagueness" doctrine to the certification requirement, rendering the requirement in violation of the due process clause of the fifth amendment.

49. The *Lewitzky* court found that because of its "unconstitutionally vague" provisions, the certification requirement has a "chilling effect" on artistic expression, in violation of the first amendment rights of grant recipients. *Lewitzky*, 754 F. Supp. at 785. That is, the vagueness of the provisions would cause grant recipients to "steer far wider of the unlawful zone" than if the boundaries of the forbidden area were clearly marked," *Id.* at 783 (quoting *Speiser v. Randall*, 357 U.S. 513, 526

dize obscene speech.⁵⁰

The screening guidelines, in several ways, abridged the constitutional rights of artists and art institutions applying for grants. First, artists' first amendment rights were infringed because the law, by arbitrarily classifying entire categories of subject matter as "obscene", in effect imposed a new national standard on "obscenity", which may or may not have had anything to do with the state statutes in the localities to which an artist's work traveled, and therefore, to which the artist was subject. In fact, the NEA's standard may have been broader than the state standards to which a particular artist was otherwise subject. Yet, each artist had also to heed the NEA's definition of obscenity, a definition more inclusive even, than the Supreme Court's latest test.

By defining obscenity in less specific terms than did the NEA in its policy, the Supreme Court in *Miller v. California*,⁵¹ provided more protection for, *inter alia*, artists. The Court's definition was made purposely broad in acknowledgment of the fact that "obscenity" is a concept which does not lend itself to objective definition. Rather, it depends on individual and/or communal reaction and is reflective of the time and place in which it is experienced.

For a work to be considered "obscene" under *Miller*, the "basic guidelines for the trier of fact *must be*":⁵²

- (1) [T]he average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ,
- (2) [T]he work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (3) [T]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵³

The first prong allows local communities to define obscenity, thus demonstrating an acknowledgement and a tolerance of the inevitably varying standards throughout the nation.⁵⁴ The second prong

(1958)), and " 'restrict . . . their conduct to that which is unquestionably safe.' " *Id.* at 783 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

50. *Lewitzky*, 754 F. Supp. at 785 (emphasis added).

51. 413 U.S. 15 (1973).

52. *Id.* at 24 (emphasis added).

53. *Id.* at 24 (citations omitted).

54. The Court further held:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that

permits each state to choose its own standards for censorable sexual conduct, rather than apply a fixed national standard.

The NEA's screening guidelines, by delineating which entire topics could not be addressed by grant applicants, imposed a national definition on obscenity in contravention of the first and second prongs of *Miller*. While the *Miller* Court even suggested general examples of what a state *might* censor,⁵⁵ it did not imply that the federal government should choose its own standards. In fact, even though the Court has, since *Miller*, upheld federal obscenity statutes which define "obscene" as: "the sort of patently offensive representations or descriptions of that specific hard core sexual conduct given as examples in *Miller*,"⁵⁶ research has not revealed an instance in which the Court has upheld a federal obscenity statute enumerating prohibited acts and depictions to the degree done in the NEA's screening guidelines. In adopting the funding law, the federal government clearly went beyond the *Miller* examples. By designating broad categories of artistic subject matter as obscene, Congress suddenly and impermissibly chose to define obscenity for its purposes more inclusively than the Supreme Court did in *Miller*.⁵⁷

The second manner in which the screening guidelines abridged the constitutional rights of artists, involved the third prong of the *Miller* test. The Supreme Court has always been loathe to scrutinize artwork for obscenity,⁵⁸ and under *Miller*'s third prong — serious value — artists are "virtually guarant[eed]" protection.⁵⁹ Although

such standards could be articulated for all 50 States in a single formulation [It] would be an exercise in futility

Id. at 30. Fourteen years later, in *Pope v. Illinois*, 481 U.S. 497 (1987), the Court did, however, concede that a national standard should govern the third prong.

55. The Court stated:

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under [the second prong of the test]:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id. at 25.

56. See *Ward v. Illinois*, 431 U.S. 767, 776 (1977) (citing *Hamling v. United States*, 418 U.S. 87, 114 (1974) (construing 18 U.S.C. Sec. 1461, prohibiting mailing of obscene matter); and *United States v. 12 200-Foot Reels of Film*, 413 U.S. 123, 130 n.7 (1973) (construing 18 U.S.C. Sec. 1462, prohibiting importation or transportation of obscene matter)).

57. As Justice Douglas noted in his dissent in *Miller*, if freedom of expression were ever to be diminished in any way, it would have to "be done by constitutional amendment after full debate by the people." 413 U.S. at 41.

58. See *Roth v. United States*, 354 U.S. 476 at 487-88; see *infra* note 87.

59. *N.Y. Times*, Apr. 8, 1990, at A26, col. 1 (quoting Constitutional Lawyer

this third prong was the one prong paid lip service by the funding law, it did not shield artists and art institutions as the *Miller Court* intended. Under the funding law, if the subject matter of a work fell into any one of the proscribed categories,⁶⁰ the work by definition could not possibly have "serious value" and thus all funding consideration came to an end.

b. Certification Requirement

As noted, while the constitutionality of the screening guidelines was never tested in court, the certification requirement was held unconstitutional by a federal judge in Los Angeles in January of 1991.⁶¹ Worse than the *denial* of funding based on screening guidelines, the certification requirement involved the *revocation* of government sponsorship already promised. When grant recipients refused to sign the pledge, they were at once "cut off indefinitely" from the grant money already assured them, without any benefit of administrative or judicial review of the decision.⁶²

Grant recipients have argued that this forces them to certify in advance that they will submit to a standard which is "void for vagueness".⁶³ The "vagueness", at least to those protesting in 1989, resulted from the fact that the NEA appointed itself the judge of what was "obscene", and grantees were forced to "speculate about how

Floyd Abrams). Most art passes the "pure speech" test of *United States v. O'Brien*, 391 U.S. 367 (1968); see *infra* notes 144-51 and accompanying text.

60. See *supra* note 24 and accompanying text.

61. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

62. *Id.* at 780.

63. "A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes." *United States v. Gilbert*, 813 F.2d 1523, 1530 (9th Cir. 1987) (citing *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984)). The Ninth Circuit held in *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third . . . where a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' *Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked.*

(cited in *Lewitzky*, 754 F. Supp. at 781) (emphasis added).

the NEA [would] assess obscenity".⁶⁴

By the time the *Lewitzky* case got to court, the NEA had announced that it would henceforth be relying on the *Miller* standard in judging works "obscene".⁶⁵ Thus, in responding to allegations of "vagueness" in the *Lewitzky* case, the NEA argued that the adoption of the *Miller* standard cured the vagueness problem, as *Miller* could not be vague "as a matter of law".⁶⁶ However, the *Lewitzky* court was unimpressed with the argument, holding that a reliance on *Miller* by the NEA did *not* cure the vagueness problem for two reasons:

- (1) The policy statements made by the NEA regarding a "promise" to rely on *Miller* is "not legally binding on the agency".⁶⁷ In other words, the court stressed, the NEA could dissolve or alter its policy "at will".⁶⁸
- (2) The NEA is not, at least currently, in a position to offer the proper procedural safeguards set forth in *Miller*, namely:
 - (a) that there be a statute which so specifically articulates what conduct or depiction is prohibited as to give people "fair notice" of what is or is not permissible;
 - (b) that there be a full adversarial trial; and
 - (c) that there be "a jury of citizens applying community standards for obscenity".⁶⁹

The *Lewitzky* court stated that "[e]ven if [we] were to make the generous assumption that the NEA could satisfy the first two procedural prerequisites,⁷⁰ the third safeguard is unobtainable by an administrative agency of the federal government . . . that, by hypothesis, is *incapable of applying varying community standards for obscenity*."⁷¹ The certification requirement left grantees no recourse but to "speculate at their peril" as to what the NEA might

64. *Lewitzky*, 754 F. Supp. at 781.

65. See *infra* note 99 and accompanying text; notice of this "adaptation" to reliance upon the *Miller* standard was sent by the NEA to grantees in July of 1990 in the "Statement of Policy and Guidance for the Implementation of Sec. 304." The *Lewitzky* case was subsequently filed that same month.

66. *Lewitzky*, 754 F. Supp. at 781.

67. *Id.* at 782. As the court held in *Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181, 1186 (D.C. Cir. 1986), "[A] general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking or adjudications." (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974). See also *Vietnam Veterans v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) ("[T]he agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest.").

68. *Lewitzky*, 754 F. Supp. at 782.

69. *Id.* See also *Miller*, 413 U.S. at 24-25, 27-28, 31-35.

70. See *infra* note 74; the NEA has no administrative review process in place.

71. *Lewitzky*, 754 F. Supp. at 782 (emphasis added).

find obscene in the grantee's local community.⁷² The court noted that the NEA had not even addressed this issue.⁷³

c. *Prior Restraint*

The law acted as a "prior restraint"⁷⁴ on expression because it: (a) screened applications for future funding based on the content of samples submitted; and (b) made the release of promised funds contingent on the signing of the certification requirement. The law had the power to prevent a new and obviously talented artist from getting the crucial funding she needed to get her career off the ground if she did not pass the screening test or the "loyalty oath" requirement.⁷⁵ The *Lewitzky* court recognized these fears:

[M]any major legitimate artistic projects will not be undertaken either for fear of violating the vague terms of the certification, or even merely for fear of becoming embroiled in a dispute with the NEA over an accusation that the work of art in question might violate the certification.⁷⁶ [Thus] *the vagueness of the statute forces grant recipients to avoid even coming close to the line between*

72. *Id.* at 25 (citing *Whitehill v. Elkins*, 389 U.S. 54, 58-59 (1967)).

73. *Id.*

74. A prior restraint, as opposed to punishment after the speech has occurred, is an attempt to prevent certain expression before it happens. The government's use of prior restraints is highly restricted. See Case Comment, *Vance v. Universal Amusement Co., sic*, 100 S.Ct. 1156, 26 N.Y.L.Sch. L. Rev. 1122, 1128 (1981). As the Supreme Court held in *Schenck v. United States*, 249 U.S. 47, 51-52 (1919), "[i]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . ." *Id.*

Those who believe that "prior restraint" arguments have no place in this debate would do well to reconsider in light of the Supreme Court's determination that, for a prior restraint to be constitutionally permissible, it:

[C]annot be administered in a manner which would lend an effect of finality to the censor's determination [O]nly a procedure requiring a judicial determination suffices to impose a valid final restraint [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial [of a license].

Freedman v. Maryland, 380 U.S. 51, 58-59 (1964). See also *Vance v. Universal Amusement Co.*, 445 U.S. 308, 309 (1980).

It is significant that courts do not have jurisdiction over NEA decisions. NEA decisions are final, and judicial or applicant review of the consideration process is not permissible. See Note, *Artistic Freedom and Government Subsidy: Performing Arts Institutions in the United States and West Germany*, 6 *HASTINGS INT'L & COMP. L. REV.* 803, 824 (Spr. 1983).

75. Many have likened the NEA's certification requirement to a McCarthy era loyalty oath, whereby persons were made to swear against the commission of future "communist" activities. See e.g., *N.Y. Times*, Jul. 9, 1990, at C13, col. 1; *L.A. Times* (syndicated in the *Albany Times Union*, Aug. 23, 1990, at 32, col. 1).

76. *Lewitzky*, 754 F. Supp. at 782 (quoting from brief of amicus Rockefeller I Foundation at 54).

what is merely provocative and . . . what is proscribed.⁷⁷

It is not hard to imagine that arts institutions in need of NEA grant money have been censoring the art they exhibit, so as not to jeopardize either present⁷⁸ or future NEA and private grants.⁷⁹ By extension, artists are no doubt being more conservative in the art they submit to galleries and museums.⁸⁰ Without governmental support for their work, many artists cannot afford to produce any work which they know or suspect would not make it past the government censor. Thus, creativity has been and — as long as the NEA focuses on obscenity — will continue to be, hampered. We can expect that after "five or ten years, American art w[ill] show 'a sameness, the rough edges being smoothed.'"⁸¹ Indeed, it may not "be long before Norman Rockwell paintings h[a]ng in every museum across the country."⁸²

2. The Focus on Content

It is an untenable argument that content is as valid a discretionary factor as any other in screening art applications. Neither the NEA's mandate⁸³ nor the legislative history behind its creation⁸⁴ permits

77. *Id.* (emphasis added).

78. *See infra* note 113 and accompanying text.

79. *See supra* note 45 and accompanying text.

80. As performance artist Karen Finley described it, "[t]here are artists right now who are changing their art because they are scared." Telephone conversation with Karen Finley, Aug. 1989 (quoted in Note, *Post-Modern Art and the Death of Obscenity Law*, 99 *YALE L.J.* 1359, 1373 n.105 (1990)).

81. Judith Baca, Co-founder of the Social & Public Art Resources Center in Venice, Cal. (quoted in *Wash. Post*, Mar. 24, 1990, at 1, col. 3).

82. Ira Glasser, Exec. Dir. ACLU, *Street News* (editorial), July, 1990, at 11.

83. The NEA was created with an extremely broad mandate:

[to] establish and carry out a program of grants-in-aid to groups, or . . . to individuals engaged in or concerned with the arts, for the purpose of enabling them to provide or support in the U.S.:

- (1) productions which have substantial artistic and cultural significance, giving emphasis to American creativity and the maintenance and encouragement of professional excellence;
- (2) productions, meeting professional standards or standards of authenticity, irrespective of origin which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens in many areas of the country;
- (3) projects that will encourage and assist artists and enable them to achieve standards of professional excellence

MERRYMAN & ELSÉN, *supra* note 1, at 339 (emphasis added).

84. The Declaration of Purpose of the National Foundation on the Arts and Humanities Act of 1965, from which the NEA was created, reads as follows:

'The practice of art and the study of the humanities require constant dedication It is necessary and appropriate for the Federal government to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry, but also the material conditions facilitating the release of this creative talent.'

content alone to be the basis for screening artwork for funding. Nowhere in the NEA's mandate is it stated or implied that the NEA may or should look to a work's content separate and apart from its artistic merit.

Furthermore, the first amendment has generally been held to protect the content of speech,⁸⁵ including "symbolic"⁸⁶ speech and/or artistic expression.⁸⁷ Even if it be said that the first amendment does allow the time, place, and manner of speech to be regulated,⁸⁸ it must be recognized that when applied to art, this type of regulation may well restrict the substance of the artist's message. For in art, not only may the form of a work be as significant as its content, in effect, it may be its content. It is logical, therefore, for the first amendment to protect the form or manner of the artistic expression.⁸⁹

3. The Choice to Fund

Those who argue that taxpayers should not have to fund art that is

Id. at 336 (emphasis added).

In light of this recognition, it was hoped that the Foundation would help "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States . . ." and that in "decentralizing" the arts, "artistic excellence could be enjoyed and appreciated by far greater numbers of our citizens, in each State of the Union." *Id.* at 338-39, 341 (emphasis added).

In part, the forerunner of the NEA was created in response to the realization that:

There is a *financial crisis facing the arts* in the U.S., which stems primarily from the *inadequacy of private sources* to support artistic excellence at an appropriate level and to foster and develop an environment which would fully stimulate the resources of American creative expression

Id. at 341 (emphasis added).

85. See *Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. at 537-38, wherein the Court held that:

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating" To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

(citations omitted).

86. "Symbolic" speech is discussed, *infra* Sec. III B-C.

87. As the Court held in *Roth*, "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Roth v. United States*, 354 U.S. 476, 487 (1957).

88. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

89. "The lesson is that courts in first amendment cases must be sensitive to the 'medium' as well as the 'message'; otherwise, the message, whatever it might be, may well be lost by governmental regulation of the medium." NAHMOD, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and The First Amendment* [hereinafter "NAHMOD"], 1987 Wis. L. Rev. 221, 246 n.145 and accompanying text.

"offensive" and which they would not choose to view if on display in a gallery should be reminded that:

No such choice is allowed to taxpayers who do not wish to pay for a bloated military establishment, or for throwing people in prison rather than offering them treatment for drug addiction, or for aid to reprehensible governments, or for the Congressional franking privilege. They have to pay anyway.⁹⁰

Funding only art which does not touch on certain subject matters would contravene the American ideal of encouraging a free marketplace of ideas.⁹¹ Furthermore, why is a concern over protecting the "moral welfare" of the public a valid concern when the only persons who will view the art are those who go to theatres, museums, galleries and the like, specifically for the experience?⁹²

What is frightening, is that since the 1989 law was passed, NEA panelists, more than ever, are aware of what types of artwork or performance art they would be better off *not* sponsoring. Though the law has been tempered, it is difficult to imagine that some degree of censorship will not take place, even if on a subconscious level by panelists. Given the subjective nature of the review process,⁹³ as well as the fact that NEA decisions are not subject to inquiry or challenge by applicants or the judiciary,⁹⁴ NEA censorship could escape public notice.⁹⁵

90. Wicker, *A Chilling Prospect* (editorial), *N.Y. Times*, Jul. 5, 1990, at 17, col. 1.

91. Justice Holmes, in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), introduced the idea that maintaining a marketplace of ideas is crucial to the progress of a society (cited in Note, *supra* note 38 at 222).

92. See discussion of this point *infra* notes 169-71 and accompanying text. See also *Cohen v. California*, 403 U.S. 15 (1971); *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970).

93. For example, what is "serious . . . merit"? What separates a sexual depiction considered "art" from one considered "obscene"? See *infra*, Sec. IV.

94. See Note, *Artistic Freedom and Government Subsidy: Performing Arts Institutions in the United States and West Germany*, 6 *HASTINGS INT'L & COMP. L. REV.* 803, 824 (Spr. 1983):

95. Certain types of censorship occurred even before the NEA brouhaha. For instance, when retraction of the AIDS exhibition grant was being discussed, Jacob Neusner, a member of the Institute for Advanced Studies at Princeton told Frohnmayer that in 1986 the National Council on the Arts rejected an application as "too political." The proposal by the Washington Project for the Arts was for a "high tech soap box" — a truck with speakers and a stadium-sized video screen — which would broadcast statements about free speech before the White House, Supreme Court and Congress. Neusner had told Frohnmayer that "the entire debate had to do with whether or not we wanted to finance political demonstrations in the name of art." "[F]or fear of arousing accusations of censorship," the only explanation given the director of the Washington Project when the application was rejected, was that there was concern among Council members regarding the "intrinsic aesthetic value," "potential quality" and "artistic merit" of the exhibit. No mention of politics was made. *N.Y. Times*, Nov. 20, 1989, at C13, col. 1.

D. *The Aftermath of the Funding Law*

Although the law was not renewed in its original form in 1990, various impermissible restrictions were retained or newly written into the 1990 appropriations law. In July of 1990, new guidelines were adopted because of mounting concerns that the statutory restrictions imposed by the 1989 law were "vague" and possibly even unconstitutional.⁹⁶ Frohnmayer, himself, less than a month after the 1989 law went into effect, had deemed it "unnecessary", and vowed to work towards its removal.⁹⁷

Though the new guidelines retained the infamous certification requirement as a prerequisite to receiving funds,⁹⁸ the NEA changed their internal screening policy, this time promising to rely on the Supreme Court's *Miller* standard in judging works obscene.⁹⁹ In a "Supplemental Statement of Policy" effective September 18, 1990, the NEA clarified that "obscenity" for the purposes of the screening guidelines meant "the sort of 'patently offensive representations or descriptions of that specific hard core sexual conduct given as examples in *Miller* . . .'"¹⁰⁰

The July 1990 guidelines also contained NEA promulgated "Procedures for Implementing Sec. 304". An investigation panel was created to follow up on tips from "any reliable source"¹⁰¹ regarding a violation of the restrictions against obscenity as defined by *Miller*. The grantee in question would be asked to file a written justification of her project with an explanation of how it complied with the language in the NEA's 1990 appropriations legislation. If the justifica-

96. N.Y. Times, Feb. 21, 1991, at C14, col. 6 (quoting from Subcommittee Report written by Henry Wray, Gen'l Counsel, G.A.O.).

97. N.Y. Times, Nov. 16, 1989, at C26, col. 3.

98. N.Y. Times, Aug. 4, 1990, at 13, col. 1. By early July of 1990, of the hundreds of agency grants already approved, approximately 12 recipients had signed the pledge under protest, 6 had refused to sign and thus forfeited their grants (including Joseph Papp, Director of the New York Shakespeare Festival and Bella Lewitzky, the Artistic Director of a non-profit dance company in L.A.), and various challenges had been brought in federal court regarding the pledge (in New York City, Jonathan Fanton, President of the New School for Social Research, on behalf of the New School; in Los Angeles, Bella Lewitzky and the Newport Harbor Art Museum).

99. Lewitzky, 754 F. Supp. at 781. See *supra*, the *Miller* test, notes 53-55 and accompanying text.

100. See *supra* note 55 and accompanying text; and note 56 and accompanying text, regarding why the Supreme Court would uphold this "Supplemental Statement of Policy". But see, *supra* notes 61-73 and accompanying text, why the *Lewitzky* court would argue that this reliance on *Miller* would not cure the problem due to the lack of procedural safeguards provided by the NEA to enforce such a policy in a predictable fashion. In short, the *Lewitzky* court found that the standard to which grantees would be held under this policy was so vague as to cause them to have to "speculate at their peril" as to what the NEA would find obscene.

101. The "reliable source" referred principally to members of Congress. N.Y. Times, Aug. 24, 1990, at C16, col. 5.

tion was found insufficient by the NEA, the grant would be recouped.¹⁰²

These new guidelines, meant to help "grant recipients . . . avoid violating the legislative language,"¹⁰³ seemed only to sharpen the debate. After the guidelines were promulgated, five lawsuits were filed against the NEA.¹⁰⁴ The controversy centered around the pledge, which was denounced as an unconstitutional prior restraint.¹⁰⁵

Chairman Frohnmayer refused to capitulate, not only to the concerns of the public, but to the National Arts Council¹⁰⁶ and an independent bipartisan commission,¹⁰⁷ both of which voted to eliminate the pledge. Frohnmayer vowed to enforce the pledge requirement until the pending court cases had been decided.¹⁰⁸

In October of 1990, responding to the twenty-six amendments proposed in the House and Senate, Congress rewrote the NEA's authorizing legislation in a compromise bill. The bill, which reauthorizes¹⁰⁹ the NEA for three more years, leaves judgments about obscenity and pornography to the courts, using *Miller* as the standard.

Most in the art world were appeased by the new law until it was discovered that the final version commands the NEA Chairman to ensure that grants be "sensitive to the general standards of decency and respect for the diverse beliefs of the American public."¹¹⁰ "Standards of decency" is perhaps even more vague a criterion than was "obscene".¹¹¹

Conjuring up images of prior restraint, highly detailed descriptions of proposed works must now be filed by all applicants and in-

102. *N.Y. Times*, July 11, 1990, at C14, col. 1.

103. Henry Wray, Gen'l Counsel, G.A.O., *Id.* at C14.

104. *See supra* note 12.

105. *See supra* note 75 and accompanying text.

106. The National Arts Council, the governing board of the NEA on Aug. 3, 1990, voted 19 to 2 to eliminate the pledge. *Albany Times Union*, Aug. 23, 1990, at 32, col. 1.

107. Congress created this commission to review the grant-making procedures of the NEA. *N.Y. Times*, Sept. 12, 1990, at C13, col. 5.

108. *Albany Times Union*, *supra* note 106.

109. This is the term actually used by Congress. Traditionally, the NEA was "up for reauthorization" every five years. Thus, it is significant that, in 1990, in the midst of the arts funding controversy, the NEA was reauthorized for only three more years.

110. *N.Y. Times* Nov. 10, 1990, sec. 1 at 13, col. 5.

111. Harvard Law Prof. Kathleen Sullivan worried that the new restriction would cause artists to steer clear of a "far broader category than obscenity". As attorney Peter Kyros, former Cultural Adviser to Pres. Jimmy Carter suggested, "[C]ongress has . . . craft[ed] a content restriction that doesn't look like one. It's very subtle. If the law had called for diverse esthetic content, that would be content neutral. But when it speaks of diverse beliefs and decency, it's making a political judgment." *Id.* at 13.

terim reports of progress filed by all recipients of grants. The bill did not require an anti-obscenity pledge for 1991 grantees, but did warn that if a grant recipient were found in violation of the anti-obscenity laws, she would not only have to return the grant, she could not apply for a new grant for three years.¹¹² Finally, the National Council on the Arts, a presidentially-appointed body, was given complete veto power over all grants.¹¹³

On December 14, 1990, the National Council on the Arts¹¹⁴ voted *not* to impose standards of decency on panelists reviewing and recommending grants.

On January 9, 1991, a California district court judge held unconstitutional the pledge required of 1989 and 1990 grantees.¹¹⁵ On February 20, 1991, the NEA agreed not to require a grantee, the New School for Social Research, to sign the anti-obscenity pledge; in exchange for which, the New School dropped its lawsuit challenging the constitutionality of the pledge.¹¹⁶ Attorneys for both sides agreed that the pledge would no longer be required of any 1990 grantee.¹¹⁷ Instead, the requirement would be replaced by a statement that the NEA will "enforce the anti-obscenity stipulation mandated by Congress 'after a grantee has been convicted of violating a criminal obscenity or child pornography statute and all appeal rights have been exhausted.'" ¹¹⁸

This is not as innocent as it may sound. In fact, such a policy is wholly objectionable. Grant recipients have always had to speculate as to which jurisdictions would be receptive to their work, knowing that they could be brought up on obscenity charges by any or all of the states or localities to which their work traveled.¹¹⁹ However, grantees have not in the past had to promise to give back their grant money if convicted in a particular jurisdiction, nor have they had to abstain from applying for a new grant for a number of years after this conviction. In imposing this *de jure* revocation policy, the NEA has gone one step too far, for it is in effect saying, "we thought you deserved funding, but now that State X thinks otherwise, we take it back." What becomes immediately apparent is that: (1) The NEA has not revealed how it proposes to deal with an artist

112. N.Y. Times, Oct. 5, 1990, at C34, col.5. See *infra* notes 119-22 and accompanying text as to why this is an objectionable policy.

113. N.Y. Times, *supra* note 110, at 16.

114. See *supra* note 16.

115. See *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

116. N.Y. Times, *supra* note 96.

117. *Id.*

118. *Id.*

119. A good example of this is the Mapplethorpe exhibit, which rolled through New York City without incident, yet in Cincinnati caused a museum and its director to be brought up on obscenity charges. See *infra* note 215.

whose work is deemed obscene in only one of the multiple jurisdictions to which it travels; and (2) the chilling effect on artists will be even greater now than it was when the sole risk they faced was being convicted under a certain state's obscenity law. Now that artists risk being stripped of NEA funding as well, they *also* risk losing their matching private funds,¹²⁰ future funds from both sources and, ultimately, their status in the artworld.

With the stakes now much higher for artists, heightened self-censorship will result. The process will doubtless be chaotic, with artists having to explore more carefully than ever, the artistic climate of a state or community before allowing their work to be exhibited there. Moreover, art institutions will be more selective of the work they exhibit, knowing (1) that their NEA backing will be stripped if an exhibition is held to be obscene in a particular jurisdiction, and (2) that if an exhibition is merely challenged in court, but is not ultimately deemed obscene, the NEA may nevertheless be wary of funding the institution the next time they apply. In other words, both artists and arts institutions will, for their own protection, begin to enforce the "lowest common denominator" rule.¹²¹

This leads to another problem: the *de facto* result of the revocation policy is that it begins to affect the artwork the NEA chooses to fund in the first instance. If the NEA strives to avoid funding art which could potentially be deemed obscene in any jurisdiction in the United States, it makes sense that the NEA would impose an unwritten "lowest common denominator" test on the artwork it funds. The motive to adopt this "unwritten policy" is that it would permit the NEA to avoid the hassle — and possibly the stigma — of having to recoup funds from convicted grantees, not to mention having to then redistribute these funds. In short, the NEA has ample reason to be more discriminate as to whom or what it funds. It is likely to be more willing to give its support to applicants seeking to *exhibit* art already in existence, than to those who wish to *produce* art, which, obviously, the NEA cannot yet screen for content. Such a result is clearly repugnant to the notion of creating and maintaining a marketplace for the free exchange of ideas; and furthermore, it is directly contrary to the NEA's mandate.¹²²

In sum, the NEA seems to have stepped on its own toes in invoking the revocation standard. Changing the policy so that the states are responsible for the underlying criminal convictions of grantees, rather than having grantees speculate as to how the NEA will apply *Miller* in each locale, ameliorated the problem. Imposing on grant-

120. See *supra* note 38, where matching of funding is explained.

121. In this context, the "lowest common denominator" means art which is undoubtedly safe from obscenity convictions in any state. A good example of this would be the art of Norman Rockwell.

122. See *supra* note 83.

ees the additional threats of revocation and lack of imminent future funding only serves to demonstrate that, after all, the NEA's primary focus remains the content of the artist's work.

III. POLITICS AND PERVERSION IN ART

Cubism aims to destroy by designed disorder. Futurism aims to destroy by the machine myth. Dadaism aims to destroy by ridicule. Expressionism aims to destroy by aping the primitive and insane. Abstractionism aims to destroy by the creation of brainstorms. Surrealism aims to destroy by the denial of reason¹²³

A. History

Artists creating works merely to shock or to protest against an austere, oppressive, or unresponsive government is as old as artwork itself.¹²⁴ In fact, modernism, the movement responsible for much of the avant-garde art implicated in the funding issue, began in the name of "liberat[ing] society"¹²⁵ through a denouncing of the "established order".¹²⁶

Throughout history, certain governments have "quieted" free artistic expression by employing artists as a "public relations arm",¹²⁷ paying them to create large-scale propagandistic works.¹²⁸ However, many more governments have, instead, punished their artistic

123. NAHMOD, *supra* note 89 at 256 n.193 (citing Hauptmann, "The Suppression of Art in the McCarthy Decade", *ARTFORUM*, Oct. 1973, at 48-52). These are the words of Michigan Congressman George Dondero in 1949, attacking modern art as "communist-inspired" due to its "depraved" and "destructive" nature. *Id.*

124. In his sexually explicit and eerie renderings of the Garden of Eden and other subjects, Hieronymus Bosch, perhaps the Mapplethorpe in shock value of the 15th century, "lashed out at the preoccupation with sin, at the hypocrisy of the priesthood and even at the Papacy." L.D. DUBOFF, *ART LAW IN A NUTSHELL* [hereinafter "Duboff"] at 245 (1984).

125. With modernism came "an increasing preoccupation with the self: unlimited self-realization, authentic self-experience, and subjectivism." NAHMOD, *supra* note 89, at 249.

126. *Id.*

Modernity revolts against the normalizing functions of tradition; modernity lives on the experience of rebelling against all that is normative [It] continuously stages a dialectical play between secrecy and public scandal; it is addicted to a fascination with that horror which accompanies the act of profaning, and yet is always in flight from the trivial results of profanation.

Id. (quoting Habermas, "Modernity — An Incomplete Project", in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* at 10 (Foster ed. 1983)).

127. MERRYMAN & ELSÉN, *supra* note 1, at 240. At times, the "force" was more subtle, in that artists who wished to gain prestige, or merely to put food on the table, knew the only way to accomplish this was to "sell" their talents to those who commissioned public or private works — usually courtly style portraits, religious icons, or still lifes. As Leonardo da Vinci once said, "I serve the one who pays me." *Id.*

128. For example, the German government during both World Wars used artists

citizens for candor of expression.¹²⁹ The recent funding restrictions can be analyzed in this light. One artist¹³⁰ has criticized them as an attempt to "eradicate or at least suppress anything in American culture that challenges a fundamentalist Christian vision of family happiness" He blames the advent of the restrictions on "fears . . . the extreme right mask[s]" including "[f]ear of change, fear of difference, fear of cultural erosion . . . ultimately . . . a deeper fear . . . of the underground sexual desires every individual harbors" ¹³¹

Indeed, it has been theorized that the relegation of "obscene" speech to a lesser first amendment status than other speech reflects *inter alia*, "a concern with the possible breakdown of society" ¹³² The judicial rejection of obscenity, thus manifests a societal desire to "repress" certain speech,¹³³ to deny the reality that we are separated from each other and from society.¹³⁴

According to this theory, artists distract themselves from this fear by engaging in artistic experimentation,¹³⁵ and intolerance of such experimentation may lead to a form of "totalitarianism".¹³⁶ Experimental art is equally deserving of first amendment protection because the sentiments it seeks to convey are as valid as those related by more conventional art forms. With respect to government funding of experimental art, "[a]rtists are always probing boundaries and they always will. But government support is supposed to be about freeing ideas and opinions."¹³⁷ The recent imposition of funding restrictions, while perhaps consistent historically with the silencing of artists, is sad testimony to the fact that we have not as a civilization grown from our mistakes.

to communicate the power and influence of the government. *DUBOFF*, *supra* note 124, at 246-47.

129. In the 16th and 17th centuries, governments across Europe destroyed artwork, jailing, exiling, or otherwise punishing the artists who used their talents to protest the government. Even in the 20th century, some governments have continued to stifle artistic expression when it is used to attack the government and/or the church. *Id.* at 246-47.

130. Author David Leavitt, *N.Y. Times*, Aug. 19, 1990, sec. 2 at 1, 27, col. 5.

131. *Id.*

132. *NAHMOD*, *supra* note 89, at 250-51.

133. *Nahmod* says the use of the Freudian term "repress" in this context appropriately conveys the desire to silence or extinguish. *Id.* at 251.

134. *Id.* at 252.

135. *Id.*

136. *Id.* at 261 (citing 1 K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* at 11-17 (5th ed. 1966)).

137. Ted Berger, Director of the New York Foundation for the Arts, a N.Y. agency which gives grants and other support to artists (quoted in *N.Y. Times*, Nov. 19, 1989, sec. 2 at 1, 25, col. 2.

B. Supreme Court Recognizes First Amendment Protection for Non-Verbal Speech

It wasn't until the 20th century that artistic expression in the form of non-verbal communication was seen as "pure speech" — separate from but equally worthy of first amendment protection.¹³⁸

Since the first "symbolic speech" case in 1931, *Stromberg v. California*,¹³⁹ it has been apparent that "speech" includes non-verbal assertions or conduct. In granting blanket first amendment protection to such speech, however, the Court recognized that there would be situations wherein protecting the freedom of artistic expression would run counter to the government's goal of maintaining and protecting the social order and morality.¹⁴⁰

While the Court in *Stromberg* devised no test to determine when speech risked putting the government in such a "situation", the Court made clear that different types of speech were accorded different values.¹⁴¹ Thus, it has been held that "political speech" — "criticism of government and public officials" deserves the most complete first amendment protection,¹⁴² while libel and obscenity are unworthy of first amendment protection.¹⁴³

In *United States v. O'Brien*,¹⁴⁴ a draft-card burning case, the Court for the first time, laid out a test for determining when first amendment protections apply to symbolic speech consisting of both "passive" and "active" elements.¹⁴⁵ Government regulation of symbolic speech is valid if:

- (1) [I]t is within the constitutional power of the Government, i.e. the police powers;
- (2) [I]t furthers an important or substantial gov-

138. It was only in the late 18th and early 19th centuries that artists gained complete creative freedom to choose the subject matter, medium of expression, and even the colors they wished. MERRYMAN & ELSÉN, *supra* note 1, at 240.

139. 283 U.S. 359 (1931) (law forbidding display of red flag as protest symbol held unconstitutional).

140. MERRYMAN & ELSÉN, *supra* note 1, at 277 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

141. It was not until *New York v. Ferber*, 458 U.S. 747 (1982), however that a majority of the Court explicitly acknowledged that certain speech has less social value than other speech, and may therefore be more strictly monitored. The *Ferber* Court held that "it is not rare that a content-based classification of speech has been accepted because . . . the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Id.* at 763-64.

142. MERRYMAN & ELSÉN, *supra* note 1, at 278; *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

143. MERRYMAN & ELSÉN, *supra* note 1, at 278; *Chaplinsky*, 315 U.S. 568, 571-72 (1942). The question, of course, then became: What is obscenity?

144. 391 U.S. 367 (1968) (burning of draft card sufficiently within governmental interest to justify incidental limitation of first amendment freedoms).

145. See *infra*, this section, discussion of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) for definition of these terms.

ernmental interest; (3) [T]he governmental interest is unrelated to the suppression of free expression; and (4) [T]he incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁴⁶

One year after *O'Brien*, the Court in *Tinker v. Des Moines Independent Community School District*,¹⁴⁷ upheld the wearing of black armbands to school in protest of the war, since the action was "closely akin to pure speech".¹⁴⁸ The Court so ruled because such a "passive" protest did not disrupt the normal functioning of school operations, nor did it infringe on the rights of others.¹⁴⁹

The Court seems to have drawn a crucial dividing line between the symbolic *speech* in *Tinker* — the "silent, passive expression of opinion"¹⁵⁰ — and the symbolic *conduct* in *O'Brien*.¹⁵¹ While the wearing of a black arm band as a protest symbol may, indeed, through the fusing of content and conduct, communicate an idea as well as the emotive force behind it, the act is considered "inherently non-disruptive", primarily "silent", "passive", and therefore permissible speech.¹⁵² To the contrary, burning a draft card is seen as communicating primarily through symbolic "conduct" which "frustrate[s] the Government's interest",¹⁵³ and is thus subject to the "restrictive" test laid out by the Court.¹⁵⁴

Unfortunately, the Court did not offer a methodology for differentiating between the "pure" speech in *Tinker* and the "symbolic" speech in *O'Brien*. As Justice Harlan remarked in a concurring opinion one year later:

The Court has . . . not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the state's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.¹⁵⁵

One year after *Tinker*, a defendant's performance of an anti-war skit while in uniform was held to be protected despite a prohibition against "discrediting" the armed forces while so attired. The Court in *Schacht v. United States*¹⁵⁶ drew a distinction between merely "caricaturing military personnel" and "discrediting" them, holding that to penalize "speaking out" against the government "would be

146. *O'Brien*, 391 U.S. at 377.

147. 393 U.S. 503 (1969).

148. *Id.* at 505.

149. *Id.* at 508.

150. *Id.*

151. *NAHMOD*, *supra* note 89, at 253-54.

152. *Id.*

153. *O'Brien*, 391 U.S. at 382.

154. *NAHMOD*, *supra* note 89, at 254. *See supra* note 146 and accompanying text.

155. *Cowgill v. California*, 396 U.S. 371, 372 (1970) (*per curiam*).

156. 398 U.S. 58 (1970).

an unconstitutional abridgement of [the] freedom of speech."¹⁵⁷ The subtle difference between *O'Brien* and *Schacht* seems to lie in the degree to which the defendant "spoke out" against the government.

The defendant in *O'Brien* presented a threat to the integrity of the system. His refusal to accept the draft could have encouraged many to follow his lead, jeopardizing the government's ability to conduct an effective defense. In *Schacht*, though the defendant was mocking the system, in so doing he was acknowledging that the system existed and indeed was powerful enough to subordinate him to a position where humor was the only defense.

Finally, in *Spence v. Washington*,¹⁵⁸ the Court held that two factors would determine whether non-verbal speech should be protected as "pure speech": (1) the "nature of the . . . activity"; and (2) "the factual context and environment in which it was [performed]".¹⁵⁹ To be within first amendment protection, the defendant must demonstrate an "intent to convey a particularized . . . message" and the "likelihood . . . that the message would be understood by those who viewed it."¹⁶⁰ The Court reasoned that an examination of the "factual context and environment" would reveal the "intent" and "likelihood" that the message would be comprehended by third persons.¹⁶¹

The *Spence* test is important because it reflects the Burger Court's redistribution of the burden of proof from the government to the defendant. For the first time, the Court did not presume that the defendant's conduct deserved first amendment protection, but rather it required the defendant to prove his/her conduct merited such protection.¹⁶² Once the Court was satisfied that the speech deserved first amendment protection, it then determined a commensurate degree of protection for the speech. If the state's interest(s) in silencing the speech outweighed the defendant's constitutional rights in speaking, the invasion of the defendant's constitutional rights was held to be warranted.

In this case, the speech — hanging an American flag with a peace sign attached, upside-down from a student's window as a war protest — was held to be protected. This is because the government was unable to prove that the interest in (1) "prevention of breach of the peace"; (2) "protect[ion of] the sensibilities of passersby"; or (3) "preserv[ation of] the . . . flag as an unalloyed symbol of our country," outweighed the constitutional rights of the defendant.¹⁶³

157. *Id.* at 62-63.

158. 418 U.S. 405 (1974) (*per curiam*).

159. *Id.* at 409-10.

160. *Id.* at 410-11.

161. *Id.*

162. *Duboff*, *supra* note 124, at 258-59.

163. *Spence*, 418 U.S. at 412.

C. The "Symbolic Speech" Test Applied to Art

The "bright-line" between symbolic speech and symbolic conduct blurs when applied to artistic expression, which may be related (1) "passively", (2) via more conduct-oriented communication, or (3) by way of performance art.¹⁶⁴

The *Spence* test was applied to artistic expression in *People v. Radich*,¹⁶⁵ in which a gallery owner was convicted for exhibiting the flag in the form of a phallic symbol protruding from a cross. On a writ of *habeas corpus*,¹⁶⁶ the federal district court held the exhibition protected under the first amendment. The court cited lack of proof by the government of "imminent unlawful conduct" or "probability of public disorder" as a result of the show.¹⁶⁷ It also noted that the state interest in maintaining the purity of the symbol was not proven because the artist did not destroy the flag in communicating his idea.¹⁶⁸

Relevant to the debate over NEA funding, the Court in *Radich* noted that since the exhibit was located on the second story of a private gallery, Radich had "not impose[d] his ideas upon a captive audience."¹⁶⁹ Therefore, the state's interest in protecting the public was insufficient to compel government regulation.¹⁷⁰ Indeed, the overly sensitive patron could simply "avert (his) eyes".¹⁷¹

164. NAWROD, *supra* note 89, at 254. Examples of these are, respectively: (1) the Mapplethorpe or AIDS show photos; (2) video art which may or may not be accompanied by music or dialogue; and (3) the work of the shock-artist Karen Finley. Karen Finley, whose act has been called "obscenity in its purest form", has been known to "graphically describe . . . violent and bizarre sex acts with priests, children, relatives, and the handicapped" as well as smear food in her genitals and defecate on stage. See Note, *supra* note 80, at 1369.

165. 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *aff'd*, 401 U.S. 531 (1971), *reh. den.*, 402 U.S. 989 (1971).

166. *United States ex rel. Radich v. Crim. Ct. of N.Y.*, 385 F. Supp. 165 (S.D.N.Y. 1974).

167. See *Brandenburg v. Ohio*, 395 U.S. 444, 447, 449 (1969); see *infra* note 171.

168. See *Radich*, 385 F. Supp. at 176.

169. *Id.* at 178.

170. *Duboff*, *supra* note 124, at 258.

171. *Cohen v. California*, 403 U.S. 15, 21 (1971) (Justice Harlan). Note that the majority of NEA funded art is privately, as opposed to publicly exhibited or performed. That is, most of the art is experienced only by the patron's deliberate choice. As ACLU Executive Director Ira Glasser put it, "I don't have to go to any museum, bookstore, or theater where art will offend me." *Street News*, July, 1990, at 11 (emphasis added).

A good example of this is that in the Mapplethorpe exhibit at the Cincinnati Contemporary Arts Center [hereinafter "C.A.C."], the most controversial photos were placed in a separate room which only those over age 18 could enter. Therefore, the patron had to (1) choose to visit the C.A.C.; (2) choose to see the exhibit once inside the C.A.C.; (3) choose to see the most provocative works once inside the exhibit and after having read posted warnings regarding the "sexually explicit na-

"Incitement to violence" or the "lawless action" standard,¹⁷² seems similarly out of place when applied to private art. Whether the expression is political in nature or not, it is hard to imagine, for instance, how criticisms of several prominent public figures¹⁷³ in the catalog to the AIDS exhibit would incite someone to violence.¹⁷⁴ It was this catalog on which Frohnmayer supposedly based the revocation of the exhibiting gallery's grant money.¹⁷⁵

Denying funding to art based on such a fear would be an unnecessary over-extension of the government's control.¹⁷⁶ According to the Supreme Court, regardless of where or how the "political" comments were made, as long as they do not "incite to violence", they should be protected by the first amendment.¹⁷⁷ If NEA guidelines do not permit political criticism to be made through artwork, then

ture" of several of the photos; and (4) be over 18 to enter the segregated room. In other words, the works were not thrust at people against their will. *N.Y. Times*, Mar. 29, 1990, at A1, col. 1.

172. The Court explained the "lawless action" standard in the following manner:

The Constitutional guarantees of free speech and free press do not permit a [s]tate 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 [e.g. screaming "fire" in a crowded theatre].

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).

173. These included John Cardinal O'Connor, Senator Jesse Helms (R-N.C.) who voted against government funding for information about safe sex on the premise that it would encourage homosexuality, and Representative William E. Dannemeyer, (R-Cal.) also an outspoken critic of such funding, and the author of a book which deals with homosexuality as "curable". *N.Y. Times*, Nov. 19, 1989, sec. 2, at 1, col. 2.

174. See *supra* notes 27-31 and accompanying text, regarding why Frohnmayer rescinded the grant. See *Masses Publishing Co. v. Patten*, 244 F. 535, 540-41 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). In this case against a monthly magazine which tended to run politically "revolutionary" cartoons, Judge Learned Hand quipped, "[i]t seems to me . . . quite plain that none of the language and none of the cartoons in this paper can be thought directly to counsel or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding."

175. Due to the subject matter of the AIDS exhibit, it was unclear if the funds were revoked wholly due to the catalog or not. Either way, neither the controversial subject matter of the pieces, nor the political content of the catalog should have been viewed as permissible reasons to rescind the grant.

176. Even Cardinal O'Connor, who in the essay is called a "fat cannibal in a black skirt," *N.Y. Post*, Nov. 11, 1989, issued a statement that had he been consulted, he "would have urged very strongly that the National Endowment not withdraw its sponsorship on the basis of criticism against [him] personally." He continued that he "do[es] not consider [him]self exempt from or above criticism by anyone." *N.Y. Times*, Nov. 10, 1989, at C33, col. 1.

177. See, *N.Y. Times v. Sullivan*, 376 U.S. at 269; *Brandenburg v. Ohio*, 395 U.S. at 447.

It is revealing to note that in 1979, Artists Space, the very gallery hosting the AIDS show, held an exhibit of abstract works by Donald Newman entitled "The Nigger Drawings". Despite the fact that a demonstration was immediately called in

they are unconstitutional as a matter of law.¹⁷⁸

IV. OBSCENITY, OBSCENE ART, AND THE FIRST AMENDMENT

A. *What is Obscenity?*

As has been noted, "obscenity" is an elusive concept. For even when parameters have been placed around it, the parameters were themselves first subjectively conceived and then are subjectively perceived by each person seeking to apply them.¹⁷⁹ Further, it is important to acknowledge that what is thought to be "obscene" is not only a matter of individual taste; it is, as well, a product of the time and place in which it arises. For instance, in the early 19th

protest of the "racist" works, the head of the New York State Council on the Arts, Kitty Carlisle Hart, issued the following statement:

[While the council loathed] the insensitivity expressed toward a large segment of our public inherent in the use of the title, [the council stood firm in its position of] encouraging and assisting rather than in any ways limiting the freedom of expression that is essential to the well-being of the arts.

N.Y. Times, Nov. 10, 1989, at C33, col. 1.

178. See *Advocates for the Arts v. Thomson*, *supra* note 41. Various critics have agreed with this sentiment. Constitutional lawyer, Floyd Abrams, called it "an appalling surrender of First Amendment principle", to revoke funds based on the criticism of political figures, in the catalogue. N.Y. Times Nov. 10, 1989, at C33, col. 3. This feeling was echoed by Vartan Gregorian, president of Brown University and former president of the New York Public Library, in his statement that:

[G]overnment funding should not be used for artists to make controversial statements is not a good argument . . . [For] if you carry that over to science and the humanities, then government funding agencies should not exist. Government money is not the government's; it is the peoples'. . . [The goal] is not to silence people but to establish dialogue . . .

N.Y. Times, Nov. 19, 1989, sec. 2, at 1, col. 2. Picasso indicated that as "political beings", artists naturally create art which responds to the political events taking place around them:

What do you think an artist is? An imbecile who only has eyes if he's a painter, ears if he's a musician, or a lyre in every chamber of his heart if he's a poet . . . Quite the contrary, he is at the same time a political being constantly alert to the horrifying, passionate or pleasing events in the world, shaping himself completely in their image . . . No, painting is not made to decorate apartments. It's an offensive and defensive weapon against the enemy.

MERRYMAN & ELSÉN, *supra* note 1, at 242-43 (quoting Picasso in 1945, cited in Ashton, *PICASSO ON ART*, at 149).

Ironically, Picasso here was defending his ostensible lack of works — aside from "Guernica" and "Charnal House" — documenting political and historical events, which many saw as reflective of his "indifference to the fate of mankind". *Id.* at 242.

179. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring). Justice Stewart asserted his belief that the only censorable material under the then-current *Roth*-test, was hardcore pornography" and the motion picture at issue in *Jacobellis* was "not that". See *Roth v. U.S.*, 354 U.S. 476 (1957).

century, "obscene" referred to a violent or supernatural depiction.¹⁸⁰

While the Court determined as early as 1942 that the first amendment did not protect obscenity,¹⁸¹ it was not until 1957, in *Roth v. United States*,¹⁸² that the Court attempted to define the concept. The Court set forth a two-prong test for obscenity:¹⁸³

- (1) [W]hether to the average person, applying contemporary community¹⁸⁴ standards, the dominant theme of the material taken as a whole appeals to prurient¹⁸⁵ interests; and
- (2) [W]hether the material in question is utterly without redeeming social importance.¹⁸⁶

This test has been criticized throughout the years as vague and unenforceable,¹⁸⁷ however, despite these criticisms, the tenets of

180. MERRYMAN & ELSÉN, *supra* note 1, at 282. See *Knowles v. State*, 3 Day 103 (Conn. 1808) ("defendant. . . convicted of showing. . . indecent representation of. . . horrid and unnatural monster' that had no eyes, whose ears were misplaced. . . whose skin was copper-colored.").

181. See *Chaplinsky*, 315 U.S. 568, 569 (1942).

182. 354 U.S. 476 (1957) (upholding conviction of a New York book and magazine publisher/distributor under a federal obscenity statute for mailing "obscene" advertisements for an allegedly "obscene" book.).

183. This was an intentional movement away from the English "most susceptible person" standard, whereby a work was to be screened for obscenity if individual passages were deemed likely to have a deleterious effect on those most likely to get hold of it. Case Comment, *Obscenity: Is the Value of a Literary or Artistic Work to be Judged by Individual Community Standards?*, 15 S.U.L. Rev. 129, 130 (1988). This standard was used by United States courts until it was rejected in 1957 by the Supreme Court in *Butler v. Michigan*, 352 U.S. 380 (1957).

184. The "community standard" in *Roth* was a national one. See *supra* note 54, a discussion of the rejection of this "national" standard in *Miller*, 413 U.S. at 32-34.

185. "Prurient" was defined by the Court as "lustful thoughts . . . itching, morbid or lascivious longings . . . a shameful or morbid interest in nudity, sex or excretion." MERRYMAN & ELSÉN, *supra* note 1, at 286.

186. See Case Comment, *supra* note 183, at 132.

187. *Roth's* dissenting Justices Douglas and Black, in an opinion by Justice Douglas, reminded the Court that the first amendment was meant to protect the free exchange of thoughts, "no matter how disagreeable" these might be to others. *Id.* at 132-33; See *Roth*, 354 U.S. at 513 ("literature should not be suppressed merely because it offends the moral code of the censor.").

Scholars William B. Lockhart and Robert C. McClure have argued that "the court's definition . . . as . . . sex in a manner appealing to the prurient interest gets us nowhere. It simply pushes the core question back one notch and makes us inquire: What is the appeal to the prurient interest that makes sexual matter obscene?" Case Comment, *supra* note 183, at 131 (citing W. Lockhart and R. McClure, *Obscenity Censorship: The Core Constitutional Issue — What is Obscene?* 7 UTAH L. REV. 289 (1961)).

Similarly, the American Law Institute (ALI) rejected — even before the *Roth* Court used it — the "lustful thoughts" definition as "too broad for a society that accepted a wide variety of erotic interest in artistic works." DUBOFF, *supra* note 124, at 131. It also rejected the "tendency to corrupt or deprave" test in the face of insufficient evidence linking obscenity and misconduct. *Id.* The ALI has focused

the *Roth* test are clearly present in the Court's current obscenity test.¹⁸⁸

The Court's test in *Roth* reflects a recognition that "sex and obscenity are not synonymous" and that the "portrayal of sex, e.g. in art, literature and scientific works [is entitled to] the constitutional protection of freedom of speech and press," providing it is not categorically obscene.¹⁸⁹ The decision implied the Court's acknowledgment of sex as a legitimate subject to pursue in art.¹⁹⁰

Seven years after *Roth*, in *Jacobellis v. Ohio*,¹⁹¹ Justice Brennan, writing for the majority, emphasized this notion, stating that "obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance'."¹⁹² "[A]rtistic creation", on the other hand, "deal[s] with sex in a manner that advocates ideas, or that has . . . artistic value . . . [and thus] may not be branded as obscenity and denied the constitutional protection."¹⁹³

In 1973, the obscenity test still used today was announced by the Court in *Miller v. California*,¹⁹⁴ another case involving the mailing of obscene material. In announcing its new formulation, the Court remarked that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression,"¹⁹⁵ and that the "permissible scope of . . . regulation" must be confined "to works which depict or describe sexual conduct."¹⁹⁶

While the Court intended juries to weigh material for obscenity under the first two prongs using *Roth's* gauge of "contemporary community standards", it made clear that under the first and fourteenth amendments, the jury need not abide by a national community standard, as *Roth* had held. This was not to say that a jury has unlimited discretion in such determination, however, for the appellate courts may review these determinations if necessary.¹⁹⁷ One

instead, on the "nature of the appeal of the material," defining "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion, and having an exacerbated, morbid or perverted interest growing out of the conflict between the universal social controls of sexual activity." *Id.*

188. See *supra*, the *Miller* test, note 53 and accompanying text.

189. MERRYMAN & EISEN, *supra* note 1, at 286.

190. "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the problems of human interest and public concern." *Roth v. U.S.*, 354 U.S. at 487.

191. 378 U.S. 184 (1964).

192. *Id.* at 191.

193. *Id.* (emphasis added).

194. 413 U.S. 15 (1973). See *supra*, the *Miller* test, note 53 and accompanying text.

195. *Id.* at 22-23.

196. *Id.* at 24.

197. *Id.* at 25.

year later, in *Hamling v. United States*,¹⁹⁸ the Court held once and for all that the "local" community was a valid standard to use in assessing violations of federal obscenity statutes.¹⁹⁹

B. *Problems with the Supreme Court's Definition of Obscenity: Is it Void for Vagueness?*

As has been noted by subsequent courts, the Supreme Court in *Miller* left unanswered such pertinent questions as: what size the "community" in the first prong should be; whose standards should be used,²⁰⁰ and — pertinent to NEA funding — whether the standard should be based on the community where the artist created the work, where the exhibit begins, or alternatively, one or a majority of the locations to which the exhibit will travel.²⁰¹

Furthermore, while *Miller's* third prong clarified that "serious" material merited constitutional protection, the *Miller* Court left unclear whether the value of a work under this third prong should be assessed using contemporary local community standards or the contemporary standards of a broader community.²⁰²

In *Pope v. Illinois*,²⁰³ the Court gave a definitive answer to this third prong question, holding:

The proper inquiry [in deciding whether allegedly obscene materials had any 'literary, artistic, political, or scientific value,'] is *not* whether an ordinary member of any given community would find . . . value in . . . [the] material, but whether a reasonable person would find such value taking the material as a whole.²⁰⁴

The Court reasoned that if, as was held in *Miller*, works of "serious . . . value" are protected under the first amendment, "regardless of whether the government or a majority of the people approve of the ideas these works represent," then it follows that the inherent value of a work does not vary between localities because of the "degree of local acceptance" it has achieved.²⁰⁵ Thus, the "reasonable person" standard adopted by *Pope* represents the Court's choice of an objective determination of a work's value — the reasonable per-

198. 418 U.S. 87 (1974).

199. *Id.* at 104. *Hamling's* dicta urges jurors to "draw on [their] own knowledge" of the community to judge something "obscene" from the vantage point of the "average person". *Id.*

200. See e.g., *Pope v. Illinois*, 481 U.S. 497 (1987).

201. For instance, the Mapplethorpe show went on without incident in New York; but in Cincinnati, a city renowned for having some of the toughest obscenity laws in the country, the museum director as well as the museum were hauled into court on criminal obscenity charges as a result of the exhibit.

202. This issue was raised by the Court in *Smith v. United States*, 431 U.S. 291, 301-02 (1977).

203. 481 U.S. 497 (1987).

204. *Id.* at 500-01 (emphasis added).

205. *Id.* at 500.

son — rather than a subjective, local community standard.²⁰⁶

Though the "objective" method of analysis seems to be the one most favorable to avant garde artists, as noted, even it is not fool-proof.²⁰⁷ No test will ever be completely objective because individual taste necessarily factors into any "value" determination of a work. As Justices Brennan and Douglas noted in their separate dissents in *Paris Adult Theatres I v. Slaton*,²⁰⁸ no test for obscenity would ever survive constitutional attack:

[S]hort of that extreme [of deeming obscene any depiction of human sexual organs], it is hard to see how any choice of words could reduce the vagueness problem²⁰⁹

* * * *

Art and Literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that 'obscenity' was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncrasies of individuals. They are too personal to define and too emotional and vague to apply²¹⁰

The "vagueness" dilemma has continually haunted the Court.²¹¹

206. See Case Comment, *supra* note 183, at 137. It should be remembered in this regard, that it is the NEA's fundamental inability to anticipate local judgment throughout the United States (i.e. the "contemporary community standards" under the first prong), that caused the *Lewitzky* court to strike down the certification requirement as unconstitutional. See *supra* notes 69-73 and accompanying text.

207. As Justice Scalia wrote in his concurring opinion in *Pope*:

[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled 'reasonable man' is of little help in the inquiry Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide 'What is Beauty' is a novelty even by today's standards.

481 U.S. at 504-05.

208. 413 U.S. 49 (1973).

209. *Id.* at 94 (Brennan, J., dissenting).

210. *Id.* at 70 (Douglas, J., dissenting).

211. As the following quotations attest, the Court has been asked over the years to rule on matters concerning the vagueness doctrine:

A law will be held void for vagueness as a matter of due process if the conduct forbidden by it is so unclearly defined that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'

Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

One of the main functions of the vagueness doctrine is to curb the discretion afforded to law enforcement officers or administrative officials and to

V. AFTER-EFFECTS OF THE LAW

The debate and publicity surrounding this issue have engendered profound changes in both the political and social climate in America. Passions have been fired, constituencies mobilized,²¹² and geographic, cultural, religious, political, and economic rifts created.

Since the first restrictive funding law went into effect in October of 1989, at least five suits have been filed against the NEA contesting the constitutionality of its restrictions in funding.²¹³ Museum directors and board members have resigned over sponsorship of various exhibits,²¹⁴ and for the first time, a museum director and his museum were brought up on criminal obscenity charges for displaying a controversial artist's works.²¹⁵ Grants promised have been rescinded, some only to be regranted;²¹⁶ and certain grants approved by the NEA's peer review panels were later rejected by the NEA.²¹⁷ Recipients of arts awards have refused to accept in protest over the funding restrictions,²¹⁸ and recipients of funding grants have re-

limit the dangers of arbitrary and discriminatory enforcement through explicit legislative standards.

Papachristou v. Jacksonville, 405 U.S. 156, 170 (1972) (cited in Case Comment, *The Reasonable Person as the Supreme Court's Latest Arbiter of Obscenity*, 7 *CARDOZO ARTS & ENT. L. J.* 185, 193 n.50 (1988)).

212. The Rev. Donald E. Wildmon of Tupelo, Miss. has crusaded against the funding of "pornography" by the NEA. He raised \$5.2 million in 1989 for his American Family Association. Others who have fought for restrictions in arts funding are Sen. Jesse Helms (R-N.C.), Rep. Dana T. Rohrabacher (R-Cal.), Rep. Peter Dannemayer (R-Cal.), the evangelist Pat Robertson, and even Oliver North. *N.Y. Times*, Sept. 2, 1990, sec. 6, at 22, 24, col. 1.

213. *See supra* note 12.

214. Christina Orr-Cahall the director of the Corcoran Gallery in Washington, D.C. resigned under pressure after she instructed the Gallery to take down the Mapplethorpe exhibit; Chad Wick, Chairman of the Board of the Contemporary Arts Center in Cincinnati resigned during the Mapplethorpe furor there.

215. The Director was Dennis Barrie, of the Contemporary Arts Center in Cincinnati. Both Barrie and the C.A.C. were acquitted of criminal charges in Oct. of 1990.

216. *See supra* discussion of the 1989 New York City AIDS show, notes 27-31 and accompanying text.

217. Artists whose grants were vetoed include performers Karen Finley, Holly Hughes, John Fleck and Tim Miller. *N.Y. Times*, July 6, 1990, at C3, col. 5. The Institute of Contemporary Art in Boston was similarly denied a \$40,000 grant to mount an exhibition of the work of artist Mike Kelley, after a peer review panel had advised the NEA to issue the grant. *N.Y. Times*, Oct. 23, 1990, at C16, col. 1.

Between 1981 and 1988, NEA grant rejection following peer review panel approval had occurred only 35 times out of 33,700. In July of 1990, four out of 18 were rejected, and all four were the above-named performance artists whose acts included sexually provocative language and/or movement. *N.Y. Times*, July 6, 1990, at C3, col. 5.

218. Leonard Bernstein refused to accept the National Medal of Arts award in protest. *N.Y. Times*, Nov. 16, 1989, at A1, col. 6.

fused to accept in protest over the requirements placed on applicants and/or recipients.²¹⁹

The NEA's budget was cut \$5 million below what President Bush had requested,²²⁰ and many who received federal grants in the past are being forced to find private funding to support their work.²²¹ In fact, the NEA is the only cultural agency which will not receive an increase in its budget in 1992.²²² While Frohnmayer requested \$212 million, the NEA's proposed 1992 budget was left at the 1991 level of \$174 million.²²³ Meanwhile, the National Endowment for the Humanities, which has consistently received less funding over the years than the NEA, will receive an increase of almost five percent in its budget for fiscal year 1992.²²⁴ In 1990, the NEA was required by Congress to increase its direct state contributions by 7.5 percent, causing a concomitant decrease of \$12 million in the NEA's own budget.²²⁵ By 1992, NEA state contributions will be up 12 percent over those in 1990.²²⁶ These actions have caused "many people in Washington to surmise that the arts endowment is on probation at the White House."²²⁷

On the positive side, the quarterly meetings of the NEA to review grant applications have now been opened to the public. More importantly, the entire debate has forced Americans to focus on the quality of our freedoms and the value we place on our culture being reflected and changed by art — specifically, controversial, so-called "peripheral" or "shock-art". The public has also been sensitized to any new laws with "language that would smack of censorship . . . believ[ing] that once that genie is out of the bottle, freedom of expression in America in all of its forms is jeopardized."²²⁸

219. Among others, these include: Bella Lewitzky, Choreographer for the Bella Lewitzky Dance Foundation in L.A.; Joseph Papp, Director of the N.Y. Shakespeare Festival; The Paris Review; the Theater for the New City; the Director of the U. of Iowa Press; The Oregon Shakespeare Festival in Ashland, Oregon; The New School for Social Research in N.Y.; The American Poetry Review; and The Gettysburg Review in Gettysburg, PA. In addition, many other artists and arts organizations, including the Director of the Lincoln Center Theater in N.Y.C. vowed to reject grants if once allotted to them, they were forced to sign the pledge. N.Y. Times, July 9, 1990; Aug. 24, 1990.

220. N.Y. Times, Oct. 18, 1990, at C17, col. 1.

221. See, e.g., the artists mentioned *supra* note 217.

222. N.Y. Times, Feb. 22, 1991, at C17, col. 1.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Rep. Pat Williams (D-MT.) (quoted in N.Y. Times, Apr. 5, 1990, at C14, col. 3).

VI. CONCLUSION

The sharing of ideas among artists across the country has always been considered integral to the evolution of our culture. Since the days of our creation as a nation, we have dedicated ourselves to ensuring the free exchange of ideas across personal boundaries. This democratic ideal is what has set us apart from and ahead of other nations. Indeed, the Supreme Court has always assumed that the first amendment protects the communication of ideas.²²⁹

A NEA free from governmental influence in grant decision-making is crucial to the future of artistic creation in America. In the words of a former NEA deputy chair: "[m]ore insidious than outright censorship because it is less visible, is the threat that government will come to dominate the cultural life of the nation . . ." ²³⁰ Restrictive arts funding laws give the government just such a power.

But what of the dissolution of the NEA altogether? If the NEA were dissolved, artists and arts institutions would have to depend solely on private contributions and indirect federal government subsidies funded through the tax laws. This would give wealthy private patrons the critical decision-making power as to which art (and artists) survives, and which is doomed.²³¹ The public depends on, and has a right to expect, the NEA to enable it to experience what the arts community in the United States is producing. If certain art is prevented from being produced or exhibited due to the withholding of government funds based on the work's content, as Americans we are weaker for the loss of cultural nourishment.²³²

It will not be long before the ramifications of the series of restric-

229. See Roth, 354 U.S. at 484. See also Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S.ILL.U. L.J. 1159, 1177 (1987).

230. See Note, *supra* note 74 (quoting M. Straight, at 826 n.170 and accompanying text).

231. "If artistic freedom is considered an objective of a society and one accepts that greater artistic freedom exists where the arts are not considered competitive goods, then such insulation from the market is desirable." *Id.* at 824-25.

232. The rationale of a free development of the arts contemplates freedom not only from the compulsion of a moral judgment, but from the compulsion of a taste judgment as well. It is not only established morality, but also established taste, which compels allegiance to traditional forms. By subjecting critically neglected works, whether they be avant-garde or commercially oriented, to the risk of prosecution under the definitional standards, and privileging those works acknowledged as meritorious by the panjandrums of criticism, we may unwittingly be furthering a stultification of art by permitting the proscription of those vital and challenging expressions that vivify the creative process. Any prior determination of the first amendment right on the basis of merit obviously defeats its historic rationale: that the survival of the best depends upon the unfettered conflict between individual forms.

MERRYMAN & ELSÉN, *supra* note 1, at 290-91 (quoting from Note, *Obscenity Prosecution: Artistic Value and the Concept of Immunity*, 39 N.Y.U. L. Rev. 1063, 1084-85 (1964)).

tive funding laws are fully understood. Even if the funding guidelines are eventually completely restored to the original merit-based factors, it may be too little, too late. The seed has been planted. Whether subconsciously or not, NEA panelists are well aware of what type of art sponsorship is guaranteed to stir up controversy.²³³ Their "steering clear" of such tumult can only hurt us all in the end. Indeed, it may mean the collapse of experimental art in America.²³⁴

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233. As one Congressional Representative remarked:

[I]t may be we are entering the quicksand of censorship . . . [we] must thoughtfully consider whether the Federal Government can maintain an environment necessary for artistic creativity to flourish while fulfilling the recent Congressional mandate that bans assistance to certain art based on content, not quality. Congressional pressure has placed NEA on a slippery slope.

Rep. Pat Williams (D-MT.), opening remarks, session of House Subcommittee overseeing NEA, (quoted in *N.Y. Times*, Nov. 16, 1989, at C26, col. 3).

234. Author David Leavitt warns that it is conceivable for there to be a "mass exodus of artists out of America to Europe" where there is much greater state support of the arts, and where a thriving economy is conducive to wooing foreign artists. *N.Y. Times*, Aug. 19, 1990, sec. 2 at 1, 27, col. 5. In this regard, it should be noted that the British government is giving 11% more money to the arts in 1991, for a total of \$37 million more dollars, enabling its quasi-governmental Arts Council to raise individual grants 8 to 9% each. *N.Y. Times*, Nov. 10, 1990, sec. 1, at 16, col. 5.