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ARTISTIC FREEDOM V. CENSORSHIP: THE AFTERMATH OF THE NEA'S NEW FUNDING RESTRICTIONS

"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 apply. . . ."¹

INTRODUCTION

In 1988, angered over government support of art he considered blasphemous and pornographic,² Senator Jesse Helms proposed a set of strict new funding constraints for the National Endowment for the Arts, (NEA).³ Although Congress did not fully adopt Helms' proposals,⁴ the Senator's efforts did result in the enactment of the first content restrictions of government sponsored art in the history of the United States.

As a condition of receiving federal support from the NEA, applicants had to certify their work did not meet the NEA's definition of obscene.⁵ Although Congress eventually dropped the so-called "obscenity pledge," current applicants must still meet certain standards of "decency," as determined by the NEA.⁶

These new regulations bitterly divide the art world. The NEA has canceled an awarded grant because of possible "political ramifications,"⁷ and the NEA has rejected a number of other projects which it considered "obscene" or "indecent."⁸ The religious right, as part of its "moral agenda," called for abolishing the NEA altogether.⁹

In response, numerous artists have refused NEA awards, and many museum directors and board members have resigned their posts in protest.¹⁰ Rallies across the nation have denounced the NEA's activities as "censorship."¹¹ Now, a series of recent judicial decisions has raised serious concerns about the constitutionality of the new restrictions on

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1. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973) (Douglas, J. dissenting).
 2. 135 CONG. REC. S8807-08 (daily ed. July 26, 1989) (statement of Sen. Helms).
 3. See *infra* notes 52-58 and accompanying text.
 4. See *infra* notes 55-58 and accompanying text.
 5. See *infra* notes 59-60 and accompanying text.
 6. See *infra* notes 102-06 and accompanying text.
 7. See *infra* note 63 and accompanying text.
 8. See *infra* note 107 and accompanying text.
 9. See *infra* note 62 and accompanying text.
 10. See *infra* notes 64-68 and accompanying text.
 11. See *infra* note 68 and accompanying text.

American art.¹² Indeed, the controversy shows no signs of abating.

Part I of this Recent Development discusses the history of government involvement with the art world and the creation of the NEA. Part II examines the adoption of the Helms Amendment and the recent controversy over the NEA's funding decisions. Part III looks at the agency's establishment of an "obscenity pledge" to enforce the Helms restrictions and the judicial challenges to that pledge. Part IV addresses the repeal of the obscenity pledge and focuses on the controversy surrounding its replacement, the "decency clause." Part V concludes that while the government should continue its important role in supporting America's art, it must do so in a neutral and unbiased manner.

I. THE DEVELOPMENT OF THE NATIONAL ENDOWMENT FOR THE ARTS

A. *Government and the Arts*

Political involvement in the arts is nearly as old as the medium itself. Ancient Athens subsidized the priceless art of the Acropolis,¹³ and the Roman Empire financed the works of Virgil, Ovid, and countless others.¹⁴ In medieval times, the Catholic Church commissioned most art to bring the mysteries of Christianity to the common man.¹⁵ Today, nearly every government in the developed world helps fund its nation's art.¹⁶

Not surprisingly, state censorship of "anti-governmental" art also enjoys a long tradition. In the middle ages, for example, the Church suppressed the works of artists such as Da Vinci, Galileo, and Hieronymus Bosch.¹⁷ In the 1800s, many impressionist masterpieces were banned from the official French Salon because they did not promote "national ideals."¹⁸ Political censorship has continued into modern times, including governments from right wing, fascist regimes,¹⁹ and left wing, com-

12. See *infra* parts III and IV.

13. HORST W. JANSON, *HISTORY OF ART 172-78* (4th ed. 1991).

14. Telephone Interview with Professor David E. Belmont, Classics Department, Washington University (August 30, 1993) (confirming general accuracy of statement).

15. MOSHE CARMILLY-WEINBERGER, *FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART 10-19* (1986).

16. J. MARK DAVIDSON SCHUSTER, *SUPPORTING THE ARTS: AN INTERNATIONAL COMPARATIVE STUDY 45* (1985).

17. *Id.*

18. CARMILLY-WEINBERGER, *supra* note 15, at 90-91.

19. Hitler's Nazi government, for example, confiscated hundreds of modern masterpieces in the

munist states.²⁰

B. *The National Endowment*

With this legacy in mind, the United States initially did not follow Europe's lead in financing art.²¹ Although public funding began in earnest during the New Deal,²² the federal government paid little attention to the issue until fairly recently.²³

With the onset of political activism of the 1960s, however, Congress began to display an increasing interest in arts funding. It recognized that while few questioned America's military and economic might, many viewed the country's art as "second rate."²⁴ Declaring that an "advanced nation cannot limit its efforts to science and technology alone," Congress announced that the United States must "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."²⁵ In 1965, it changed the face of American art forever by creating the NEA.²⁶

The NEA provides stipends to deserving artists and museums. In or-

1930s and placed them in an "Exhibition of Degenerate Art." This infamous presentation, orchestrated by Joseph Goebbels, contained pieces by Picasso, Gauguin, Kandinsky, Chagall, and many others. See IAN DUNLOP, *THE SHOCK OF THE NEW* 224-59 (1972).

20. Until very recently, the Communist world banned any art except "state sponsored" works which glorified the Communist Revolution. See generally CARMILLY-WEINBERGER, *supra* note 15, at 117-38.

21. See generally SULLIVAN, *THE ARTS AND PUBLIC POLICY IN THE UNITED STATES* vii (W. Lowry ed. 1984) ("While other governments have had their ministries of culture and decreed national policies with respect to the arts, our political leaders have generally shied away from attempts to define an American public policy towards the arts.")

22. In response to the economic crisis of the Depression, Congress created the Federal Arts Project (FAP). The government commissioned unemployed artists to create thousands of public murals, paintings and sculptures. FAP - funded artists included Jackson Pollack, Mark Rothko, and David Smith. LEONARD DUBOFF, *ART LAW IN A NUTSHELL* 154-56 (2d ed. 1993).

23. See, e.g., Kenneth Goody, *Arts Funding: Growth and Change Between 1963 and 1983*, 144 AM. ACAD. POL. & SOC. SCI. 471 (1984).

24. One of Congress's main goals was to demand worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit." 20 U.S.C. § 957(7) (Supp. III 1991).

25. 20 U.S.C. § 951(5) (1965) (current version at 20 U.S.C. § 951 (5) (Supp. III 1991)).

26. Congress established the NEA as part of the Arts and Humanities Act of 1965, 20 U.S.C. §§ 951-57 (1965). (current version at 20 U.S.C. §§ 951-69 (1990)) This Act also created the National Endowment for the Humanities (NEH), which provides funds to advance scholarship in the humanities, and the Federal Council on the Arts and the Humanities. *Id.* In 1984, the Foundation added an Institute of Museum Studies to support museums and galleries. *Id.*

When Congress restricted the NEA's selection criteria in 1989, it also placed similar constraints

der to take advantage of this generosity, artists must complete applications stating the nature of their work, the estimated cost of their venture, and information about private sources of funding.²⁷ After peer panels select projects with "artistic merit,"²⁸ the National Council on the Arts decides which applicants receive grants and the amount of each grant.²⁹ Final authority rests with the NEA Chairperson who presents the awards to successful artists.³⁰

Throughout this complex process, the NEA must remain strictly neutral in its decisions. Recalling the "national art" of other countries, some members of Congress feared that government funded art might evolve into "government approved" art.³¹ Accordingly, the Act stresses that funding is meant to foster "free enquiry and expression"³² and that "no preference should be given to any particular school of thought or expression."³³ Congress further emphasized that in the administration of the agency, the government shall not "exercise any direction, supervision, or control over the policy determinations" of the NEA.³⁴

II. THE HELMS AMENDMENT

Today, the NEA occupies the dominant financial position in American art.³⁵ Over the last twenty-five years, the NEA has distributed billions of

on NEH funding. *See generally* Alvaro I. Anillo, Note, *The National Endowment for the Humanities: Control of Funding Versus Academic Freedom*, 45 VAND. L. REV. 455 (1992).

27. NATIONAL ENDOWMENT FOR THE ARTS, APPLICATION GUIDELINES FISCAL YEAR 1990.

28. Peer panels consist of independent groups of experts in various fields of art. 20 U.S.C. § 955 (b)(2) (Supp. III 1991). The NEA's legislation requires these panels to make initial decisions regarding each project's "artistic merit." 20 U.S.C. § 955(f)(2) (Supp. III 1991).

29. The Council, consisting of twenty-six Presidentially-appointed members, includes private citizens who have expertise in the arts, artists, cultural leaders and others professionally engaged in the arts, and people chosen from among the major fields of art, all representing different geographical areas of the country. 20 U.S.C. § 955(b) (Supp. III 1991).

30. The Chairperson enjoys a veto power over the Council's decisions, although the Chairperson may not approve an application which the group has already rejected. 20 U.S.C. § 955(f)(2) (Supp. III 1991).

31. H.R. REP. NO. 618, 89th Cong., 1st Sess. 19, 231 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3203-07 (warning that federal subsidies would contribute to a "spirit of compromise and conservatism in art").

32. 111 CONG. REC. 13,108. (1965).

33. *Id.*

34. 20 U.S.C. § 953(c) (Supp. III 1991).

35. *See, e.g.*, Allan Parchini, *NEA Flap Seen as Threat to Private Funding*, L.A. TIMES, July 20, 1990, at F1 ("[B]ecause of the closely integrated structure of public and private support which drives the art world, NEA funding decisions and NEA policy exercises a most powerful influence — an influence far beyond the dollar amounts involved.").

dollars to various artists and museums³⁶ and funded over 85,000 separate projects in every state of the union.³⁷ Because the art world views the grants as virtual “stamps of approval,” the large amount of federal support attracts even greater amounts of private financing for the arts.³⁸

Although minor controversies have arisen from time to time, the NEA’s funding decisions did not evoke considerable debate in its first twenty-five years.³⁹ In the late 1980s, however, two events shook the NEA’s former tranquility.

In the spring of 1988, the NEA supported an exhibit at the Southeastern Center for Contemporary Art⁴⁰ featuring a photograph by Andres Serrano.⁴¹ This piece, entitled “Piss Christ,” depicted a plastic crucifix suspended in a jar of the artist’s urine.⁴²

Serrano’s work sparked immediate criticism. Senator Alphonse

36. 135 CONG. REC. H3639 (daily ed. July 12, 1989).

37. The NEA funded approximately 85,000 of the roughly 302,000 grant applications it received between 1965 and 1988. *Id.*

38. The NEA matches funds from individuals and organizations, and often conditions grants upon a certain amount of private financing. Much of this private support, in turn, depends upon whether the NEA sponsors or rejects a particular project.

In fiscal 1992, the NEA invested \$153 million in a total of 4,300 communities in every state. This money generated an additional \$1.68 billion in contributions from private individuals, state governments, and other sources. Patricia C. Johnson, *Arts Supporters Take Off Gags*, HOUS. CHRON. Aug. 30, 1992, at 14.

39. The best known “pre-Helms” controversy occurred in 1984, when the NEA sponsored a production of the opera *Rigoletto*. Italian-Americans claimed the work was derogatory and unfairly stereotyped Italians. Representative Mario Biaggi offered an unsuccessful measure to ban government funding of racially offensive material. See generally McFadden, *A Modernized ‘Rigoletto’ Is Attacked*, N.Y. TIMES, Mar. 6, 1984, at B1. See also Enrique R. Carrasco, Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521 (1986) (analyzing the controversy over the *Rigoletto* production and subsequent congressional reaction).

Before the present debate only a few artists had sued the NEA to protest allegedly discriminatory funding decisions. See, e.g., *Serra v. General Serv. Admin.*, 664 F. Supp. 798 (S.D.N.Y. 1987) (holding that the government did not violate artist Richard Serra’s “clearly established rights” by removing his sculpture from public property); *Advocates for the Arts v. Thomson*, 397 F. Supp. 1048 (D. N.H. 1975) (finding that the Governor of New Hampshire could refuse to approve a grant to a literary magazine which he believed lacked artistic merit).

For a complete review of the NEA’s controversial grants, see THE INDEPENDENT COMMISSION, A REPORT TO THE CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS 37-39 (Sept. 1990).

40. The Center, one of the most important galleries in the south, is located in Winston-Salem, North Carolina, the home state of Senator Jesse Helms.

41. Serrano, a well known Hispanic artist, received the coveted Award in the Visual Arts, and participated in the Bicentennial Exhibition at the Whitney Museum of Art. Nichols Fox, *NEA Under Siege: Artwork Sparks Congressional Challenge to Agency’s Reauthorization*, NEW ART EXAMINER 18 (Summer 1989).

42. McGuigan & Glick, *When Taxes Pay for Art*, NEWSWEEK, July 3, 1989, at 68.

D'Amato took to the Senate floor and denounced the photo as a "deplorable, despicable display of vulgarity."⁴³ D'Amato, joined by twenty-six other senators, sent a letter to the NEA demanding that the agency stop financing "sacrilegious art."⁴⁴

At about the same time, the Corcoran Gallery accepted an NEA sponsored retrospective of artist Robert Mapplethorpe's work.⁴⁵ Besides photographs of flowers, children, and the male body, the Mapplethorpe collection included several images of bondage and homosexuality.⁴⁶

After religious groups brought the Mapplethorpe issue to Congress's attention,⁴⁷ many members denounced the NEA's involvement. Senator Dan Coats criticized the NEA for taking money from citizens and then "using it to offend their most deeply held moral beliefs."⁴⁸ Senator Helms condemned the NEA's "militant display of disdain for the moral and religious sensibility of the majority of the American people."⁴⁹

As the debate reached a fever pitch, several congressmen introduced measures to address this controversy. Representative Dana Rohrabacher recommended that Congress abolish the NEA completely.⁵⁰ In a less drastic action, Representative Charles Stenholm proposed a \$45,000 cut in the NEA's budget, the exact amount of the Serrano and Mapplethorpe awards.⁵¹

The most vocal critic of the NEA's actions was Senator Jesse Helms of North Carolina.⁵² Senator Helms introduced a strict measure placing un-

43. Parachini, *Endowment Congressmen Feud over Provocative Art*, L.A. TIMES, June 14, 1989, § VI, at 10.

44. *Id.*

45. *Id.* The NEA gives the Corcoran Gallery some \$300,000 per year in federal aid. Mapplethorpe himself received a \$15,000 grant in 1984 to support the exhibition.

46. The retrospective, entitled "Robert Mapplethorpe: The Perfect Moment," had been organized at the University of Philadelphia Contemporary Art Institute.

47. Rev. Donald Wildmon of the fundamentalist American Family Association instituted a letter writing campaign to various Senators and Representatives. Together with Rev. Pat Robertson and others, the groups even took out advertisements in papers such as USA Today claiming the work was "un-Christian." Nichols Fox, *supra* note 41, at 19.

48. 135 CONG. REC. S8809 (daily ed. July 26, 1989).

49. 136 CONG. REC. S16,626 (daily ed. Oct. 24, 1990).

50. 135 CONG. REC. H3637 (daily ed. July 12, 1989).

51. 135 CONG. REC. H3637 (daily ed. July 12, 1989). Congress ultimately passed this punitive measure.

52. Senator Helms, one of the most conservative members of Congress, is widely known for his support of right-wing causes. When the NEA controversy emerged, Helms insisted that his amendment would "prevent the NEA from funding of immoral trash." 135 CONG. REC. S8807 (daily ed. July 26, 1989). He applied tremendous pressure on his fellow Senators to restrict the NEA, and at one point demanded a roll call vote to show "which Congressmen favored taxpayer funding for

precedented controls on future NEA grants.⁵³ These restrictions included a ban on works depicting "obscene or indecent materials" including "sodomasochism, homo-eroticism, and the exploitation of children."⁵⁴

Ultimately, Congress rejected Helms' harsh medicine.⁵⁵ Yet on October 23, 1989, it enacted a compromise measure, the so-called "Helms Amendment."⁵⁶ This watered down version prohibited the use of federal funds to promote material which, "in the judgment of the NEA," could be considered obscene.⁵⁷ While the bill purported to provide objective guidelines, it vested extraordinary power in the NEA to specify the definition of obscenity.⁵⁸

pornography." William H. Honan, *Helms Amendment is Facing a Major Test in Congress*, N.Y. TIMES, Sept. 13, 1989, at C18.

53. For the full text of the Helms proposal, see *infra* note 54.

54. Senator Helm's proposal read as follows: None of the Funds pursuant to [] Act may be used to promote, disseminate, or provide —

- (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or
- (2) materials which denigrate the objects or beliefs of the adherents of a particular religion or non-religion; or
- (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age or national origin.

135 CONG. REC. S8806 (daily ed. July 26, 1989).

55. Many Senators felt the original Helms proposal was too broad and intolerant. Senator Danforth pointed out that, under the proposal, classics such as "Tom Sawyer" and "Huckleberry Finn" could not have received federal support since they "denigrated . . . a person . . . on the basis of race." 135 CONG. REC. S8806 (daily ed. July 26, 1989). Senator Kerry went further, calling the proposal "politically motivated intimidation." 135 CONG. REC. S12,116 (daily ed. Sept. 28, 1989).

56. The Interior Appropriations Conference Committee rejected the Helms proposal in H.R. 2788.

For a complete discussion of the 1990 Appropriations Bill's procedural history, see generally Mary Ellen Kresse, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the 'Mapplethorpe Controversy'?*, 39 BUFF. L. REV. 231 (1991).

57. While the original Helms proposal contained an outright ban on certain subject matters, the compromise legislation placed a general prohibition on obscene works:

None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

Dep't of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, tit. III, § 304(a), 103 Stat. 701, 741 (1989) (codified as amended 20 U.S.C. 954 (1990)).

58. *Id.* The Helms Amendment borrows language from the Supreme Court's obscenity definition in *Miller v. California*, 413 U.S. 15, 24 (1972). Yet because the measure only uses this language as a guideline and because the ultimate meaning of obscenity is left to the NEA, the legislation sweeps far more broadly than the *Miller* standard.

III. THE "OBSCENITY PLEDGE"

For the first time in history, Congress had placed restrictions on the content of government sponsored art. To enforce this Congressional mandate, the NEA established an infamous "obscenity pledge."⁵⁹ This measure required grant applicants to certify, in advance, that they would not use government funds to promote materials which could be considered obscene.⁶⁰

The new NEA regulations, and particularly the obscenity pledge, quickly became one of the most divisive issues in the history of American art. Bowing to political pressure, the Corcoran Gallery dropped the controversial Mapplethorpe exhibit.⁶¹ Right-wing interest groups began organizing campaigns to restrict further, and in some cases ban, federal funding of art.⁶² As his first official act, John Frohnmayer, the new director of the NEA, revoked a previously awarded grant to an AIDs-related presentation.⁶³

59. Statement of Policy and Guidance for the Interpretation of Section 304 of the 1990 Interior Appropriations Act, *reprinted in* THE INDEPENDENT COMMISSION, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS 88 (Sept. 1990).

60. The NEA added the pledge to the second paragraph of the "Request for Advancement or Reimbursement." Its language drew directly from Section 304(a) of the new amendments.

61. The Director of the Corcoran, Dr. Christina Orr-Cahall, voluntarily canceled the show on June 13, 1989. In defending her actions, Dr. Orr-Cahall contended that the exhibit was "at the wrong place at the wrong time," and "had the strong potential to become some persons' political platform." Carlson, *Whose Art is it Anyway*, TIME, July 3, 1989, at 21. Because of the ensuing controversy, Orr-Cahall eventually resigned her post.

Rather than fade into obscurity, however, the Mapplethorpe exhibit began a fascinating journey. Shortly after the cancellation, the Washington Project for the Arts picked up the show. The collection drew nearly 50,000 people in less than a month. It continued to attract unprecedented crowds in locations such as Berkeley, California, Boston, Massachusetts, and Cincinnati, Ohio.

In Cincinnati, the gallery hosting the exhibit placed the controversial photographs in a separate room open only to those over eighteen. Nevertheless, the Hamilton County prosecutor sued the Contemporary Arts Center for violating a Cincinnati statute banning the display of nude children. *City of Cincinnati v. Contemporary Arts Center*, 566 N.E.2d 207 (Ohio Misc. Ct. 1990).

62. Oreskes, *Bush Position on Art Group Evokes Protest from the Right*, N.Y. TIMES, Mar. 23, 1990, at A14.

63. The NEA had promised a \$10,000 grant to Artists Space, a New York gallery which hosted a presentation entitled "Witnesses: Against our Vanishing." The exhibition, containing works by twenty-three artists, detailed the effects of AIDs on American society. Feeling that the exhibit had become "primarily political in nature," Frohnmayer claimed that "political discourse ought to be in the political arena, and not in a show sponsored by the Endowment." N.Y. TIMES, Nov. 19, 1989, § 2 at 1, 25.

The catalogue for the show particularly troubled Frohnmayer. It contained unflattering commentary concerning Archbishop John O'Connor of New York and various political figures, including Senator Helms himself. After the grant's rescission Archbishop O'Connor declared that, had he been

Not surprisingly, artists, civil libertarians, and others vigorously opposed the restrictions.⁶⁴ Museum directors and board members resigned their posts in protest.⁶⁵ Several prominent artists returned their NEA grants; others refused to accept any future federal funds.⁶⁶ The heralded conductor, Leonard Bernstein, declined the National Medal of Arts Award.⁶⁷ As the battle lines increasingly became drawn, artists rallied in cities across the United States, including a large demonstration at the Republican National Convention in November 1992.⁶⁸

The most pivotal confrontations on this issue, however, have occurred in the judicial arena. A number of cases have challenged the constitutionality of the new regulations.⁶⁹

consulted, he would have "urged very strongly that the National Endowment not withdraw its sponsorship on the basis of criticism against me personally." N.Y. TIMES, Nov. 10, 1989, at B13.

Amidst a storm of public protest, the NEA eventually reinstated the grant. The NEA refused to fund the catalogue itself, however, and required a printed disclaimer about its lack of support. William H. Honan, *National Arts Chief, in Reversal, Gives Grant to AIDS Show*, N.Y. TIMES, Nov. 17, 1989, at A1.

64. See generally Bob Kim Masters, *Arts Panel Urges End to Grant 'Pledge'; Breaks with NEA on Anti-Obscenity Restriction*, WASH. POST, Aug. 4, 1990, at G1.

65. Oreskes, *supra* note 62.

66. The American Poetry Review, the Paris Review, and the Boston Review all rejected NEA grants. Joseph Papp, Director of the New York Shakespeare Festival, also refused to take NEA monies, claiming that the restrictions had "caused the air for arts to become poisonous." CHI. TRIB., Oct. 30, 1990, at 4.

67. Michael Himmelman, *Leonard Bernstein Refuses the Medal of Arts*, N.Y. TIMES, Nov. 16, 1989, at C26.

68. In fiscal 1992, the NEA invested \$153 million in a total of 4,300 communities in every state. This money generated an additional \$1.68 billion in contributions from private individuals, state governments, and other sources. Patricia C. Johnson, *Arts Supporters Take Off Gags*, HOUS. CHRON. Aug. 30, 1992, at 14.

69. See *infra* Parts III and IV. Among other charges, plaintiffs have claimed that the restrictions constitute a prior restraint, are unconstitutionally vague and overbroad, violate the Due Process Clause of the Fifth Amendment and the Free Speech Clause of the First Amendment, and impose an unconstitutional condition on fundamental rights.

The legal commentary regarding the new regulations has been largely negative. See generally Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 U. KAN. L. REV. 437 (1992); Arthur I. Jacobs, *One if by Land, Two If By Sea*, 14 NOVA L. REV. 343 (1990); Mary Ellen Kresse, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Arts Survive the Mapplethorpe Controversy*, 39 BUFF. L. REV. 231 (1991); Nancy Ravitz, *A Proposal to Curb Congressional Interference with the National Endowment for the Arts*, 9 CARDOZO ARTS & ENT. L.J. 475 (1991); Stephen F. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HASTINGS L.J. 353 (1990); Note, *Congressional Funding for the Arts: from Article I to Art Critic*, 18 OHIO N.U. L. REV. 667 (1992); Note, *The Politicization of Art: the National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991); Note, *1991 Legislation, Reports and Debates over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545 (1991).

A. *Bella Lewitsky Dance Foundation v. Frohnmayer*

Bella Lewitsky Dance Foundation v. Frohnmayer,⁷⁰ represented the first serious attack on the NEA restrictions.⁷¹ The Foundation Lewitsky (Foundation), a well-known international dance company,⁷² refused to sign the "obscenity pledge" contained in an NEA award letter.⁷³ When the NEA informed the Foundation that "none of the terms of the grant [were] optional,"⁷⁴ the Foundation sued, maintaining that the pledge was unconstitutional.⁷⁵

70. 754 F. Supp. 774 (C.D. Cal. 1991)

71. Prior to *Lewitsky*, courts had decided several suits seeking to overturn the Helms Amendment without directly addressing its constitutionality.

In *Todd v. Smith*, 407 S.E.2d 644 (1991), for example, an artist brought a civil rights action against the City of Myrtle Beach for refusing to display a painting of a nude woman. Noting that the city council had never officially met nor voted on the action, the court held that the city's "particular acts of censorship" did not give rise to a civil rights violation. 407 S.E.2d at 647.

In *Frasier v. United States Dept. of Health and Human Serv.*, 779 F. Supp. 213 (N.D. N.Y. 1991), an artist claimed that the NEA violated her due process rights by negligently failing to approve her grant request. The court rejected the applicant's allegation, holding that she did not have a legitimate right to an entitlement sufficient to sustain a due process claim. 779 F. Supp. at 222.

In *Oursler v. Women's Interart Ctr.*, 566 N.Y.S.2d 295 (N.Y. App. Div. 1991), a corporation terminated a previously arranged art exhibit after the NEA withdrew federal funds. The court refused to entertain a suit by several artists against the corporation, and held that the artists "were merely incidental beneficiaries of the contract between the NEA and [the corporation] . . ." *Id.* at 296.

In *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.C.D.C. 1991), finally, a group of lay citizens, rather than artists, brought suit against the NEA. The plaintiffs claimed to have suffered "spiritual injury" as a result of an NEA sponsored show with an anti-religious theme. *Id.* at 656. Because the group had never even seen the exhibit, however, the court found the plaintiffs lacked standing to challenge the NEA's decisions. *Id.*

72. The Bella Lewitsky Dance Foundation creates and performs modern dance works in the United States and in foreign countries. Since 1972, the NEA has awarded the Foundation some \$1,400,000 in grants. 754 F. Supp. at 775.

The Newport Harbor Art Museum, a visual arts center located in Newport Beach, California, also joined in the action. The Museum received fifty-six NEA grants totalling over \$1,250,000 since 1973. *Id.* at 775-76.

73. As part of a \$74,000 grant on January 4, 1990, the Foundation received a document specifying the terms and conditions of the award. The second paragraph of the letter contained the pledge that none of the NEA money would be used to "produce material which in the judgement of the NEA . . . may be considered obscene." *Id.* at 776.

Darlene Neel, manager of the Foundation, crossed out and initialed the paragraph, indicating the Foundation's refusal to comply with the condition. *Id.* at 777.

74. Julianne Ross Davis, the NEA's General Counsel, sent a letter to the Foundation explaining that if it wished to use the grant, the Foundation would have to abide by all of the award's terms and conditions, including the obscenity pledge. In response, the Foundation segregated the money already distributed under the disputed grant. *Id.*

75. 754 F. Supp. at 774.

A California district court agreed. First, the court found that the obscenity pledge was too vague to meet the Fifth Amendment's due process requirement.⁷⁶ Due process demands that laws be clear and impartial.⁷⁷ The court emphasized that the deciding factor was that the pledge left the definition of obscenity completely under the NEA's control.⁷⁸ This lack of objectivity, the court argued, required artists to speculate about how the agency might determine obscenity.⁷⁹ Because of the uncertainty and ambiguity in the measure, the court found that the obscenity pledge was unconstitutional.⁸⁰

Secondly, the *Lewitsky* court held that the pledge's vagueness also ran

76. *Id.* at 781.

77. The Fifth Amendment mandates due process of the law. Courts have interpreted this clause to assure citizens fundamental justice and a fair trial. As part of the due process guarantee, people must know why they are being punished for a particular crime. Accordingly, all federal and state statutes must be as clear and precise as possible.

The Supreme Court continually emphasizes the importance of the vagueness prohibition. The Court has recently stated:

Vague laws offend several important values. First, . . . [laws must] give the person of average intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . . Third, . . . [u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden zone were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1978) (quoting *Bassett v. Bullitt*, 372 U.S. 360, 372 (1964)).

For a more thorough discussion of the vagueness doctrine, see generally David S. Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679 (1978); Stephen Kloepfer, *Ambiguity and Vagueness in the Criminal Law: An Analysis of Types*, 27 CRIM. L.Q. 94 (Dec. 1984); Anthony G. Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

78. 754 F. Supp. at 781. See also *supra* notes 57-58 and accompanying text.

79. In response to this criticism, the NEA announced at trial that, in the future, it would rely upon the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15 (1972).

The *Miller* Court developed a three-pronged test to determine whether material could be considered "obscene." The basic guidelines ask:

(1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)):

The Supreme Court's standard conceivably provides grant recipients a more objective and certain measure. However, the *Lewitsky* court felt that its adoption would not cure the statute's vagueness. The court stated that NEA policy statements did not legally bind the agency. 754 F. Supp. at 782. Additionally, the court contended that certain procedural safeguards in *Miller*, such as a trial and jury, could not be provided in NEA proceedings. *Id.*

See *infra* notes 99-100 and accompanying text.

80. 754 F. Supp. at 782.

afoul of the First Amendment's guarantee of free speech.⁸¹ The court stressed again that the measure lacked a clear definition of obscene art.⁸² The court reasoned that in order to avoid breaching the grant's terms, grantees would be forced to engage in self-censorship and abandon many legitimate, non-obscene projects.⁸³

Finally, the court concluded that the obscenity pledge placed an "unconstitutional condition" upon an artist's freedom to exercise fundamental rights.⁸⁴ The court first conceded that Congress did not have an

81. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST., amend I. While the amendment refers to "speech," the Supreme Court has long recognized that certain forms of non-verbal conduct are protected from government interference. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft cards); *Stromberg v. California*, 283 U.S. 359 (1931) (displaying red flags).

82. 754 F. Supp. at 783.

83. The court stated:

[The effect of] the NEA's vague certification requirement is unmistakably clear. The creative expression of the . . . Foundation would necessarily be tempered were it to sign the certification and then take seriously its pledge not to promote, disseminate, or produce anything that the NEA in its judgement might find obscene. Similarly, in compiling works for inclusion in the various exhibits for which it obtained NEA grants, [the Newport Art Museum] would have to continually moderate its selection decisions with a view towards steering clear of what might strike the NEA as obscene.

Id. at 782.

The court also noted that the NEA's "dominant influence" in the art world further exacerbated the problem. *Id.* Because the NEA's funding produced a "multiplier effect in the competitive market for funding of artistic endeavors," the court felt that artists would face additional pressures to censor and curtail their right of free speech. *Id.*

84. The doctrine of unconstitutional conditions is based upon the principle that government may not do indirectly what it cannot do directly. Thus, Congress may not substitute subsidies for penalties in order to accomplish unconstitutional goals. While the government may not have an affirmative duty to provide a benefit, once it does so, it may not condition the assistance on the recipient's surrender of a constitutionally protected right. *Id.* at 784. As the Supreme Court stated:

[E]ven though a person has no 'right' to a valuable government benefit, and even though the government may deny him the benefit for a 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."

Id. (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1971)).

See also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (discriminatory state sales tax which gave benefits to certain newspapers violated the First Amendment); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (denying public broadcasting funds to radio stations which editorialize is "flatly coercive").

For a detailed discussion of the unconstitutional conditions doctrine, and its application to federal art funding, see Kim M. Shipley, Comment, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Note, *Unconstitutional Con-*

affirmative duty to finance art per se.⁸⁵ Yet once the government chose to support such activities, it could not, the court argued, condition funding on the grantee's relinquishment of a constitutional liberty.⁸⁶ Because accepting NEA grants indirectly required artists to suppress their fundamental rights of free speech and due process, the *Lewitsky* court struck down the NEA's obscenity restrictions as vague.⁸⁷

B. *New School v. Frohnmayer*

In *New School v. Frohnmayer*,⁸⁸ the New School for Social Research (New School), an arts institution with campuses in New York and California,⁸⁹ refused a grant to remodel its courtyard.⁹⁰ Comparing the NEA restrictions to a "loyalty oath," the New School challenged the constitutionality of the obscenity pledge and sought an injunction against its enforcement.⁹¹

Like the parties in *Lewitsky*, the New School claimed that the certification violated its rights to due process and free speech.⁹² In addition to these charges, however, it also argued that the obscenity pledge acted as a classical "prior restraint."⁹³ Prior restraints which allow the government to prohibit expression before it ever takes place and are not constitutionally favored.⁹⁴ Because the measure did not provide the procedural

ditions as "Nonsubsidies": When is Deference Appropriate?" 80 GEO. L.J. 131 (1991); Georges Nahitchevansky, Note, *Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like?* 56 BROOK. L. REV. 213 (1990).

85. 754 F. Supp. at 785.

86. *Id.*

87. 754 F. Supp. at 785. In several recent cases, however, the Supreme Court has retreated from its expansive view of the doctrine of unconstitutional conditions. See *infra* note 122.

88. No. 90-3510 (S.D.N.Y. 1990).

89. New School is the parent organization of the well known Parsons School of Design in New York City and the Otis Arts Institute in California. Louise Sweeney, *Levy Sees Smoother Seas at Corcoran*, CHRISTIAN SCI. MONITOR, Sept. 27, 1991, at 12.

90. No. 90-3510 (S.D.N.Y. 1990).

91. L.A. TIMES, Oct. 18, 1990. Ironically, the Chancellor of New School, David Levy, later became President of the Corcoran Gallery of Art, the same institution whose actions helped initiate the entire arts funding battle. Louise Sweeney, *supra* note 89.

92. L.A. TIMES, Oct. 18, 1990.

93. *Id.*

94. In contrast to statutes which punish certain types of expressive conduct after they have happened, prior restraints prevent expression from ever occurring at all. These measures originated with the English licensing schemes, where the government or church had to approve any publication before it could be produced. In the United States, any system of prior restraints bears a heavy presumption of unconstitutionality, and the government carries an equally heavy burden of showing a justification for imposing such a restraint. *New York Times Co. v. United States*, 403 U.S. 713

safeguards required for such restraints,⁹⁵ the New School argued that the obscenity clause violated the First Amendment.

The prior restraint argument, however, was never addressed. Before the case could be resolved, the NEA agreed to let the New School have the funds without signing the pledge.⁹⁶ In exchange, the New School settled the suit and dropped the charges in February 1991.⁹⁷

IV. THE "DECENCY CLAUSE"

In response to judicial challenges, Congress revised the NEA's governing statute on November 5, 1990.⁹⁸ In a widely hailed move, it deleted the contested obscenity pledge.⁹⁹ The legislature shifted the difficult task of defining "artistic obscenity" to the judicial branch and adopted the Supreme Court's obscenity standards set forth in *Miller v. California*.¹⁰⁰ Initially, at least, the art world celebrated the repeal as a hard won victory.¹⁰¹

(1971). See also *Near v. Minnesota*, 283 U.S. 697 (1931). Prior restraints on speech and publication "are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

95. In order to reduce the dangers of prior restraints, the Supreme Court imposes several procedural requirements upon the administration of such measures. In exercising a prior restraint, the government must "assure a prompt, final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license," it must promptly institute such proceedings, the burden of proof rests with the government, to show that the speech in question is unprotected and finally, the proceedings must be adversarial. *Freedman v. Maryland*, 380 U.S. 51 (1965). Because the NEA's funding decisions are not subject to any type of judicial review, the obscenity pledge contains none of these procedural safeguards.

But cf. FW/PBS v. Dallas, 110 S. Ct. 596 (1990), suggesting that at least some of the *Freedman* standards, such as the burden of proof requirement, may be unnecessary in using prior restraints against obscene materials.

96. Chuck Phillips, *NEA Settles Suit by Deleting Pledge Against Obscenity*, L.A. TIMES, Feb. 21, 1991, at 4.

97. *Id.*

98. Congress incorporated these changes into the NEA's Reauthorization Bill, the Arts, Humanities, and Museum Amendments of 1990, Pub.L. No. 101-512, § 103(b), 104 Stat. 1963 (codified at 20 U.S.C. § 951-59 (1990)).

99. *Id.* However, Chairman Frohnmayer claimed that the legislation did not permit the NEA to lift the requirement for fiscal 1990 grantees. On February 20, 1991, Frohnmayer issued an amendment treating all 1990 grantees like 1991 grantees, thus formally expunging the pledge from all pending grants.

100. The new legislation prohibited NEA funding of works determined to be obscene "in a final judgment of a court of record and of competent jurisdiction." 20 U.S.C. § 952(3)(j) (1990). For a discussion of the *Miller* standards, see *supra* note 78 and accompanying text.

101. James Fitzpatrick, chairman emeritus of the Washington Project for the Arts, called the reversal "a stunning victory for people who care about freedom of expression," and claimed that "for all practical purposes, the debate in Congress on content restrictions is over." Floyd Abrams, a well

Yet that which Congress gave with one hand, it took away with the other. Although the NEA now used the "Miller Standard" of obscenity, the NEA's Reauthorization Bill also included a new provision, the so-called "decency clause."¹⁰²

The decency clause directed the NEA Chairperson to ensure that all funded works incorporate "general standards of decency and respect for the diverse beliefs and values of the American public."¹⁰³ Furthermore, it dictated that award recipients file interim reports certifying that their work complied with this standard.¹⁰⁴ If the NEA should determine that an applicant does not meet this test, it could suspend grant payments,¹⁰⁵ and could even require artists to pay back money previously disbursed.¹⁰⁶

At first, few in the arts world noticed this relatively obscure clause. It soon became clear, however, that the NEA could bypass *Miller's* obscenity standard by simply rejecting applicants on ambiguous grounds of "decency." Not surprisingly, little time elapsed before the decency clause itself was challenged in court.

A. *Finley v. National Endowment for the Arts*

On June 29, 1990, ignoring the recommendations of the NEA Advisory Panel, Chairman Frohnmayer rejected the grant applications of four controversial performance artists.¹⁰⁷ In *Finley v. National Endowment for the Arts*,¹⁰⁸ these artists, known as the "NEA Four,"¹⁰⁹ brought suit

known civil rights lawyer, declared that the changes "added some significant weapons to the arsenal of people opposing governmental content restrictions on the arts." Kim Masters, *NEA Drops Contested Grant Oath; Suit Settlement Revokes Anti-Obscenity Pledge*, WASH. POST, Feb. 21, 1991, at D1.

102. 1990 Amendments, Pub.L.No. 101-512, § 103(b), 104 Stat. 1963, (codified at 20 U.S.C. § 954(d) (1990)).

103. *Id.* § 954(d)(1).

104. *Id.* § 954(i)(3)(ii).

105. *Id.* § 954(j).

106. Section 954(h) allows the NEA to demand repayment of the grant if a court of competent jurisdiction decides the supported art is obscene. The NEA may also take the "breach" into account when deciding whether to provide subsequent financial assistance. *Id.* § 954(f)(3)(A).

107. Patty Hartigan, *Artists Lash Out at NEA*, BOSTON GLOBE, July 12, 1990, at 74.

108. 795 F. Supp. 1457 (C.D. Cal. 1992). The NEA has appealed the district court's decision. Jacqueline Trescott, *NEA to Pay 4 Denied Arts Grants But Decency Rule Challenge Unresolved*, WASH. POST, June 5, 1993, at D1.

109. The group consisted of Karen Finley, John Fleck, Holly Hughes, and Tim Miller. Finley is well known for spreading chocolate and bean sprouts on her semi-naked body. Fleck, Hughes, and Miller produce works with gay and lesbian themes. N.Y. TIMES, July 6, 1990, at C3.

against the NEA, and mounted a facial challenge¹¹⁰ to the decency clause.¹¹¹

A California district court struck down the clause. First, the *Finley* court held that the decency clause, like the obscenity pledge before it, was unconstitutionally vague.¹¹² The court dismissed the NEA's claim that "decency" and "diverse views" were simply implicit and voluntary guidelines in funding decisions.¹¹³ Instead, the court stated that the clause represented explicit criteria to determine eligibility for NEA grants.¹¹⁴ Because of the inherent subjectivity of this standard, the court found the clause violated the Fifth Amendment due process requirement.¹¹⁵

The district court also held that the new NEA guidelines were unconstitutionally overbroad¹¹⁶ and explained that an overbroad statute would restrict both protected and unprotected speech.¹¹⁷ The court noted that

110. A "facial challenge" alleges that a statute is void upon its face, and cannot be applied in a constitutional manner.

111. In addition, the artists maintained that the NEA's release of information from their grant applications to the media violated the Privacy Act, 5 U.S.C. § 522a. 795 F. Supp. at 1460. The court agreed, holding that neither the Freedom of Information Act, nor the fact that some of the information was already publicly available, excused the NEA's actions. *Id.* at 1467-68. The NEA has settled the monetary dispute over the denied grants and the Privacy Act violations by giving \$252,000 to Karen Finley, Holly Hughes, Tim Miller and John Fleck. Jacqueline Trescott, *NEA to Pay 4 Denied Arts Grants But Decency Rule Challenge Unresolved*, WASH. POST, June 5, 1993, at D1. Each of the artists will receive \$26,000 compensation for the denied grants and \$6,000 for the Privacy Act violations. *Id.* The remainder of the settlement will go to legal fees. *Id.* The NEA agreed to settle the monetary dispute because of the "overwhelming evidence" that former chairman Frohmyer did not follow the agency's decision-making procedures. *Id.* The settlement did not affect the portion of the pending appeal disputing the constitutionality of the decency clause. *Id.*

112. 795 F. Supp. 1472. The court adopted reasoning similar to that used in *Lewisisky*. See *supra* subpart III(A). It held that artists would necessarily differ as to the meaning and application of the decency clause, and would therefore implicate the concerns addressed by the Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). 795 F. Supp. at 1471-72.

113. The court found that the plain language of the statute required the NEA to consider "general standards of decency and respect for . . . diverse beliefs . . ." *Id.* at 1470.

Even if the NEA could use an alternative interpretation, however, the court felt that the agency's construction clearly contradicted congressional intent. "Had Congress believed that 'decency' and 'respect for diverse views' were naturally embedded in the concept of 'artistic merit,'" the court argued, "there would be no need to elaborate on the [artistic merit] standard." *Id.* at 1471.

114. Indeed, the legislative history of the decency clause supports this interpretation. Several Senators believed the clause would preclude funding of works such as Serrano's "Piss Christ" and others "deeply offend[ing] the sensibilities of significant portions of the public." 136 CONG. REC. H9410-57 (daily ed. Oct. 11, 1990).

115. 795 F. Supp. at 1472.

116. *Id.*

117. The overbreadth doctrine invalidates laws which infringe upon expression to a greater de-

the requirement does control "obscene" speech which the government may constitutionally regulate.¹¹⁸ However, the court stressed that the clause would also repress "indecent" speech, a form of expression clearly immune from substantial governmental interference.¹¹⁹ Because the decency clause reached artistic expression "explicitly protected by the First Amendment," the court held the clause could not be given effect.¹²⁰

Finally, the *Finley* court pronounced a new, protected First Amendment interest in government funded art.¹²¹ Examining recent Supreme Court precedent, the court recognized that, in many cases, the government could restrict the speech of those receiving federal monies.¹²² Yet in certain "protected" areas, such as the funding of public education, the court noted that government grants "may not be used to suppress unpopular expression."¹²³ Because both academic speech and artistic expression "reached the core of a democratic society's cultural and political vitality,"¹²⁴ the court argued that arts funding, like educational funding,

gree than that justified by a legitimate government need. A measure that suppresses a substantial amount of constitutionally protected expression "must be refused effect unless it is subject to a construction that narrows its reach only to unprotected speech." *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575-76 (1987). See generally Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1981); Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031, 1056-69 (1983).

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

119. See, e.g., *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (expression which is indecent but not obscene is protected by the First Amendment); *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978) ("Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality.").

120. 795 F. Supp. at 1475.

121. *Id.*

122. In *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the Supreme Court held that the government could prohibit abortion counseling in federally funded clinics without violating the First Amendment. The court concluded that "when the government appropriates public funds to establish a program, it is entitled to define the limits of that program." *Id.* at 1773. See generally Kim Masters, *The Abortion Ruling's Impact*, WASH. POST, June 3, 1991, at C7. Beverly M. Wolff, *The NEA and First Amendment Revisited: What Do the Latest Developments Mean for Museums? A Look at Rust v. Sullivan, Barnes v. Glen Theater, and Other Recent Cases*, C723 ALI-ABA 503 (1992) (discussing the impact that *Rust* and other cases may have on freedom of speech in the artistic community).

123. The *Rust* court cited a special exemption prohibiting governmental restrictions on speech in the public funding of universities. Because they operated in "a traditional sphere of free expression fundamental to the functioning of our society," the Supreme Court found they were a "protected class" under the First Amendment. 111 S. Ct. at 1776 (citing *Keyishian v. Board of Regents of the Univ. of New York*, 389 U.S. 589, 603, 605-06 (1967)).

124. 795 F. Supp. 1473. The court surveyed the NEA's legislative history and authorizing statutes in detail. Recognizing the high ideals and ethics embedded in the Act, the court felt that "artis-

demanded government neutrality.¹²⁵ Holding that the decency clause imposed non-neutral, content based restrictions on NEA grants, the *Finley* court found the new requirement unconstitutional.¹²⁶

B. *The Aftermath*

Despite the decisions in *Lewitsky* and *Finley*, controversy continues to engulf the NEA and its funding decisions. In May 1992, Anne-Imelda Radice, the new Chairperson of the NEA, vetoed grants for exhibits at the Massachusetts Institute of Technology and Virginia Commonwealth University.¹²⁷ The presentations reportedly contained images of male and female sexual organs.¹²⁸ When the NEA refused to review the grants after the *Finley* decision, the arts world again erupted. Beacon Press, one of the Nation's oldest publishers, refused to accept a previously awarded grant,¹²⁹ and in an unprecedented move, a sitting review panel, the 1993 Visual Arts Sculpture Fellowship, disbanded in protest.¹³⁰ The artists affected by the grant decisions threatened to file suit.

On November 20, 1992, Chairperson Radice provoked further discord by rejecting grants for three gay film festivals. The NEA had provided grants for these same festivals in previous years. Yet in a terse, one sentence statement which did not even mention the decency clause, Radice

tic expression served many of the same societal values as scholarly expression in [the field of public education]." *Id.* at 1474.

In addition, the court pointed out that the NEA makes many of its grants in a university setting. Therefore, the court concluded that artistic activity in the classroom deserved the same assurance of freedom as that accorded to other scholarly and teaching activities. *Id.*

125. *Id.* at 1472.

126. *Id.* at 1476. Besides the vagueness, overbreadth, and protected interest issues, the *Finley* court also addressed the prior restraint question originally advanced in *New School*, *supra* notes 93-95 and accompanying text. Claiming that it was "unsupported by any authority," however, the *Finley* court dismissed the artists' prior restraint argument. 795 F. Supp. at 1464.

127. The grants were for the List Visual Arts Center at the Massachusetts Institute of Technology for an exhibit entitled "Corporal Politics," and for Virginia Commonwealth University's Anderson Gallery for the "Anonymity and Identity" exhibit. The Chairperson claimed the works were "unlikely to have the long-term artistic significance necessary to merit endowment funding." See Stephen Burd, *Rejection of 2 Proposals by Acting Head of Arts Endowment Spawns Protests, Questions About Accepting Agency Support*, CHRON. OF HIGHER EDUC., May 27, 1992, A21-A23.

128. *Id.* Both the peer review panel and the National Council on the Arts strongly recommended funding the shows.

129. William H. Honan, *Endowment Head Draws Protest and Praise*, N.Y. TIMES, June 8, 1992, C11.

130. The panel stated: "[o]ver the course of a week, it has become abundantly clear that the process of peer-panel review has become severely compromised and placed in great jeopardy." Two additional peer-panels later resigned in protest. See Burd, *supra* note 127.

claimed the vetoed grants "failed to demonstrate artistic excellence."¹³¹ Calling the decisions a "last, desperate act," many contended that the Chairperson rejected the festivals for political, rather than aesthetic, reasons.¹³²

With the election of President Bill Clinton in November 1992, the art community hailed a new optimism and a renewed sense of artistic freedom. Many praised the end of the "suffocating environment" at the NEA, and claimed that the administration would generate a "cultural renaissance" in America.¹³³ Chairperson Radice resigned but only after disbursing 90 percent of the NEA's emergency funds, leaving the current staff less than \$90,000 for the 1993 fiscal year.¹³⁴

The much heralded election of Bill Clinton may not fully calm the turbulent seas at the NEA. During the campaign, candidate Clinton did indeed oppose content restriction on NEA-funded art, and vowed to "depoliticize" the NEA.¹³⁵ Yet in a recent interview, the President stated that while he did favor freedom of speech and artistic expression, he believes that "publically funded projects should strive to reflect the values that most communities share."¹³⁶ Whether these "community values" threaten to cast yet another shadow over NEA decision making remains to be seen.

V. CONCLUSION

The purpose of art is to hold a mirror up to society, to point out its flaws and defects. In short, that encourages dialogue. The nature of our pluralistic society ensures that some artistic views will not be palatable to many, if not most, American citizens; however, our society loses something rare and precious every time we shut out even a single voice.

Government does have an interest in how it spends its funds, and it may regulate truly obscene speech. Yet it must resist the majoritarian

131. Stephan Salisbury, *NEA Rejects 3 Grants for Gay Film Festivals*, PHILA. ENQUIRER, Nov. 21 1992, at A1.

132. *Id.*

133. Karen Ficker, *Culture with Clinton-As the New US President Takes Over*, Karen Ficker *Looks at the Implications for the Arts*, FIN. TIMES, Jan. 23, 1993, XVIII.

134. Jacqueline Trescott, *The Art's Agency's Spending Flurry; Last Minute Grants Deplete Reserve Fund*, WASH. POST, Feb. 4, 1993, at C1. Radice remained defiant to the end. See generally Karin Lipson, *Art v. Obscenity; Bush's Decency Czar: I Have No Regrets*, NEWSDAY, Nov. 7, 1992, at 8.

135. Karin Lipson, *Holding Our Breath*, NEWSDAY, Feb. 8, 1993, at 45.

136. Ficker, *supra* note 133.

urge to dictate standards of art. Vague and threatening “obscenity pledges” or “decency clauses” simply will not suffice. If the government actively participates in the art world, as indeed it should, it must do so as a neutral and unbiased supporter, rather than a partisan and intolerant censor.

Michael Wingfield Walker