Turmoil at the National Endowment for the Arts: Can Federally Funded Act Survive the "Mapplethorpe Controversy"?

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COMMENTS

Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the “Mapplethorpe Controversy”?

If it is true that “one [person’s] vulgarity is another’s lyric,” is it equally true that one person’s obscenity is another’s art?

The United States Congress, caught up in the controversy surrounding the National Endowment for the Arts (NEA), has indicated that it is not true—at least not when the “art”/“obscenity” is federally funded.

The National Endowment for the Arts has been in a precarious position since June 1989, when several controversial grants resulted in legislation to restrict its funding and study its grant making process. Torn between the artists who benefit from its grant money and the legislature that controls its funding and continued existence, the NEA struggled to maintain its equilibrium and a semblance of political independence.


Another example of Frohnmayer’s struggle to maintain a middle position occurred in August 1990, when he rejected grants for four controversial performance artists who had come to the atten-
Nevertheless, more than a year after the controversy began, at a time when the federal government faced fiscal shutdown, the future of the National Endowment for the Arts was again the focus of congressional debate. Given a second chance to decide its fate, Congress passed legislation which, though substantially altering the Endowment's enabling legislation, extended its authorization for three-years. While this legislation has been viewed as both a victory and mere stay of execution,

ation of Congress. When an outcry arose from the arts community, Frohnmayer said that the artists could appeal the decision, though there was no precedent for such action. He later upheld the rejections. See generally Fields, *Endowed to Confront*, Wash. Times, Aug. 14, 1990, at G1.


7. See Lipson, *Few Fans for NEA Compromise*, Newsday, Oct. 31, 1990, at 7. "A compromise bill extending the existence of the National Endowment for the Arts, ... has left some supporters and some opponents of the NEA equally unenthusiastic. ..." While Los Angeles choreographer Bella Lewitzky, who filed a suit against the NEA in July, described the legislation as a "victory," Joseph Papp, director of the New York Shakespeare Festival, referred to the legislation as a "trap." The Rev. Donald Wildmon of the American Family Association said that with the new legislation, "you're worse off than before." See also De Witt, *New Fiscal Year Ends Anti-Obscenity Pledge*, N.Y. Times, Oct. 31, 1990, at C16, col. 5; Zimmerman & Phillips, *NEA Bill's 'Decency Clause' Raises Doubts*, USA Today, Oct. 29, 1990, at 1D (Melanne Verveer of People for the American Way, a free-speech lobbying group, expressed concern that the act's new "decency clause" is "vague and poten-
its passage raises almost as many questions about the NEA’s continued viability as the events that initially sparked the controversy in 1989.

The controversy surrounding the National Endowment for the Arts represents a crisis in the ongoing debate regarding the proper role of government in the business of funding art. Congress has, in employing restrictive language, creating an Independent Commission, and amending the NEA’s enabling legislation, demonstrated a willingness to curtail federally funded art and limit free speech and artistic expression in the process. Such congressional action holds serious, though subtle, implications for the future of federally funded art in the United States. The NEA has become overly conscious of the emotionally charged atmosphere in which it exists. In the wake of intensified congressional scrutiny lies the reality of self-censorship, both for the NEA and the arts community.

Part I of this article describes the national and legislative response to the “Mapplethorpe Controversy” and its charges of NEA-funded obscenity. Part II briefly describes the history of support for the arts in the United States. It traces the development of the NEA in the context of the role of government sponsored art in the American democratic system, and places the recent debate surrounding the Mapplethorpe Controversy in an historical context of controversy. Part III discusses the congressional response to the Mapplethorpe Controversy through the 1990 Interior Appropriations Act and the Arts, Humanities and Museums Amendments of 1990 in order to analyze the implications of such legislation for the future of federally funded art in the United States. Part IV briefly describes the law dealing with the federal subsidization of expression and analyzes the constitutional implications of the restrictions imposed on NEA grant making procedures under the 1990 Arts Amendments. The article concludes that the legislative response to the Mapplethorpe Controversy raises the spectre of increased politicization of NEA grant making decisions and the reality of a chilling effect on both the NEA and the arts community.

*temporarily unconstitutional.* Robert Lynch, president of the National Assembly of Local Arts Agencies asserted that grant recipients “will hold back a touch, wondering what [decency] means.”)

8. See generally 1990 Interior Appropriations Act, supra note 2; 1990 Arts Amendments, supra note 6.
I. THE "MAPPLETHORPE CONTROVERSY":9 A NATIONAL AND LEGISLATIVE RESPONSE TO FEDERALLY FUNDED OBSCENITY

The NEA crisis began in June 1989, when Congress learned that the NEA was responsible for funding an Andres Serrano photograph entitled Piss Christ.10 Spurred by conservative groups such as the American Family Association (AFA), conservative leaders in both the House and Senate urged that immediate action be taken against the Endowment.11

In an attempt to deflect further congressional scrutiny, Washington's Corcoran Gallery abruptly canceled a NEA-funded retrospective of the photographs of the late Robert Mapplethorpe.12 Although the exhibition had previously toured Philadelphia and Chicago without incident, museum director Christina Orr-Cahall acted out of concern that the "homoerotic and sadomasochistic" themes of some of the photographs would exacerbate congressional outrage and negatively affect the NEA's funding under the 1990 Department of the Interior Appropriations

9. The controversy surrounding the National Endowment for the Arts resulted, to a large extent, from the agency's indirect funding of a photographic retrospective by Robert Mapplethorpe. See infra notes 12-15 and accompanying text. Although the controversy went beyond the Mapplethorpe grant to the very process of grant making by the NEA, Robert Mapplethorpe remained the dominant symbol of the legislative and cultural struggle to reassess the role of government in the funding of artistic endeavor. Thus, the recent controversy surrounding the NEA is here referred to as the "Mapplethorpe Controversy."

10. McGuigan & Glick, When Taxes Pay for Art, NEWSWEEK, July 3, 1989, at 68. The photograph depicts a plastic crucifix submerged in the artist's urine. According to Serrano, the photograph symbolized "a rejection of organized attempts to co-opt religion in the name of Christ." The NEA funded the project through a $15,000 subgrant to the Southeastern Center for Contemporary Art (SECCA) in Winston-Salem, North Carolina. Although it was the Serrano picture that initiated the controversy over NEA funding, it was soon enveloped by the Mapplethorpe imbroglio. See infra notes 12-15 and accompanying text.

11. On May 18, 1989, Senator Alfonse D'Amato (R-N.Y.) sponsored a letter to acting NEA chairman Hugh Southern, asking that the Endowment change its grant-making procedures. Over two dozen senators co-signed the attempt to prevent future funding of "shocking, abhorrent and completely undeserving" art. In the House, Dick Armey (R-Tex.) sponsored a similar letter to the Endowment which was signed by 107 representatives. Carlson, Whose Art Is It, Anyway?, TIME, July 3, 1989, at 21; Gamarekian, Corcoran, to Foil Dispute, Drops Mapplethorpe Show, N.Y. Times, June 14, 1989, at C22.

The Rev. Donald Wildmon of the AFA was largely responsible for initiating this congressional response. His newsletter prompted the thousands of letters which poured into Congress protesting the Serrano grant. McGuigan & Glick, supra note 10.

12. Gamarekian, supra note 11. The retrospective, entitled Robert Mapplethorpe: The Perfect Moment, included several controversial photographs involving children with their genitals exposed, and depictions of homosexual and sadomasochistic acts. A $30,000 NEA grant had been used by the University of Pennsylvania's Contemporary Art Institute (CAI) to organize the exhibit. See Vance, The War on Culture, ART IN AMERICA, Sept. 1989, at 39.
The Corcoran severely miscalculated the effect of the cancellation. Instead of shielding itself from involvement in the controversy, it opened itself and the NEA up to resounding criticism on all sides. Artists characterized the cancellation as censorship and an encroachment on artistic freedom. Constituent-conscious politicians and religious conservatives characterized such use of government funds as an affront to the morality and values of the majority of Americans, paid for by their own tax dollars.

Asserting that the Mapplethorpe and Serrano grants warranted the imposition of restrictions on the NEA's appropriation under the 1990 Interior appropriations bill, Representative Dana Rohrabacher (R-Cal.) proposed an amendment to completely eliminate NEA funding. Although the Rohrabacher Amendment was ultimately rejected, an amendment by Representative Charles Stenholm (D-Tex.) cut NEA funding by $45,000, the amount expended for the Serrano and Mapplethorpe grants.

In the Senate, Jesse Helms (R-N.C.) led the battle to impose restrictive language on the Endowment. On July 26, 1989, he offered an amendment to prevent federal support for "obscene and indecent" art,

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13. See Carlson, supra note 11 ("We really felt this exhibit was at the wrong place at the wrong time... We had the strong potential to become some persons' political platform.") (quoting Christina Orr-Cahall).

14. Gamarekian, Crowd at Corcoran Protests Mapplethorpe Cancellation, N.Y. Times, July 1, 1989, at 14, col. 3. On June 30, the Coalition of Washington Artists organized a protest against the cancellation that drew a crowd of 700. Several days earlier, the Washington Project for the Arts had agreed to host the canceled Mapplethorpe exhibition beginning July 20, 1989. See also Can Crippled Corcoran Survive?, ART IN AMERICA, Nov. 1989, at 43 (Several artists withdrew shows from the Corcoran's 1989-90 season in protest of the cancellation.); McGuigan & Glick, supra note 10 (Harvey Lichtenstein, president of the Brooklyn Academy of Music, stated that "[t]he question here is one of censorship."); Gamarekian, supra note 11 (Jock Reynolds, director of the Washington Project, referred to the Corcoran's cancellation as "an outright cave-in to conservative political forces who are once again trying to muzzle freedom of expression in the arts.").

15. See, e.g., 135 CONG. REC. S12,111 (daily ed. Sept. 28, 1989) (statement of Sen. Helms) ("If artists want to go in a men's room and write dirty words on the wall, let them furnish their own crayons; let them furnish their own wall. But do not ask the taxpayers to support it with their hard-earned money.").


18. Id. at H3655.

19. See id. at H3644. The Stenholm provision was offered as an amendment to a perfecting amendment by Representative Dick Armey which called for a ten percent reduction in the NEA's funding for fiscal year 1990, rather than a complete elimination of its appropriation. See id. at H3642. The Stenholm Amendment was adopted by a vote of 361-65, id. at H3653, and the Armey perfecting amendment, as amended, by a vote of 332-94. Id. at H3654.
art that "denigrates the objects or beliefs . . . of a particular religion or non-religion," and art that "denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin."\(^2^0\) The amendment was accepted by the leaders of the Appropriations Committee and adopted by voice vote.\(^2^1\)

In response to criticism that his content restrictive amendment had been accepted "in the dead of night," Senator Helms requested a vote on the amendment in the form of an instruction to the Senate conferees on the Interior appropriations bill.\(^2^2\) However, concerns regarding the constitutionality of several of the amendment's provisions\(^2^3\) as well as the reluctance of Committee leaders to abide by such an instruction\(^2^4\) resulted in the tabling of the amendment.\(^2^5\) Undaunted, Senator Helms eliminated the challenged language and offered an amendment to prohibit funding for "obscene and indecent materials."\(^2^6\) This amendment

\(^2^0\) 135 CONG. REC. S8806 (daily ed. July 26, 1989) (Helms Amendment No. 420):

None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce—

(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) material which denigrates 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.

\(^2^1\) Id. at S8808. Other Senate provisions called for a five-year ban on funding to the offending arts agencies, id. at S8774, and an allocation of an additional $100,000 for an outside study of NEA grant making procedures. Id. at S8779.

\(^2^2\) 135 CONG. REC. S12,110 (daily ed. Sept. 28, 1989) (Helms Amendment No. 891). See also id. at S12,111 (statement of Sen. Helms):

[When I offered my amendment in July that was approved on a voice vote in the Senate, the papers declared that Mr. Helms had slipped into the Senate Chamber and got this amendment passed in the dead of night . . . But since so many misrepresentations have been floating across the land, I decided the Senate of the United States should vote on this question of whether or not we want this kind of garbage to be funded with the American taxpayers' money.]

\(^2^3\) See generally id. at S12,121-133 (debate on Helms Amendment No. 891) (expresses a concern regarding constitutionality of inclusion of term "indecent" and language prohibiting funding for works which denigrate religion or non-religion).

\(^2^4\) See, e.g., id. at S12,118 (statement of Sen. Byrd) ("[T]he appropriate time . . . to raise this question would be when amendments are brought back in disagreement . . . [Senator Helms] certainly has a right to raise it here, but as a conferee, I will pay no attention whatsoever to this instruction.").

\(^2^5\) Id. at S12,133 (Helms Amendment No. 891 tabbed by vote of 62-35).

\(^2^6\) 135 CONG. REC. S12,210 (daily ed. Sept. 29, 1989) (Helms Amendment No. 894): "None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce indecent or obscene materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts."
by Senator Helms was adopted after the language restricting funding of “indecent” art was removed by a second-degree amendment offered by Senator Wyche Fowler (D-Ga.).

In what was described as one of the most difficult, controversial, and emotional appropriations debates, the House-Senate conference committee for the Interior formulated a compromise provision which represented a more moderate version of the Senate bill. The conference report language prohibited the use of NEA funds to “promote, disseminate, or produce material which in the judgment of the National Endowment for the Arts . . . may be considered obscene,” and adopted the Senate recommendation that an Independent Commission be established to review NEA grant making procedures. The main difference between the conference language and the Helms Amendment was the addition, in the former, of the *Miller v. California* language that the depictions of “sadomasochism, homo-eroticism, exploitation of children or individuals engaged in sex acts” be without “serious literary, artistic, political or scientific value” when “taken as a whole.”

Referring to the addition of such language as a “loophole so wide
you can drive twelve Mack trucks through it abreast," Senator Helms made a last-ditch effort to strengthen the conference report amendment by forbidding the use of NEA funds to "promote, discriminate, [sic] or produce materials that are obscene or that depict or describe, in a patently offensive way, sexual or excretory activities or organs, including but not limited to obscene depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sexual intercourse." Although Senators were well aware that a vote against funding restrictions would be portrayed as a vote for pornography, they rejected Helms' efforts and chose the less restrictive language embodied in the conference report. In the House, Representative Sidney Yates (D-Ill.), chairman of the House Interior Appropriations Subcommittee and long-time defender of the NEA, was instrumental in urging the conference report's adoption without amendment to the NEA provision.

The Mapplethorpe Controversy did not, however, end with President Bush's signature of the 1990 Interior Appropriations Act. While the restrictions imposed on NEA funding warned that a repeat of the Mapplethorpe and Serrano grants would not be tolerated, events over

35. Id. (Helms Amendment No. 991 to House and Senate Amendment No. 153).
36. See id. at S12,969 (statement of Sen. Helms) ("Vote to table the Helms amendment, but be prepared for some questions to be asked by the people back home."). See also 135 CONG. REC. S12,130 (daily ed. Sept. 28, 1989) (statement of Sen. Helms) ("Senators can vote as they please but a vote against this amendment is a vote for pornography and blasphemy.").

Members of the House were faced with similar pressures. See Mathews, Fine Art or Foul?, NEWSWEEK, July 2, 1990, at 50. Mailings were sent by the GOP's Congressional Committee to the districts of 22 Democrats who voted against an amendment to cut the NEA budget by the amount expended for the grants that produced the Mapplethorpe and Serrano works. The American Family Association circulated the names of representatives who opposed "a tough 'pornography' amendment."

37. The Helms Amendment (No. 991) was tabled by a vote of 62-35, 135 CONG. REC. S12,987 (daily ed. Oct. 7, 1989), and the conference report adopted by a vote of 91-6. Id. at S12,983.
40. See 135 CONG. REC. S12,968 (daily ed. Oct. 7, 1989) (statement of Sen. Helms): "If the Senate does not approve the amendment today, the Senate will vote on it again and again, on bill after bill, month after month, year after year, until Government subsidies for 'artistic' perversion are prohibited once and for all."; id. at S12,975 (statement of Sen. Rudman):

Let us recognize that we have fired a warning shot across their bow. . . . [I]f it was to happen again in the coming year, with this language there is little doubt in my mind what we will do. . . . If they do not stop funding obscenities, we will do what we have to do.

Id. at S12,983 (statement of Sen. Byrd): "[I]f there is a repetition of what has happened in this
the next year kept Mapplethorpe and the NEA at the center of national attention.

Less than a month after the restrictive language was passed, newly appointed NEA Chairman John E. Frohnmayer revoked a $10,000 grant to a New York City art show on AIDS. Noting the recent criticism directed at the Endowment and the "seriousness of Congress' directives," Frohnmayer justified the revocation on the fact that the show was too political. Although funding for the show was later reinstated, the new Chairman's action was perceived by the arts community as a clear message that, in his urgency to avoid future confrontations with Congress, Frohnmayer would censor the NEA from within on grounds not even mentioned in the 1990 Interior Appropriations Act.

In another attempt to appease Congress, Frohnmayer instituted a certification requirement by which recipients, as a condition of receiving NEA grant money, promised not to produce works that might be considered obscene. This obscenity pledge stirred controversy not only in the instance, I think that the next firestorm would be much, much greater, and . . . it could lead to the unfortunate result of the withholding of Federal funds entirely from the endowments."

Frohnmayer was appointed Chairman of the National Endowment for the Arts on October 10, 1989. See Honan, Arts Chief's Potholed Path to a Grants Decision, N.Y. Times, Nov. 20, 1989, at 13, col. 1.

Honan, Arts Endowment Withdraws Grant for AIDS Show, N.Y. Times, Nov. 9, 1989, at A1, col. 6. The show, entitled Witnesses Against Our Vanishing, included images of homosexual acts.

Frohnmayer's cancellation of the show was not based on the show's art, but rather on its catalogue, which criticized Cardinal O'Connor, the Roman Catholic Archbishop of New York, Rep. William E. Dannemayer (R-Cal.), and Sen. Jesse Helms. Frohnmayer stated that "political discourse ought to be in the political arena and not in a show sponsored by the endowment." See also Glueck, Border Skirmish: Art and Politics, N.Y. Times, Nov. 19, 1989, at H1, col. 2.


Honan, supra note 42. Frohnmayer stated that "we must all work together to insure that projects funded by the endowment do not violate either the spirit or the letter of the law. The message has been clearly and strongly conveyed to us that Congress means business." Although the grant for the exhibit was eventually restored, the catalogue was excluded from funding. See Honan, supra note 44. See also Testing the New Arts Rules, NEWSWEEK, Nov. 27, 1989, at 43. "The issues are free speech, censorship and self-censorship." (quoting Susan Wyatt, executive director of the gallery which sponsored the exhibition).

The restrictive language in the 1990 Interior Appropriations Act only prohibited the funding of works that were obscene, not political. See supra note 30 and accompanying text.

"[G]rant recipients, in order to receive funds, must agree that they will not use those grant funds to promote, disseminate or produce materials that are "obscene" under the well-settled legal definition employed by the Supreme Court in Miller v. California." Statement of Policy and Guidance for the Implementation of Section 304 of the 1990 Interior Appropriations Act (effective July 5, 1990), reprinted in THE INDEPENDENT COMMISSION, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS, at 88 (Sept. 1990) [hereinafter INDEPENDENT COMMISSION, REPORT ON THE NEA].
arts community, but also within the NEA. Referring to the pledge as a "loyalty oath," several artists and art institutions rejected their grants and filed suits to challenge the constitutionality of the requirement.47 Within the NEA, Frohnmayer refused to follow the recommendations of both the grant advisory panels and the National Council on the Arts that the pledge requirement be discontinued.48

47. See Mathews, supra note 36, at 52; Hartigan, Two Literary Journals Reject NEA Grants, Boston Globe, Aug. 10, 1990, at 35. Artists and arts institutions such as Joseph Papp, producer of New York Shakespeare Festival, the University of Iowa Press, the American Poetry Review, the Boston Review, and the Paris Review turned down NEA grants. In the end, at least "sixteen artists and arts institutions refused to sign the pledge and forfeited more than $318,000 in endowment grants. . . ." Chicago Tribune, Oct. 30, 1990, at 4.


For a description of the arts community's reaction, see Masters, Arts Panel Urges End to Grant 'Pledge'; Breaks with NEA on Anti-Obscenity Restriction, Wash. Post, Aug. 4, 1990, at G1: The chilling effect of the pledge "has been almost incalculable. . . . [I]t is a loyalty oath." (quoting Ray Goodman, member of the National Council on the Arts). The Council is "being cowed and watered down and getting more and more on a road to censorship. It all still looks very benign but this can lead to something very dangerous. . . . [F]ear has been injected into the arts community. . . ." (quoting artist Helen Frankenthaler).

48. Chicago Tribune, Sept. 11, 1990, at 5; Zimmerman, Future of NEA, Grants 'in Question', USA Today, Aug. 6, 1990, (Life). Although both the panels and the National Council urged Frohnmayer to drop the pledge, he stated that he would wait to see what happened in the courts and in Congress. See also Archibald & Price, NEA Council Rejects Its Own Anti-Obscenity Rules, Wash. Times, Aug. 6, 1990, at A3 (Sen. Helms characterized the Council's action as another example of the NEA's bad faith. "Obviously, the NEA doesn't want to stop pornography financed by the American taxpayers."). For an explanation of the role of advisory panels and the National Council on the Arts in the NEA's grant making process, see infra notes 157 & 161-63 and accompanying text.

The report of the Independent Commission stated that "such a ban has no talismanic capacity to encapsulate and eliminate the problems that are actually involved in the present controversy," and that the NEA should "rescind its current requirement that grantees certify that the works of art they propose to produce will not be obscene." INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 84, 88. Frohnmayer rejected this suggestion as well. De Witt, New Fiscal Year Ends Anti-Obscenity Pledge, N.Y. Times, Oct. 31, 1990, at C16, col. 5.


On January 9, 1991, a California Federal District Court jointly decided cases brought by Bella
As the NEA struggled to reconcile the new congressional mandate with requirements under its enabling legislation that its grants “encourage and assist artists,” national attention once again focused on the photographs of Robert Mapplethorpe. On April 7, 1990, the Mapplethorpe retrospective opened at Cincinnati’s Contemporary Art Center. Several hours later, the Center and its director, Dennis Barrie, were indicted on obscenity charges.

On June 29, 1990, Frohnmayer was pressured into rejecting funding for four controversial performance artists by the precariousness of the NEA’s position in Congress and by growing White House impatience.


50. Price, Judge Lets Cincinnati Show Go On, Wash. Times, Apr. 9, 1990, at A1. The exhibit received no funding from the NEA. It was only the initial creation of the Mapplethorpe exhibit by the University of Pennsylvania’s Institute of Contemporary Art that received a NEA grant. See supra note 12.

51. Price, supra note 50. The charges were based on five photographs involving homoerotic acts and two of nude children. Barrie faced up to $2,000 in fines on the two misdemeanor charges, and a year in prison. The gallery faced $5,000 in fines. See also NEA Head Gives Strong Support to Mapplethorpe Exhibit, United Press Int’l, Apr. 18, 1990. John Frohnmayer commented that “[t]he picture of police marching into a sanctuary of thought is inimical to everything this country stands for and chills me to the bone.”

With one trial pending, the Mapplethorpe exhibit traveled to Boston’s Institute of Contemporary Art, where it opened without incident despite demands for its cancellation. See, e.g., Butterfield, Disputed Art Show Opens Peacefully, N.Y. Times, Aug. 2, 1990, at A10, col. 1; Hartigan, Group Protests ICA’s Mapplethorpe Exhibit, Boston Globe, July 19, 1990, at 77 (American Freedom Coalition of Massachusetts called for the immediate cutoff of the museum’s funding from Massachusetts’ Cultural Council); Catholic Groups Call for Ban on Mapplethorpe Exhibit, United Press Int’l, July 6, 1990 (The Catholic League for Religious and Civil Rights called for the banning of the exhibition).

52. See Bedard & Archibald, Bush Has a Change of Art, Wash. Times, June 13, 1990, at A1. Referring to grant requests by Karen Finley and John Fleck, White House spokesman, Marlin Fitzwater stated: “We . . . feel that you cannot, should not provide federal subsidies for this kind of obscene material. We need to speak out against subsidies—by federal taxpayers—for this kind of art.” See also Endowment Finds Fault with Artists, Chicago Tribune, Aug. 28, 1990, at 3 (In rejecting the grants, Frohnmayer stated that the work of the four artists would not “enhance public understanding and appreciation of the arts.”).

The four artists whose grants were denied were Karen Finley, Holly Hughes, John Fleck, and Tim Miller. Finley is notorious for an act in which she smears her partially naked body with chocolate and bean sprouts to symbolize the oppression of women. Fleck is known for acts in which he performs naked and urinates on stage. The work of Hughes and Miller deals with issues surrounding lesbianism and homosexuality. See generally Archibald, NEA Chief Seeks Quiet Rejection of 5 Theater Grants, Wash. Times, June 12, 1990, at A3. The nature of these rejections lends support to the argument that much of the controversy surrounding the NEA stemmed from anti-homosexual sentiment.
Although the grants had been unanimously approved by the theater arts review panel, the National Council on the Arts voted in May to delay decision on them until August. In June, Frohnmayer polled each of the Council members by telephone before announcing that four of the eighteen grants had been denied. This announcement came just several days after Frohnmayer reportedly stated that the eighteen performance arts grants were being reviewed in order to contain the controversy and quiet political opposition. While many in Congress saw the rejections as a step in the right direction, Frohnmayer was excoriated by the arts community for having again caved in to political pressure. In Septem-


Members of the theater panel issued a strong statement declaring that the continuing controversy over the performance arts grants was "contribut[ing] to a climate of fear that is anathema to the creation of art in a free democracy." See Parachini, Theater Advisers' Resolution Condemns NEA's Critics, L.A. Times, June 16, 1990, at F1, col. 2.

54. Frohnmayer's individual polling of Council members was unprecedented, and was reportedly done to avoid discussion of the controversial grants at the next Council meeting, which had recently been opened to the public. See Archibald, supra note 52.

55. See Parachini, NEA Rejects Grants for 4 Performance Artists, L.A. Times, June 30, 1990, at 1, col. 2. On June 27, Frohnmayer met with twelve community arts leaders in Seattle and reportedly stated that action on the performance arts grants would seek to "contain the controversy over the NEA and pacify Helms and other conservatives in Congress while stemming growing concern in the White House over the NEA crisis."

56. See Masters, supra note 53. "It will soothe some of the critics because they see finally some policy makers are making some decisions." (Rep. Tom Coleman (R-Mo.)); "It reflects the kind of sensitivity that members of Congress had been hoping for." (Rep. Paul Henry (R-Mich.)); "[Frohnmayer's action] probably helps us to avoid an amendment that would impose serious subject-matter restrictions on the NEA, so politically I think it's helpful." (Rep. Pat Williams (D-Mont.)). See also 136 Cong. Rec. H9412 (daily ed. Oct. 11, 1990) (statement of Rep. Gaydos):

[A] number of things have occurred that have encouraged me to believe that changes for the better were coming forth. . . . [W]e have seen a different kind of activity by the chairman of the National Endowment for the Arts—a willingness to take unpopular actions in the interest of seeking to come to terms with the objections to some grant applications.

But see 136 Cong. Rec. E2247 (daily ed. July 10, 1990) (statement of Rep. Edwards). "[U]nder extreme pressure by those who impose their personal standards on American artists . . . the chairman of the National Endowment for the Arts was prevailed upon to deny four grants recommended by the peer panel. The chairman, John E. Frohnmayer, cited 'political realities' as the reason for his vetoes."

57. Parachini, supra note 55. "Political expediency is a horrible way to make judgments about art and the public's access to it. These artists are being punished for having their names appear in the press. It is as simple and chilling as that." (quoting Charlotte Murphy, executive director of the National Association of Artist Organizations). Philip Arnoult, chairman of the theater panel that screened the applications in question said "I believe that the decision on these four artists was based on perceived political realities. But I disagree with that decision." Id.

In May, the NEA had denied two out of three grants to the University of Pennsylvania's Institute
ber, the rejected artists filed suit against the NEA, requesting that their grants be restored.58

The vindication of the photographs of Robert Mapplethorpe by a Cincinnati jury on October 5, 1990 did nothing to quell the rising tide of antagonism toward the NEA.59 In an important election year, a controversy which so easily lent itself to emotional outbursts of rhetoric and righteousness helped divert national attention from more formidable problems like the Savings and Loan scandal, the Middle East, and a deficit out of control.60

of Contemporary Art, see supra note 12, because, as Council member Jacob Neusner said, a majority of the Council thought approving all three would be perceived as an act of defiance toward Congress. Master & Kastor, NEA Advisers Kill 2 Grants, Defer 18; Action Called a Response to Endowment's Critics, Wash. Post, May 14, 1990, at B1.

58. Parachini, 'NEA Four' Suit Seeks Rejected Grant Funds, L.A. Times, Sept. 28, 1990, at B3, col. 5. The four artists alleged in their complaint that they were denied grants on political grounds rather than artistic merit—that the grants were denied "because of the controversial political content of their work . . . with the aim of suppressing the expression of plaintiffs' ideas."


Commenting on the outcome of the trial, director Dennis Barrie stated that:

[Artists are] going to find less freedom. Because this is a period in which enough political clout has been activated to really try to crush creativity in this country. And that's going to have an effect. It's going to have the effect of self-censorship, which has already started to occur all across the nation.

In other words, don't do risky or challenging work, don't present challenging plays, or don't present challenging dance or controversial exhibitions. Artists and the arts institutions for the next few years, because of the impact of Helms and others, are going to do less controversial work.

The issue goes far beyond the issue of sexuality and art. The people who oppose federal involvement in the arts and propose censorship don't stop at sexual issues. . . . They have a political, social agenda. They would just as soon curtail political expression, social expression, expression dealing with minorities as they would dealing with sexual content.


60. See 136 CONG. REC. H9427 (daily ed. Oct. 11, 1990) (statement of Rep. Williams): It is unfortunate that there are those both within and outside of the Congress who have used opposition to the National Endowment for the Arts to troll for money, membership, and votes. Some in this country have used the artist Robert Mapplethorpe as this
Although President Bush had announced in March that his Administration supported NEA reauthorization without content restrictions,\(^{61}\) White House support began to waver as the controversy showed no sign of diminishing. Conservatives on the religious right continued to bombard Congress and the American people with diatribes against NEA funding of "perversion."\(^{62}\) In June, the Administration warned Republi-
can leaders that questionable NEA grants would have to stop.\textsuperscript{63} NEA supporters increasingly doubted the agency's ability to weather the storm of controversy, and considered various tactics to prevent or delay the reauthorization debate.\textsuperscript{64} Nevertheless, vehement opposition by NEA adversaries made a confrontation over reauthorization inevitable.

In the House, Representatives Steve Gunderson (R-Wis.) and Tom Coleman (R-Mo.) proposed an amendment which called for the distribution of sixty percent of the NEA's 1991 appropriation to state and local arts agencies.\textsuperscript{65} Representative Paul Henry (R-Mich.) proposed an amendment mandating that no NEA-funded project "deliberately denigrate the cultural heritage of the United States, its religious traditions or racial or ethnic groups."\textsuperscript{66}

\footnotesize

\textsuperscript{63} See Bedard & Archibald, supra note 52. White House spokesman, Marlin Fitzwater made a statement outlining President Bush's shifting position on the NEA. The statement was reportedly designed to inform Congress that the Administration had moved away from its earlier support of a five-year extension of NEA funding without restrictions.

\textsuperscript{64} Some members of Congress expressed the belief that support for the NEA's reauthorization was "disintegrating" due to all the opposition. Price, \textit{NEA Chief Wavers on Mapplethorpe}, Wash. Times, Apr. 27, 1990, at A1. Some suggested that a one year reauthorization rather than the usual five should be sought. Honan, \textit{Arts Endowment Backers Are Split on Strategy}, N.Y. Times, May 17, 1990, at C20, col. 3.

In June, Senator Orrin Hatch (R-Utah) said that he saw the agency "losing heavily. . . . I think it's going to be very difficult for it to withstand some of the [right wing] criticisms." Parachini, \textit{Theater Advisers' Resolution Condemns NEA's Critics}, L.A. Times, June 16, 1990, at F1, col. 2. See also 136 CONG. REC. H9429 (daily ed. Oct. 11, 1990) (statement of Rep. Schneider) (noting that more than twenty-four amendments to the NEA's reauthorization had been introduced over the summer in the House alone).

The reauthorization hearings were viewed as critical because several NEA opponents had made it clear during debate on the 1990 Appropriations Act, that the agency's future would be more properly debated at that time. Honan, \textit{The Arts Endowment: Still in Trouble}, N.Y. Times, Oct. 8, 1989, at E7, col. 1. Prior to the 1990 reauthorization, the agencies of the National Foundation on the Arts and Humanities, \textit{see infra} note 100, had come up for reauthorization every five years.


Reauthorization hearings are only incidentally concerned with funding. . . . These periodic reviews allow the authorizing committees, the agencies in their orbits, and the interest groups that revolve around them to gather for the purpose of examining a public policy's performance. The committees . . . can use reauthorization hearings as a vehicle for increasing their influence over the agencies under their statutory supervision.


\textsuperscript{66} Reich, supra note 65. Although this amendment was never debated as part of the reauthorization bill, Rep. Henry was instrumental in the inclusion of language in the Williams-Coleman Amendment requiring the NEA chairperson to develop funding procedures which "must take into consideration general standards of decency and respect for the diverse beliefs and values of
Aware of the NEA's desperate situation, and the impossibility of pulling together a core of support for a straight, five-year reauthorization, Representative Pat Williams (D-Mont.), chairman of the House subcommittee with jurisdiction over the NEA reauthorization, worked throughout the summer to formulate a compromise bill.67

In October, he announced that he and Representative Coleman had devised legislation—the Williams-Coleman compromise—which would alter the structure of the Endowment's grant making procedure;68 leave the obscenity determination to the courts;69 increase the percentage of NEA funding for state and local arts agencies;70 provide for increased public access to the arts through increased funding for rural and inner city areas and arts education;71 and authorize the General Accounting Office (GAO) to "evaluate the roles and responsibilities" and "relative effectiveness" of the NEA and state and local arts agencies in providing financial assistance.72

House debate on the NEA reauthorization ultimately focused on either amending the five-year reauthorization bill, or replacing it with the Williams-Coleman compromise language. Amendments were proposed by Representative Philip Crane (R-Ill.) to dissolve the Endowment,73 and by Representative Dana Rohrabacher to impose strict content restrictions which would go beyond those proposed by Jesse Helms in 1989.74


67. Although Williams had originally hoped for and proposed a straight five-year reauthorization without any content restrictions, H.R. 4825, 101st Cong., 2d Sess., 136 CONG. REC. H9431-32 (1990), he realized that, with disintegrating White House support and various Republican proposals designed to substantially restructure the agency, such a bill would never pass. See also id. at H9427 (statement of Rep. Owens) ("[T]he stampede has been so successful that it is going to be necessary to compromise in order to keep the program alive.").

68. 136 CONG. REC. H9448-53 (daily ed. Oct. 11, 1990). The compromise altered the role of the Chairperson by adding a number of specific factors which he or she must consider in promulgating funding policy, id. at H9450 (§ 103(b)). It also increased NEA supervision of the application process, id. at H9450-51 (§ 103(g)); increased reporting requirements for both the National Council for the Arts and the review panels, id. at H9451-53 (§§ 106(b), 109(9)); and altered the composition of the review panels to increase diversity of representation and eradicate the possibility of conflicts of interest, id. at H9452-53 (§ 109(9)).

69. Id. at H9450 (§§ 102(c), 103(b)).

70. Id. at H9453 (§ 110(a)(4)). The percentage of the Endowment's appropriation designated for state and local agencies was increased from 20% to 25% for fiscal years 1991 and 1992, and to 27.5% for fiscal year 1993.

71. Id. at H9451 (§§ 104, 105).

72. Id. at H9453 (§ 111(a)).

73. See id. at H9432-42 (Crane Amendment, text and debate).

74. See id. at H9442-48 (Rohrabacher Amendment, text and debate). The Rohrabacher Amendment sought, in part, to amend 20 U.S.C. § 954 by redesignating subsections (k) through (m)
After fierce debate, the language embodied in the Williams-Coleman substitute prevailed. In a highly unusual procedural move, the House appended the Williams-Coleman reauthorization bill to the 1991 Department of the Interior appropriations bill to be debated in conference with the Senate.

as subsections (i) through (t), and adding new subsections (k) through (q). These new subsections would prohibit the use of NEA funds to "promote, distribute, disseminate, or produce:"

(i) [material which] is (1) obscene; or (2) depicts or describes, in a patently offensive way, human sexual or excretory activities or organs.

(m) [material which] has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion.

(n) [material which] has the purpose or effect of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin.

(o) [material which] (1) employs, uses, persuades, induces, entices, or coerces any minor to engage in sexually explicit conduct for the purposes of producing any visual depiction of such conduct. [Under (2)(B)], "sexually explicit conduct" means actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masochism or sadism; (iv) lascivious exhibition of the genitals or pubic area of any person.

(p) [material in which] the flag of the United States is mutilated, defaced, physically defiled, burned, maintained on the floor or ground, or trampled.

(q) [material which] includes any part of an actual human embryo or fetus.

Id. at H9442-43.


76. The Williams-Coleman substitute was passed as a replacement for the language of H.R. 4825 by a vote of 382-42. Id. at H9460. The House defeated the Crane Amendment by a vote of 361-64, id. at H9442, and the Rohrabacher Amendment by a vote of 249-175. Id. at H9448.


78. Representative Ralph Regula had offered an amendment to the Interior Appropriations bill in order to ensure that restrictions would be imposed on the NEA. See 136 Cong. Rec. H9674 (daily ed. Oct. 15, 1990) (statement of Rep. Regula) ("[O]ne of the reasons that I feel that we need language in the appropriations bill is because we know this bill is going to get signed."). The Regula Amendment sought, in part, to make grants "sensitive to the nature of public sponsorship," "appropriate for a general audience," and reflective of "general standards of decency." Id. However, in order to avoid a repetition of the authorization debate, and to prevent the passage of conflicting legislation, Representative Williams offered the Williams-Coleman reauthorization bill (H.R. 4825) as a substitute for the Regula Amendment. Id. at H9679. The Regula Amendment was defeated by a vote of 234-171. Id. at H9683.

Another motivation for this action by the House was the fear that, with the Senate reauthorization bill held up in committee, see infra note 79 and accompanying text, no reauthorizing legislation at all would be passed. See 136 Cong. Rec. H9523 (daily ed. Oct. 12, 1990) (statement of Rep. Pashayan) ("[T]he addition of [the Williams-Coleman Substitute] to this bill might actually improve the chances that the new authorization language should become law.").

Although the Senate Labor and Human Resources Committee had approved a reauthorization bill for the NEA in September, the legislation had never reached the Senate floor. Therefore, the NEA controversy was discussed during Senate debate on the 1991 Interior appropriations bill. After the managers of the Interior Appropriations Committee summarily rejected the Williams-Coleman reauthorization amendment, the Senate debated its own proposals for NEA reauthorization.

An amendment by Senator Orrin Hatch (R-Mo.) proposed structural changes in review panel procedures and sanctions for recipients producing obscene works. This amendment was adopted over a proposal by Senator Helms which sought to revive his earlier attempts to prohibit funding for works which "promote, distribute, disseminate, or produce materials that depict or describe, in a patently offensive way, sexual or excretory activities or organs." Although the Hatch Amendment ultimately prevailed, Helms was successful in passing a different amendment by voice vote, prohibiting the use of funds for the "dissemination, promotion, or production of obscene or indecent material or material denigrating a particular religion."

During the House-Senate conference on the Interior appropriations bill, the Williams-Coleman language prevailed over the Hatch and Helms amendments.
Amendments and subsequently became law.\textsuperscript{84}

The debate surrounding the reauthorization and appropriation of the NEA reflects an enduring conflict between irreconcilable notions of federally funded art.\textsuperscript{85} Those who view the government as promoter of innovative and political art characterize the imposition of restrictions as censorship.\textsuperscript{86} Those who believe that federal funds should encourage the dissemination of art which reflects the experiences and culture of “mainstream” America characterize such restrictions as guarantors of accountability.\textsuperscript{87} The congressional response to the Mapplethorpe Controversy

\textsuperscript{84} See Parachini, \textit{Changed NEA Likely Even Without Content Rules}, L.A. Times, Oct. 29, 1990, at F6, col. 1 (“A parliamentary anomaly led House and Senate negotiators to conclude that they had to pass either the entire Senate or House version of the NEA bill—and could not mix the provisions.”). The conference report was passed in the House by a vote of 298-43. 136 CONG. REC. H12,417 (daily ed. Oct. 27, 1990). \textit{See id.} at H12,406 (statement of Rep. Regula) (“The House language is much stronger than the Senate language and, therefore, I think in prevailing with the House position, . . . we have a stronger set of guidelines for the National Endowment for the Arts, certainly much more so than we would have had with the Senate language.”). The conference report was adopted in the Senate by unanimous consent agreement, 136 CONG. REC. S17,679 (daily ed. Oct. 27, 1990), and signed by President Bush on November 5, 1990. 1991 Interior Appropriations Act, \textit{supra} note 6.

\textsuperscript{85} See, \textit{e.g.}, 136 CONG. REC. H9413 (daily ed. Oct. 11, 1990) (statement of Rep. Gaydos): [U]nderlying the entire debate on the reauthorization of this agency is the whole question of the Federal Government’s role in the arts. Is it the primary role of Government at the Federal level to provide dollars to individual artists, helping to free them from searching to meet basic needs so that they might create something?

Or, should the principle role of the Federal Government be that of enhancing our existing system of making artistic endeavors more available to the general public and of encouraging a greater appreciation for the broad spectrum of the arts by all of our citizens, whether they live in our cities, towns, or villages?

\textsuperscript{86} See, \textit{e.g.}, \textit{id.} at H9430 (statement of Rep. Pelosi):
[C]ensorship is dangerous. . . . The increasing political pressure on arts organizations and museums to monitor the work of their membership and to restrict the work that they exhibit is a disturbing trend. Censorship not only undermines the ability of artists to produce truly creative work, but it also shrinks our cultural horizons. The duty of the NEA should be to promote and encourage creativity, not to suppress it or to play Big Brother to artists.


The arts are a measure of our civilization—they chronicle our history, record our successes, warn of our weaknesses, and challenge us to seek out what is best in ourselves and in our national character.

Sometimes, art shocks our sensibilities. It is supposed to. But in a free society, we must not yield to the appeals of know-nothings. We must not embrace the calls for censorship. We must not tolerate the extreme and unwarranted intrusions of those who—if the truth be known—are against Federal support for the arts.

\textit{See also supra} notes 43, 47.

\textsuperscript{87} See, \textit{e.g.}, 136 CONG. REC. S16,626 (daily ed. Oct. 24, 1990) (statement of Sen. Helms) (“Let us lay to rest the nonsense about censorship somehow being involved in the Federal Government refusing to automatically grant funds to self-proclaimed artists. There is a great deal of difference—
clearly illustrates the unenviable position of a federal agency authorized to subsidize art in a democratic society.

II. DEMOCRACY AND GOVERNMENT SPONSORED ART

A. The Creation of a National Arts Endowment

The United States has never had a national cultural policy in the traditional European sense, 88 for the notion of government sponsored art was historically seen as inimical to the republican principles on which the country was founded. 89 America’s first experience with public funding for the arts occurred during Franklin D. Roosevelt’s New Deal, with the establishment of programs under the Treasury Department and the Works Progress Administration (WPA). 90 While the severity of the Depression necessitated expanded government involvement in the previously private realm of art, such involvement was always motivated by economics, rather than by a desire to promote or preserve American

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88. Sullivan, Preface to THE ARTS AND PUBLIC POLICY IN THE UNITED STATES at vii (W. Lowry ed. 1984) (“While other governments have had their ministries of culture and have decreed national policies with respect to the arts, our political leaders have generally shied away from attempts to define an American public policy toward the arts.”).

89. Wyszomirski, Controversies in Arts Policymaking, in PUBLIC POLICY AND THE ARTS 11 (K. Mulcahy & C. Swaim eds. 1982) [hereinafter Controversies]: While Americans have traditionally envied the European tradition and achievements in the arts, we have also recognized the roles that monarchies, aristocracies, and churches have played in providing public patronage for the arts. The close historical relationship between the arts and these elite institutions has created a cross-current of American opinion which suspects that artistic excellence may not be compatible with secular, democratic values.

See also Katz, Influences on Public Policies in the United States, in THE ARTS AND PUBLIC POLICY IN THE UNITED STATES 25 (W. Lowry ed. 1984) (describing “the unwillingness of Americans to give their national government the authority to set national standards of social well-being, let alone to enforce them,” as the result of federalism); Mankin, Government Patronage: An Historical Overview, in PUBLIC POLICY AND THE ARTS 111 (K. Mulcahy & C. Swaim eds. 1982) [hereinafter Historical Overview] (“Our early puritan background created cautious attitudes regarding the arts. Today we are pragmatists who demand tangible results from our investments. It is difficult to convince people to support art for its own sake; it must be justified as conducive of some further good.”).

90. Historical Overview, supra note 89, at 117-21. The Section on Fine Arts in the Treasury Department produced sculpture work and murals for buildings. The WPA’s arts projects were involved in theater, writing, art, music and history.
Congress at no time overwhelmingly embraced these programs and indeed, severely curtailed those that remained as the Depression receded.

While several post-World War II presidents expressed encouragement for artistic activity, it was not until 1965, at the height of Lyndon B. Johnson's Great Society, that legislation creating an agency for the arts was passed. The 1965 Arts and Humanities Act was, in part, a response to a pervasive American inferiority complex that cultural development in the United States had lagged behind industrial development.

91. Note, The National Endowment for the Arts: A Search for an Equitable Grant Making Process, 74 GEO. L.J. 1521, 1526 (1986) [hereinafter Note, Equitable Grant Making Process]. See also Historical Overview, supra note 89, at 118 (20,000 theatrical artists alone were out of work).

92. W. MCDONALD, FEDERAL RELIEF ADMINISTRATION AND THE ARTS 112 (1969), quoted in Historical Overview, supra note 89, at 121 (“At no time can it be said that Congress, as a whole, truly and generally supported the principle of work relief. Congress merely permitted its use, because in 1935 it was afraid to do otherwise and, having started the WPA, was after 1935, afraid to stop it.”).

The remaining programs were curtailed in part because a controversy erupted over the Federal Theater Project's funding of what many Congressmen deemed to be "radical" plays. Cummings, To Change a Nation's Cultural Policy: The Kennedy Administration and the Arts in the United States, 1961-1965, in PUBLIC POLICY AND THE ARTS 142 (K. Mulcahy & C. Swaim eds. 1982). See also Comment, Mechanisms for Control and Distribution of Public Funds to the Art Community, 85 DICK. L. REV. 629, 630-32 (1981) [hereinafter Comment, Mechanisms for Control] (noting that the WPA programs had been a frequent source of congressional discontent).


95. Note Equitable Grant Making Process, supra note 91, at 1527. See also 20 U.S.C.A. § 951(2) (1990) (“[A] high civilization must not limit its efforts to science and technology alone but must give full value and support to the other great branches of scholarly and cultural activity. . . .”) (to be recodified at 20 U.S.C. § 951(3)); id. § 951(7) (“[T]he world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.”) (to be recodified at 20 U.S.C. § 951(8)); NEW DIMENSIONS FOR THE ARTS, supra note 94, at 5 (quoting August Heckscher, Special Consultant on the Arts under President Kennedy):

[The United States is] entering a period when in terms of the genius and ability of individual artists in all fields, and when in terms of the excitement and enthusiasm of the great public, we are witnessing a kind of renaissance such as we have not had before and
It was also a realization by Congress that while encouragement and support for the arts were "primarily . . . matter[s] for private and local initiative,"96 private funds were becoming increasingly inadequate.97 Therefore it was deemed appropriate and necessary for the Federal Government to "complement, assist, and add to"98 local, state, regional and private agencies, and to "help create and sustain [both] a climate encouraging freedom of thought, imagination, and inquiry [and] the material conditions facilitating the release of [such] creative talent."99

The National Endowment for the Arts was one of several agencies created under the 1965 Arts and Humanities Act.100 While supporters of the legislation stated that the establishment of an arts agency would result in cultural progress and the advancement of civilization,101 critics asserted that art funded through a government agency would involve impermissible content-based discrimination and censorship—the creation of an "official" art form.102 Others argued that government funding would stifle experimentation and create a sort of middle-class majoritarian art.103 Artists expressed concern that government oversight would in-

which in the decades to come may well place us in the very forefront of the civilized world.

97. Comment, Mechanisms for Control, supra note 92, at 633.
99. Id. § 951(5) (to be recodified at § 951(7)). In terms of numbers of dollars, the NEA does not provide large-scale support for the arts. See id. § 954(b)(2) (total amount of grant may not exceed 50% of project's cost). See also Sullivan, supra note 88, at vii ("In relative terms, governmental financial support for the arts has been but a fraction of the entire reservoir of philanthropy, private patronage, and corporate contributions that reflect the pluralism of our political, economic, and social systems."). The NEA has, however, been instrumental in funding artists and art groups that would be ignored under a system of purely private patronage. See Mulcahy, The Rationale for Public Culture, in PUBLIC POLICY AND THE ARTS 52-53 (K. Mulcahy & C. Swaim eds. 1982) ("Public subsidy enables cultural institutions to do what they cannot afford and encourages them to do what they would not otherwise consider. . . . Public funding can partially free these institutions to provide more adventuresome programming, to reach out to new audiences, to keep admissions prices down while surviving financially.").
100. 20 U.S.C.A. § 953(a) (1990). The 1965 Arts and Humanities Act created a Foundation on the Arts and Humanities which was composed of the NEA, the National Endowment for the Humanities (NEH), and the Federal Council on the Arts and the Humanities. An Institute of Museum Services was created under the Foundation in 1984.
102. Id. at 19-23, 1965 U.S. CODE CONG. & ADMIN. NEWS at 3203-06. See also Note, Equitable Grant Making Process, supra note 91, at 1528.
fringe upon artistic freedom. 104

Painstaking efforts were made to address and guard against such dangers. The NEA was structured so as to insulate the funding process from political influence, and the recipient artists and institutions from "direct supervision or control of the granting agency."105 The NEA's enabling legislation provided that "no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any . . . non-Federal agency. . . ."106

To guard against the creation of an "official" or "majoritarian" art form, the legislation placed funding decisions in the hands of art experts, chosen with an emphasis on cultural diversity.107 Grant making decisions were to be based on criteria such as "artistic and cultural significance" and the reflection of "cultural diversity."108 In addition, the NEA consistently maintained that it had no intention of defining "art"109 or devising a national arts policy.110 Nevertheless, the same structure that was designed to guarantee cultural diversity in grant making deci-

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For a description of the NEA's structure and grant making process, see infra notes 154, 157 & 161-63 and accompanying text.
107. See id. § 954(b) (Chairperson); id. § 955 (National Council on the Arts); id. § 959(a) (advisory panels). The structure of the NEA's grant making procedure was amended by the 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1963-66, 1968, 1970-72, §§ 103, 106, 109. See infra notes 154-66 and accompanying text.
109. See Preamble: Statement of the National Council on the Arts on Goals and Basic Policy of the National Endowment for the Arts (adopted June 17, 1978), reprinted in Moore, Seeking Clarity at the National Endowment for the Arts, 13 J. ARTS MGMT. & L. 93, 97-99 (1983) ("The term [art] is to be understood in its broadest sense; that is, with full cognizance of the pluralistic nature of the arts in America, with a deliberate decision to disclaim any endorsement of an 'official' art and with a full commitment to artistic freedom.").
110. See M. MOONEY, THE MINISTRY OF CULTURE: CONNECTIONS AMONG ART, MONEY AND POLITICS 251 (1980) [hereinafter M. MOONEY, MINISTRY OF CULTURE] (The national policy of the NEA involves "support for the arts," rather than "policy for the arts.").

The role of the Endowment has always been as a catalyst, not as an arbiter of taste, not as a dominant or domineering entity. The Endowment is a partner in the development of the arts. Its funding encourages other support. The greatest fear of Congress, in the days when the enabling legislation was evolving, was that it might one day create a cultural czar.

Id. (quoting Livingston Biddle).
ions also makes it difficult for the NEA to extricate itself from charges of politicization, since the agency is dependent on Congress for funding and reauthorization; its Chairperson and Council members are presidially selected and Senate-approved; and its panel nominations are heavily influenced by politics.

The Endowment's persistent struggle to guard against charges of elitism, censorship, and political dependence reflects the difficulty of using public money to subsidize a type of speech not easily amenable to clearly defined standards of artistic merit and value.

B. A Tradition of Controversial Grant Making: The 1985 Reauthorization Hearings

Art is by its very nature the product of the time and place in which it is created. What is considered art in one era or even one society is considered obscene, offensive or blasphemous in another. Given this reality of artistic expression and the inherent complexities of government funding for art in a democratic society, it is noteworthy that out of over 85,000 NEA grants, only about twenty have provoked controversy.

Nevertheless, the NEA has, in its twenty-five year history, faced various attempts to implement content restrictions on its funding determinations. In 1985, charges that NEA grants had been awarded for obscene and stereotypical works ultimately resulted in the substantial

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113. NEA: 1965-1980, supra note 94, at 173. The nomination process for panelists "begins with solicited and unsolicited recommendations from 'the Council, staff, current panel members, national art associations, the general public, and the White House.'" (quoting Anna Steele, National Endowment for the Arts).
114. See 135 CONG. REC. S12,972 (daily ed. Oct. 7, 1989) (statement of Sen. Jeffords) (citing works such as William Faulkner's books and Manet's Dejeuner sur L'Herbe and Olympia, which were perceived as obscene or otherwise offensive at the time of their creation); Horn & Plattner, Should Congress Censor Art? U.S. NEWS & WORLD REPT., Sept. 25, 1989, at 24 (noting that the Vietnam Veterans Memorial, a NEA project, has become Washington's "most popular monument" despite the controversy it inspired in Congress).

Now do not talk to me about 85,000 nice grants and 20 obscene ones. . . . Where do we get the figure of 85,000 for all of the grants? They cannot tell you. They pull this figure of 85,000 out, and they throw it out, and it takes a life of its own. And the American people have it stuck to them again.

For a description of controversial grants made by the NEA, see INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 37-39.
amendment of the agency's grant making procedures. 116

In 1984, a NEA-funded production of Verdi's Rigoletto raised the ire of New York City's Italian-American community and prompted a demand, by Representative Mario Biaggi (D-N.Y.), that the NEA cancel the production. 117 Representative Biaggi protested the use of tax money for "art" portraying ethnic or racial groups in a negative light and proposed an amendment to require the NEA to declare a grantee in default if NEA funds were used to "denigrate any ethnic, racial, religious or minority group." 118

In 1985, controversy erupted again over the alleged funding of pornographic poetry, and led Representative Steve Bartlett (R-Tex.) to propose an amendment by which NEA grant making decisions would have to utilize "reasonable socially acceptable standards." 119 At the reauthorization hearings that year, then-chairman Frank Hodsoll was berated for NEA support of "pornographic, subversive, and generally 'offensive' art." 120 A proposal was offered by Representative Bartlett to establish a panel to screen out grants for art "potentially offensive to the average person." 121

The 1985 reauthorization of the National Endowment for the Arts considered both of these controversies in amending the Endowment's en-


117. McFadden, A Modernized 'Rigoletto' Is Attacked, N.Y. Times, Mar. 6, 1984, at B1, col. 4. The production transformed the opera's setting from the royalty of sixteenth-century Italy to the Mafia of twentieth-century New York. The community protested the offensive and stereotypical image of Italian-Americans portrayed by the updated version.


121. Id. (quoting Rep. Bartlett).
abling legislation. In response to the *Rigoletto* controversy and Representative Biaggi's proposal to prevent funding of ethnically or racially offensive works, Congress sought to encourage pluralism and increase participation by previously under-represented groups. In response to the controversy over the alleged funding of obscene poetry, Congress added language directing panelists to "recommend for funding only applications and projects that in the context in which they are presented, in the experts’ view, foster excellence, are reflective of exceptional talent, and have significant literary, scholarly, cultural, or artistic merit."223

Although the Arts, Humanities, and Museums Amendments of 1985 rejected the content-restrictive wording of the Biaggi and Bartlett proposals, the desire to regulate the content of NEA grants resurfaced with the renewed charges of federally funded obscenity surrounding the Mapplethorpe Controversy. The congressional response to the Mapplethorpe Controversy was similar to its reaction to questionable grant making in 1985, in that it sought to prevent the occurrence of future debate by amending the Endowment’s structure and grant making procedure.224

Nevertheless, the inclusion of language in the 1990 Arts Amendments requiring the NEA Chairperson to devise procedures to ensure that “general standards of decency and respect for the diverse beliefs and values of the American public” are considered in making grants225 moves

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123. Id. § 110(1)(G), 99 Stat. 1332, 1340 (codified at 20 U.S.C.A. § 959(a) (1990)). This language was deleted by the 1990 Arts Amendments and replaced with a requirement that the panels recommend projects for funding “solely on the basis of artistic excellence and artistic merit.” See supra note 6, 104 Stat. 1915, 1971, § 109(9) (to be codified as amended at 20 U.S.C. § 959(c)). The 1990 Arts Amendments also required that the NEA Chairperson “ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation,” “individuals reflecting diverse artistic and cultural points of view,” and “lay individuals who are knowledgeable about the arts,” but not involved either as professionals or as members of arts organizations. Id. (to be codified as amended at 20 U.S.C. § 959(c)(1), (2)). See infra notes 163-65 and accompanying text.

124. See infra notes 144-85 and accompanying text.

125. 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1963, § 103(b) (to be codified at 20 U.S.C. § 954(d)(1)). For the constitutional implications of this language, see infra notes 187-203 and accompanying text.
Congress closer to a role of arbiter of taste and makes real the danger of overt intrusion of politics into the grant making process. It is one thing to have as the NEA's purpose to foster "artistic excellence" and "artistic merit." It is quite another to make the NEA, and hence the arts community conform their work to undefinable standards of decency.

III. THE EFFECT OF THE MAPPLETHORPE CONTROVERSY ON THE FUTURE OF FEDERALLY FUNDED ART THROUGH THE NEA

It is often said that the role of art is to shock, and that the expression of unpopular ideas by artists allows society to "explore influences in [its] culture that . . . would otherwise not [be] experienced." But how much "shock" can and should the NEA support in the name of art?

The congressional response to the Mapplethorpe Controversy intimates that if the shock or societal insight is produced by works that are obscene, or not in conformance with general standards of decency, the NEA cannot fund them.


127. See generally 1990 Arts Amendments, supra note 6. See also 1990 Interior Appropriations Act, supra note 2.

Defining obscenity and indecency, like defining art, is an inherently subjective process, lending credence to Justice Stewart's assertion, "I shall not . . . attempt . . . to define [it]. . . . But I know it when I see it. . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Such definitions are shaped by one's political orientation and perceptions of social reality. Like art, they are the products of the time and place in which they are developed. See supra note 114 and accompanying text.

Nevertheless, obscenity, unlike indecent expression, has never been granted constitutional protection. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[O]bscenity is of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."). Although the Supreme Court struggled to define obscenity, it eventually devised a three-prong test under Miller v. California, 413 U.S. 15 (1973), which has been applied to the NEA under the recent legislation. See infra notes 133, 180-82 and accompanying text. The prohibitions against NEA funding of obscenity in the 1990 Interior Appropriations Act and the 1990 Arts Amendments, cannot, therefore, be challenged as per se violative of the first amendment. An artist cannot produce with government funds that which he or she would be constitutionally proscribed from producing with private funds.

Defining "decency" or "indecency" is even more problematic, because the Supreme Court has neither clearly defined indecency nor held it outside the realm of first amendment protection. See Cohen v. California, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular [offensive] words without also running the substantial risk of suppressing ideas in the process."). Members of Congress who advocated the imposition of a "decency clause" cited
Although the 1990 and 1991 Interior Appropriations Acts have been portrayed as simple demands for increased NEA accountability and responsibility in applying the criteria of artistic merit, their regulatory requirements represent the danger of increased political supervision of the Endowment's grant making process.

A. The 1990 Interior Appropriations Act

In its final form, the 1990 Interior Appropriations Act was perceived as a mild reprimand of the NEA's grant making behavior. Its $171 million NEA budget appropriation represented a cut of only $45,000—the amount expended for the Mapplethorpe and Serrano projects. Nevertheless, the Act reflected growing congressional impatience with the NEA and its program of federally funded art. Noting that works "without artistic value" and "pornographic . . . by any standards" had been funded, the 1990 Appropriations Act instructed the NEA to "seek out those works that have artistic excellence and . . . exclude those . . . without any redeeming literary, scholarly, cultural, or artistic value."

The focus of this provision was on the NEA's alleged funding of obscenity. In forbidding future funding of such works, the Act authorized the NEA to determine whether a work is obscene under a

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128. 1990 Interior Appropriations Act, supra note 2, 103 Stat. 701, 738. The Act rejected the Senate's proposed five-year ban on funding to the offending agencies, but required that the Endowment notify Congress before making such grants.

129. Id. § 304(b)(2), 103 Stat. 701, 741.

130. Id. § 304(b)(4)(C), 103 Stat. 701, 741-42.

131. Id. § 304.

132. Id. § 304(a), 103 Stat. 701, 741. "None of the funds authorized to be appropriated for the
The Act also adopted the Senate's recommendation for a review of the NEA's grant making process, allocating $250,000 for the establishment of a temporary Independent Commission to determine whether new standards for grant making should be imposed. 134

133. 413 U.S. 15 (1973). In determining whether a work is obscene, the jury must consider: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)) (citation omitted). In Pope v. Illinois, 481 U.S. 497, 500-01 (1987), the Supreme Court held that the "reasonable person" standard, as opposed to a community standard, was the appropriate method for determining whether suspect material contains "literary, artistic, political, or scientific value."

The language in the 1990 Interior Appropriations Act prohibiting NEA funding of obscenity closely adhered to the Miller standard:

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. . . ." This provision was consistent with the NEA's enabling legislation under which the NEA is the expert which is to decide what constitutes "significant literary, scholarly, cultural, or artistic merit." 20 U.S.C.A. § 959(a) (1990). The provision represented a rejection of the Helms Amendment, which would have shifted the funding decision from the NEA to some unspecified authority elsewhere in the federal government. 135 CONG. REC. S12,967 (daily ed. Oct. 7, 1989) (Helms Amendment No. 991). Senator Helms criticized the provision as allowing "the very same crowd that caused the controversy in the first place . . . [to] decide what obscenity is worthy of Federal funding. . . ." Id. at S12,968.

Nevertheless, there were potential difficulties in simply transposing the Miller test from the context in which it was developed, to a federal agency. There is, for example, no local community by which to determine "prurient interest" and "patent offensiveness" when it is a federal agency deciding what is and is not obscene. In addition, how is "reasonable person" to be defined for purposes of determining a work's artistic value? Did Congress intend the "reasonable person" to be an artist or art aficionado on the National Council on the Arts, or an average American with an average appreciation for art? See Bella Lewitzky Dance Found. v. Frohnmayor, No. 90-3616 (C.D. Cal. Jan. 9, 1991) (1991 U.S. Dist. LEXIS 332 *22-26).

134. 1990 Interior Appropriations Act, supra note 2, § 304(b)(4)(D), 103 Stat. 701, 742. The commission was established to review NEA grant making procedures, including those of its panel system, to determine whether there should be standards for grant making other than "substantial artistic and cultural significance, giving emphasis to American creativity and cultural diversity and the maintenance and encouragement of professional excellence" (20 U.S.C. § 954(c)(1)) and if so, then what other standards. The criteria to be considered by the commission shall include but not be limited to possible standards where (a) applying

The Arts, Humanities, and Museums Amendments of 1990 resulted from a persistent congressional fear that the NEA could and would continue to fund obscenity and other works of questionable artistic merit under its old authorization.

In September 1990, the Independent Commission issued a report recommending "a combination of Congressional guidance and oversight, [and] significant reforms in grant making procedures . . . ," in order to reaffirm the principle that the NEA is "a public agency established to serve purposes the public expresses through its elected representatives." The Commission found that the standard for publicly funded art must go beyond that for privately funded art by taking into account "the conditions that traditionally govern the use of public money." It recommended that NEA grant making procedures be amended to strengthen the role of the Chairperson, increase the participation of the National Council on the Arts in grant making decisions, and add structure to the role of the grant advisory panels. Regarding the continuation or addition of restrictive language on NEA grant making pro-

contemporary community standards would find that the work taken as a whole appeals to a prurient interest; (b) the work depicts or describes in a patently offensive way, sexual conduct; and (c) the work, taken as a whole, lacks serious artistic and cultural value.


136. INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 40.

137. Id. at 2. For reactions to the Independent Commission's report, see Winer, supra note 79 ("[I]f you look closer at the report . . . you will see recommendations that may be just as damaging to artistic freedom as the flashier outrages of Jesse Helms. At its core, the report advocates a restructuring that trades overt censorship for a more insidious form and institutionalizes the pressure to conform."); Wash. Times, Sept. 14, 1990, at F2 ("[D]espite the good intention of many of the commission's findings, they probably won't be effective and the NEA's incestuous funding procedures and public funding of creepy sex will continue. And that, in turn, means that the American people need to rethink whether they really want federally subsidized art at all.").

138. INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 57.

139. Id. at 63-68. The report suggested, in part, that the Chairperson be given more authority in making funding decisions, and more grants to choose from. Id. at 64-65. Its recommendation that the Chairperson's term be coterminous with the president's, id. at 68, led to assertions that the Chairperson would become a "culture czar." See Winer, supra note 79; Farrell, And Now, an Arts Czar, Boston Globe, Sept. 12, 1990, at 51.

140. INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 69-70.

141. Id. at 71-77. The report recommended that NEA conflict of interest rules be strengthened, and that participation be expanded to "[p]eople who do not earn their living in the arts," in order to eradicate the "perception of panels as the captive of particular interests. . . ." Id. at 72-74.
procedure, the Commission strongly recommended that the obscenity certification be discontinued, and that no other content restrictions be imposed.

Heavily influenced by the Commission’s recommendations, the 1990 Arts Amendments sought to eradicate impolitic grant making by shifting the distribution of funds and the focus of arts policy from a national to a local level, by altering the procedures by which NEA grant making decisions are made, and by imposing new purposes, goals and content restrictions on the decision making process.

1. A Changing Focus for Federally Funded Art. Since its inception, the NEA has sought to make art accessible to all Americans through state and local arts funding, arts education, and the encouragement of minority participation in both artistic endeavor and grant making decisions. Under the 1990 Arts Amendments, this goal of art accessibility has been used as a means to diminish the NEA’s role in federally subsidized art.

Congress’ shifting preference for a local rather than a national arts policy is evidenced by a gradual increase in the percentage of the NEA appropriation designated for state and local arts agencies. Increasing the state appropriation from 20% to 27.5% of the NEA’s yearly budget

142. Id. at 88. The certification requirement was established by the NEA in order to implement Section 304 of the 1990 Interior Appropriations Act. See supra note 46 and accompanying text.

The report stated that the NEA was not the appropriate body for the legal determination of obscenity, but rather that such determinations must be left to the courts. INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 87-88.

143. INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 89-91. While noting that the Chairperson necessarily makes judgments about the nature and content of projects, the report expressed concern that “if the standards for making these decisions are codified as explicit content restrictions, it seems clear that the result will not be more elevated art but debilitating administrative and legal difficulties.” Id. at 90.


145. Id. § 951(3), (8) (to be recodified at 20 U.S.C. § 954(4), (9)).

146. Regarding minority participation in the arts, see id. § 954(c)(4) (providing support for “projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community”); id. § 954(c) (“In selecting individuals and groups of exceptional talent as recipients of financial assistance . . . the Chairperson shall give particular regard to artists and artistic groups that have traditionally been under-represented.”).

Regarding minority representation in the grant making process, see id. § 955(b) (In making appointments to the National Council on the Arts, the president “shall give due regard to equitable representation of women, minorities, and individuals with disabilities who are involved in the arts.”); id. § 959(a) (appointments to the panels should include individuals “who broadly represent cultural diversity”).

147. 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1972, § 110(a)(4) (to be codified as
holds serious implications for the survival of the NEA. Indeed, this provision has already resulted in the NEA’s cancellation of five grant programs. The fact that state arts agencies have a larger combined appropriation than the NEA indicates that the real motivation behind this provision is a desire to reduce NEA influence on arts policy.

Such a motivation is also evidenced by provisions which seek to facilitate public access to the arts through greatly expanded programs for arts education and for rural and inner city areas. While the NEA’s enabling legislation states that “democracy . . . must . . . foster and support a form of education, and access to the arts. . . .” the 1990 Arts Amendments authorize the Chairperson to establish and carry out a funding program with state and local agencies to “foster and encourage exceptional talent, public knowledge, understanding, and appreciation of the arts, and to support the education, training, and development of th[e] Nation’s artists. . . .” The 1990 Arts Amendments also authorize the

amended at 20 U.S.C. § 960(a)(1)(A)). The percentage of the NEA appropriations allocated to the states increased from 20% to 25% for fiscal years 1991 and 1992, and to 27.5% for fiscal year 1993. This represented a less drastic shift than the 60% proposed by Representatives Gunderson and Coleman. See supra note 65 and accompanying text.

Increasing the amount of funds going directly to the States will drain funds from the national pot and not necessarily increase resources at the State level. States merely will substitute Federal money for the money they had been giving because this substitute does not require matching grants for Federal funds.
Channeling more money to State agencies will also reduce national coordination currently afforded by the NEA. And it will generate less private funds.
See also Knight, NEA’s First Amendment Win Still Leaves Hurdles, L.A. Times, Oct. 29, 1990, at F6, col. 1 (“A transfer from federal to state agencies would make the arts Establishment more beholden to local interests, which could apply so-called ‘local standards’ in the absence of content restrictions on the National Endowment. The NEA is important precisely because it is national, not local.”).

149. See Parachini, Artists Feel the Sting and NEA Cuts Museum Funds, L.A. Times, Jan. 9, 1991, at F1, col. 4. A letter sent by the NEA to grant applicants in the canceled museum program stated that the NEA’s grant programs were under pressure to cut back due to the requirement that an increased percentage of its budget be shifted to the states.

150. See, e.g., Independent Commission, Report on the NEA, supra note 46, at 33-34 (“In 1990, state arts agency budgets combined—$284 million—exceeded the appropriations for the National Endowment for the Arts—$171.2 million.”).

151. 20 U.S.C.A. § 951(3) (1990) (to be recodified at 20 U.S.C. § 951(4)). See also id. § 951(8) (“Americans should receive in school, background and preparation in the arts . . . to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression.”) (to be recodified at 20 U.S.C. § 951(9)).

152. 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1967, § 105 (to be codified at 20 U.S.C. § 954A(b)). The legislation calls for the establishment of an advisory council on arts education, appointed by the Chairperson to “provide advice and counsel concerning arts education.” Id. (to be codified at 20 U.S.C. § 954A(c)).
establishment of a program with the states, to "raise[ ] the artistic capa-
bilities of developing arts organizations" and "stimulat[e] artistic activity . . . and broaden[ ] public access to the arts" in rural, inner city, and 
under-served areas.\textsuperscript{153}

While such increased focus on state and local arts agencies repre-
sents both a retreat from the NEA's role in federally funded art, and an 
attempt to make federal funding more responsive to local tastes, values, 
and notions of morality, the amendment of the Endowment's grant mak-
ing procedure seeks to make the agency more accountable to the legisla-
ture in its role as elected representative of the American people.

2. Restructuring NEA Grant Making Procedures. The 1990 Arts 
Amendments have retained the general structure of NEA grant making 
procedures while attempting to implement a system of checks and bal-
ances on its various components. Under the NEA's enabling legislation a 
presidentially-appointed and Senate-approved Chairperson is authorized 
to develop programs and provide grants-in-aid or loans.\textsuperscript{154} Although the 
1990 Arts Amendments did not institute many of the recommendations 
made by the Independent Commission regarding the role of the 
Chairperson,\textsuperscript{155} they did increase the Chairperson's responsibilities re-
garding establishing procedures to ensure that only applications reflect-
ing artistic excellence receive funding.\textsuperscript{156}

The role of the National Council on the Arts\textsuperscript{157} as advisor to the 
Chairperson has been more strictly enumerated. The legislation requires 
the Council to make recommendations regarding both applications for 
approval\textsuperscript{158} and the amount of financial assistance to be awarded.\textsuperscript{159} Fi-

\textsuperscript{153.} \textit{Id.} at 104 Stat. 1915, 1966, § 104(3) (to be codified at 20 U.S.C. § 954(p)(2)(A)(i), (ii)).

\textsuperscript{154.} 20 U.S.C.A. § 954(c) (1990) (groups and individuals); \textit{id.} § 954(g)(1) (the states); \textit{id.} 
§ 954(f)(1) (public agencies and private nonprofit organizations, on a national, state, or local level). \textit{See also infra} note 169.

\textsuperscript{155.} \textit{See supra} note 139 and accompanying text.

\textsuperscript{156.} 1990 Arts Amendments, \textit{supra} note 6, 104 Stat. 1915, 1963-64, § 103(b) (to be codified as 
amended at 20 U.S.C. § 954(d)). Nevertheless, in requiring the Chairperson to establish such proce-
dures, Congress arguably imposed unconstitutional restrictions on the federal funding of artistic excellence. \textit{See id.} § 103(b)(1), (2). \textit{See also infra} notes 186-203 and accompanying text.

\textsuperscript{157.} \textit{See} 20 U.S.C.A. § 955(b) (1990). The National Council is composed of the Chairperson and twenty-six members who are appointed by the president with a goal towards the equitable repre-
sentation of women, minorities and the disabled. Membership is to include: (1) private citizens who 
have expertise in, and a history of support for the arts; (2) artists, cultural leaders and others profes-
sionally engaged in the arts; and (3) people chosen from among the major fields of art. \textit{Id.} The 1990 
Arts Amendments added a requirement that members be selected so as to represent all geographical 
areas of the country. \textit{See} 1990 Arts Amendments, \textit{supra} note 6, 104 Stat. 1915, 1968, § 106(a) (to be 
codified at 20 U.S.C. § 955(b)).

\textsuperscript{158.} 1990 Arts Amendments, \textit{supra} note 6, 104 Stat. 1915, 1968, § 106(c)(5) (to be codified as
nal authority on grant making decisions is vested in the Chairperson, but he or she may neither approve what the Council has rejected, nor exceed the recommended funding amount.160

The panel component of the NEA's grant making procedure has been subject to the most comprehensive restructuring under the 1990 Arts Amendments. Although originally conceived as a body of "experts and consultants"161 to be called at the Chairperson's discretion, the panel system has become an integral part of the grant making procedure.162

The 1990 Arts Amendments seek to control panel decision-making by regulating grant making procedures and panel composition.

In response to charges of federally funded obscenity arising out of the Mapplethorpe Controversy, the 1990 Arts Amendments have replaced language authorizing panels to recommend works that "foster excellence," and reflect "significant literary, scholarly, cultural, or artistic merit"163 with a requirement that funding recommendations be based "solely on . . . artistic excellence and artistic merit."164

In response to charges that panel grant making decisions frequently involve conflicts of interest, the legislation has expanded panel membership to include "individuals reflecting diverse artistic and cultural points of view," and "lay individuals" who are knowledgeable in the arts, but not "engaged in the arts as a profession" nor as "members of artists' . . . or arts organizations."165 The Chairperson is required to ensure that membership on each panel change "substantially" from year to year, and that individuals not serve on panels before which they, or their agent or amended at 20 U.S.C. § 955(f)(1)). The Council makes recommendations regarding which applications to approve for funding from those already determined to have artistic excellence by the advisory panels.

Prior to the 1990 Arts Amendments, the NEA's enabling legislation authorized the Council to "advise the Chairperson with respect to policies, programs and procedures," and to "review applications for financial assistance." 20 U.S.C.A. § 956(f)(1), (2) (1990).


160. Id. § 106(c)(4) (to be codified at 20 U.S.C. § 955(f)).


162. Panels have been established in every program area to make initial application determinations. See INDEPENDENT COMMISSION, REPORT ON THE NEA, supra note 46, at 71. The NEA program areas include: Education, Dance, Architecture Planning and Design Arts, Expansion Arts, Folk Arts, Partnership, and Media Arts: Film/Radio, Television, Museums, Music, Opera-Musical Theater, Special Projects, Theater, and Visual Arts. See NEA: 1965-1980, supra note 94, at 171-73.


165. Id. (to be codified at 20 U.S.C. § 959(c)(1), (2)). The amendments also restate the requirement that panel composition reflect "a wide geographic, ethnic, and minority representation."
employer, have an application pending.\textsuperscript{166}

The 1990 Arts Amendments have also attempted to make the grant making process more politically accountable through the promulgation of content restrictive application requirements\textsuperscript{167} and increased supervision of the application process.\textsuperscript{168}

Federal subsidies under the NEA are distributed as grants to regional arts groups and official state arts agencies; matching grants to non-profit, tax-exempt organizations; and fellowships to individuals of exceptional talent.\textsuperscript{169} Under the 1990 Arts Amendments, applicants for NEA grants are required to provide interim reports describing their project's compliance with the legislation.\textsuperscript{170} They must also include an assurance that the project will meet the requisite standards of artistic excellence and artistic merit.\textsuperscript{171} To ensure continued compliance with grant requirements, the Chairperson is authorized to distribute financial assistance through installments.\textsuperscript{172} Grant recipients whose work is determined to be obscene by a court of law are required to pay back the amount of the grant.\textsuperscript{173}

The cumulative effect of such application requirements is legislative micro-management of the NEA which, when combined with content restrictions, inevitably produces a chilling effect on the production and funding of art through the NEA.

\textsuperscript{166} Id. at 104 Stat. 1915, 1972 (to be codified at 20 U.S.C. § 959(c), (c)(6)).

\textsuperscript{167} Id. at 104 Stat. 1915, 1963-64, § 103(b) (to be codified at 20 U.S.C. § 954(d)). See also infra notes 174-85 and accompanying text.

\textsuperscript{168} 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1964-65, § 103(g) (to be codified at 20 U.S.C. § 954(i), (j), (k)).

\textsuperscript{169} New Dimensions for the Arts, supra note 94, at 9. While this article focuses solely on art funded through the federal government, there exists a complex network of federal, state and local programs that are both independently and interdependently involved in the business of funding art. See generally M. Mooney, Ministry of Culture, supra note 110.

The total amount of any grant made by the NEA may not exceed 50% of the project's cost, 20 U.S.C.A. § 954(e), (f) (1990), in order to encourage private support for the arts. See id. § 951(1) (noting that encouragement and support of the arts remain "primarily a matter for private and local initiative") (to be recodified at 20 U.S.C. § 951(2)). See also Independent Commission, Report on the NEA, supra note 46, at 32-33 (noting that relatively few grants provide 50% of project cost, and that "although the NEA is a partner in many privately initiated projects, it is usually a minority shareholder."). The report also noted that the use of matching grants has stimulated private support and public interest in the arts. Id. at 35.

\textsuperscript{170} 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1965, § 103(g) (to be codified at 20 U.S.C. § 954(i))(3)). The application must also include a detailed description of the proposed project, and a timetable for its completion. Id. at 104 Stat. 1915, 1964-65 (to be codified at 20 U.S.C. § 954(i)(1), (2)).

\textsuperscript{171} Id. at 104 Stat. 1915, 1965 (to be codified at 20 U.S.C. § 954(i)(4)).

\textsuperscript{172} Id. (to be codified at 20 U.S.C. § 954(j)).

\textsuperscript{173} Id. at 104 Stat. 1915, 1965-66, § 103(h) (to be codified at 20 U.S.C. § 954(f)(1)).
3. **Regulating the Content of Federally Funded Art.** The most deleterious provision of the 1990 Arts Amendments, in terms of the NEA's continued viability, involves the imposition of restrictions on NEA grant making decisions. Congress has responded to the Mapplethorpe Controversy by seeking to guarantee that future arts funding reflect "general standards of decency,"\(^\text{174}\) and has justified such interference on its determination that the role of the federal government in arts funding must be "sensitive to the nature of public sponsorship."\(^\text{175}\) Nevertheless, the addition of such language to the NEA's enabling legislation has, in effect, authorized continued congressional interference in the NEA's grant making process, a process that was purposefully structured so as to maintain the NEA's independence from politics.\(^\text{176}\)

In an effort to "contribute to public support and confidence in the use of taxpayer funds,"\(^\text{177}\) the 1990 Arts Amendments have required the Chairperson to promulgate standards which will guarantee that the "artistic excellence" standard does not result in future funding of works such as Mapplethorpe's.\(^\text{178}\) Such standards must indicate that "obscenity is without artistic merit" and shall not be funded.\(^\text{179}\) The legislation provides for obscenity to be defined under *Miller v. California*,\(^\text{180}\) but rejects the 1990 Interior Appropriations Act's language authorizing the NEA to make that determination.\(^\text{181}\) Rather, the 1990 Arts Amendments have incorporated the Independent Commission's recommendation that the obscenity determination be left to a court of law.\(^\text{182}\)

Although the primary focus of the NEA's reauthorization was the prevention of future funding of obscenity, the notoriety of the Mapplethorpe Controversy inspired a congressional desire to establish additional safeguards.\(^\text{183}\) The 1990 Arts Amendments added language emphasizing that the arts "belong to all the people of the United

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\(^{174}\) *Id.* at 104 Stat. 1915, 1963, § 103(b) (to be codified as amended at 20 U.S.C. § 954(d)(1)).

\(^{175}\) *Id.* at 104 Stat. 1915, 1961, § 101 (to be codified as amended at 20 U.S.C. § 105(5)).

\(^{176}\) *See supra* notes 105-10 and accompanying text.


\(^{178}\) *Id.* at 104 Stat. 1915, 1963-64, § 103(b) (to be codified at 20 U.S.C. § 954(d)).

\(^{179}\) *Id.* (to be codified at 20 U.S.C. § 954(d)(2)).


\(^{181}\) *See supra* note 6, 104 Stat. 1915, 1962, § 102(c) (to be codified at 20 U.S.C. § 952(f), (k)). *See also* INDEPENDENT COMMISSION, REPORT ON THE NEA, *supra* note 46, at 87-88.

\(^{182}\) *See supra* note 67-72 and accompanying text. The fact that the Mapplethorpe Controversy failed to recede after restrictions against obscenity were imposed under the 1990 Interior Appropria-
States," and required the Chairperson to establish regulations to ensure that "artistic excellence" incorporate "general standards of decency and respect for the diverse beliefs and values of all persons and groups."

The addition of language purporting to delineate the meaning of artistic excellence holds serious implications for the constitutionality of grant making under the NEA. Attempts by Congress to restrict NEA funding to works which reflect "general standards of decency," and foster "mutual respect for . . . diverse beliefs and values," threaten to place the NEA in the untenable position of defining art.

While the NEA has discretion to choose between potential recipients of federal subsidies, it may not make such choices or regulate the decision-making process in a way that restricts expression based on its content. General criteria such as artistic excellence and artistic merit are permissible guidelines. However, legislative attempts to define artistic excellence as works that are not obscene and works that reflect general standards of decency and respect for diverse beliefs, do arguably restrict the content of artistic expression. While the Supreme Court has held that some limits on freedom of expression are constitutionally per-

185. Id. at 104 Stat. 1915, 1963, § 103(b) (to be codified at 20 U.S.C. § 954(d)(1)). See also id. at 104 Stat. 1915, 1961, § 101 (to be codified at 20 U.S.C. § 951(6)) ("The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.").
186. See Parachini, Changed NEA Likely Even Without Content Rules, L.A. Times, Oct. 29, 1990, at F6, col. 1. Even Rep. Coleman, one of the legislation's sponsors, questioned the constitutionality of the clause:
   My preference was that it not go in at all. I have always had problems with the constitutionality of trying to limit indecent speech and expression. I tried to craft a constitutional bill, and I would hope a court would toss off this clause as [really meaning] something less than opponents think it means.

A top NEA official admitted that the Endowment had thought that such language would be stripped away in conference, and that they had therefore never focused on how such standards would be promulgated. "We didn't count on that one. . . . There's no accounting for taste." See also supra note 127.

187. See Carey v. Brown, 447 U.S. 455, 471 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (First amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.).
188. See, e.g., Advocates for the Arts v. Thompson, 532 F.2d 792, 797 (1976), cert. denied, 429 U.S. 894 (1976). "[T]he would be unwise to require an objective measure of artistic merit as a matter of constitutional law. . . . [A]rtistic merit . . . and guidelines elaborating it do not lend themselves to translation into first amendment standards." (citations omitted).
missible where the expression is federally funded, the imposition of obscenity and decency clauses restricts expression based on content and thus denies funding on grounds that infringe upon the right of free expression.\textsuperscript{189}

IV. CONSTITUTIONAL CONSIDERATIONS: FEDERALLY FUNDED ART AND THE FIRST AMENDMENT

General prohibitions against the imposition of content or viewpoint restrictions on expression are of limited application in the realm of federal subsidization. The Supreme Court has long recognized that the government has, in its role as promoter of expression, discretion to choose between various speakers and types of expression.\textsuperscript{190} Nevertheless, the role of federal subsidization has been characterized as the use of public funds "not to abridge, restrict, or censor speech, but rather to . . . facilitate and enlarge" expression.\textsuperscript{191}

The Supreme Court has consistently held that because there is no entitlement to federal funds, a decision not to subsidize does not in itself violate the rejected individual's right of free expression.\textsuperscript{192} Indeed, the

\textsuperscript{189} See infra notes 194-95 and accompanying text.


\textsuperscript{191} Buckley, 424 U.S. at 92.

\textsuperscript{192} Taxation With Representation, 461 U.S. at 549. The Court noted that strict scrutiny is rarely applicable where Congress chooses to subsidize some but not all speech. See Harris, 448 U.S. at 316 ("[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."); Planned Parenthood v. Agency for Int'l Dev., 915 F.2d 59, 63 (2d Cir. 1990) ("A policy of not subsidizing the exercise of a fundamental right differs in an important respect from a prohibition on the exercise of a fundamental right, or from the imposition of an unconstitutional condition on the exercise of a fundamental right, because the mere refusal to subsidize a fundamental right "places no governmental obstacle in the
Court has held that the selection of certain individuals over others for receipt of federal funds is "a matter of policy and discretion. . . ."193

Nevertheless, the Court has held that the right of the government to control the expenditure of public money is conditioned on the requirement that the refusal to subsidize a particular speaker not be for reasons which infringe upon constitutionally protected rights—especially the right of free expression.194 Thus, the Court in *Perry v. Sindermann* stated:

>[E]ven 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. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."195

While recognizing the "unconstitutional condition" principle of the Speiser-Perry model, the Court in *Taxation With Representation* re-emphasized that "although [the] government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not re-

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193. *Taxation With Representation*, 461 U.S. at 549 (quoting United States v. Realty Co., 163 U.S. 427, 444 (1896)). *See also Advocates for the Arts*, 532 F.2d at 797 n.7 ("It is ultimately the prerogative of elected officials to decide when and how to spend the tax dollar. . . .")

194. *See Perry v. Sindermann*, 408 U.S. 593 (1972) (employer may not refuse to renew teaching contract as a reprisal for the exercise of constitutionally protected first amendment rights); *Speiser v. Randall*, 357 U.S. 513 (1958) (state provision denying tax exemption for engaging in certain forms of speech violates the first amendment). *See also INDEPENDENT COMMISSION, REPORT ON THE NEA*, supra note 46, at 85-87 (Legal Task Force Consensus Statement on the role of federally funded art under the Constitution) (noting that "[w]hen funding denials are the product of invidious discrimination with the aim of suppressing a particular message and for no other reason, a particularly powerful case might be made that the decision was unconstitutional"). *Id.* at 86.

move those not of its own creation.”

The federal subsidization of art through the NEA necessarily implicates the tension between government spending power and constitutional principles that funding not be denied based on the exercise of the right of free expression. The general principle that artists and art institutions not chosen for funding have no claim against the NEA is an acceptable result as long as the decision not to fund is based on constitutionally permissible grounds such as artistic merit. However, the congressional imposition of content restrictions on NEA grant making procedures has shifted discretionary government funding decisions to an impermissible purpose and result under Perry. Provisions in the 1990 Arts Amendments that restrict the definition of artistic excellence to works that are not obscene and works that reflect general standards of decency deny funding based on the content of artistic expression. This inhibition of expression is exacerbated by the inherent difficulty of defining the terms “obscenity” and “decency.” Such provisions are impermissible not because obscenity is constitutionally protected speech, or because the government must fund indecent as well as decent expression, but rather because the 1990 Arts Amendments seek to regulate the content of artistic expression using terms that are so uncertain that such restrictions will have an unconstitutional chilling effect on speech.

The imposition of funding restrictions against obscenity and indecency in effect “produce[s] a result which could not [be] command[ed] directly.” For example, outside the context of federal subsidization law, Congress would be prohibited from enacting a general ban restricting indecent expression. Similarly, the fact that the Court has promulgated a definition of obscenity and held it outside the protection of the first amendment does not require a finding that the prohibition against NEA funding of obscenity is constitutionally permissible. Indeed, a California District Court recently held that the obscenity language appended

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197. *See Advocates for the Arts*, 532 F.2d at 796 (Neutrality is “inconceivable” where a program’s purpose “is to promote ‘art,’ the very definition of which requires an exercise of judgment from case to case.”); id. at 797 (noting that “it would be unwise to require an objective measure of artistic merit as a matter of constitutional law”).

198. *See supra* notes 174-86 and accompanying text.

199. *See supra* note 127.


201. *See, e.g., Cohen v. California*, 403 U.S. 15, 26 (1971) (“[W]e cannot indulge the facile assumption that one can forbid particular [offensive] words without also running the substantial risk of suppressing ideas in the process.”).

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to NEA grant making procedures in the 1990 Interior Appropriations Act was unconstitutionally vague, and that the resulting chilling effect on speech violated the first amendment rights of potential grant recipients.\textsuperscript{202} Although Congress seemingly remedied this constitutional problem in the 1990 Arts Amendments by placing the obscenity determination in the courts rather than the NEA,\textsuperscript{203} the unconstitutional chilling effect remains due to both the continued prohibition against funding obscenity and the promulgation of the new prohibition against indecent art. Because obscenity and indecency are not amenable to clear definition, the denial of federal funding on such grounds will result in the restriction of much constitutionally protected expression. Such provisions therefore have the effect of penalizing the exercise of free expression. Such a result is especially untenable given the nature of art and the role of artists in society.

Nevertheless, opponents of the NEA frequently state that artists who do not or cannot receive NEA funding because their work is obscene, indecent, or lacking in artistic merit are free to express themselves or produce their work with private funds.\textsuperscript{204} Although the Supreme Court has implicitly accepted this argument as a justification for selective government subsidization,\textsuperscript{205} such a rationale fails to consider the role played by the NEA in encouraging and discouraging the exercise of first amendment rights.

Under its enabling legislation, the NEA provides only a percentage of a project's cost, so as to require applicants to secure matching grants from private or other public sources.\textsuperscript{206} This statutory provision was designed to and has been successful in encouraging private support for the arts.\textsuperscript{207} Indeed, it is widely recognized that the receipt of NEA funds acts as an imprimatur such that funding from other sources becomes


\textsuperscript{203} See 1990 Arts Amendments, supra note 6, 104 Stat. 1915, 1962, § 102(c) (to be codified at 20 U.S.C. § 952(j)). The court in Bella Lewitzky Dance Foundation, 1991 U.S. Dist. LEXIS 332 *26, found the 1990 Interior Appropriations Act's placement of the obscenity determination with the NEA determinative in its holding that the obscenity pledge and the legislation that spawned it were unconstitutionally vague.


\textsuperscript{207} Id. § 951(1) (noting that "the encouragement and support of national progress and scholarship in the . . . arts [is] primarily a matter for private and local initiative") (to be recodified at 20 U.S.C. § 951(2)). See also supra note 99.
more readily available.\textsuperscript{208} Conversely, the rejection of applicants has been demonstrated to adversely effect their ability to obtain other funding, and indeed, to find places to exhibit their work.\textsuperscript{209}

This reality of arts funding through the NEA exacerbates the chilling effect on artistic expression resulting from the imposition of unconstitutional content restrictions on funding determinations. Knowing that rejection by the NEA will make alternate funding difficult to obtain, NEA applicants will refrain from producing works that could be construed as obscene or indecent, or that could cause another Mapplethorpe Controversy. Such a result erects a government-constructed obstacle to artists’ exercise of first amendment rights.

While federal subsidization cases decided by the current Supreme Court indicate that the 1990 Arts Amendments may be difficult to challenge on constitutional grounds, the precedent set by Bella Lewitzky Dance Foundation is important due to its recognition of the NEA’s complex role in subsidized art and the reality and danger of a chilling effect on artistic expression. The continued vitality of federally funded art as an instrument of social commentary, a patron of minority art and a disseminator of art to all Americans ultimately depends on artists’ freedom from regulations that seek to restrict and control the scope of their vision.

CONCLUSION

The threat to the National Endowment for the Arts is more than conservative rhetoric determined to eradicate government subsidies for “artistic perversion.” The real danger lies in the aftermath of the Mapplethorpe Controversy and the legislation it spawned.

Although the National Endowment for the Arts has survived a reauthorization hearing and appropriations debates for two fiscal years, amendments imposed on its enabling legislation threaten continued political interference in the grant making process such that the insidiousness


\textsuperscript{209} See, e.g., De Vries, Karen Finley Has Become a Symbol in the Struggle Over Public Arts Support, L.A. Times, Oct. 21, 1990, at 3 “I’m not getting a grant and I have had cancellations. There are places that are scared they will lose their [federal] funding if they put me on.” (quoting Karen Finley).
of a chilling effect on artistic expression and self-censorship within the NEA has become a reality.

Aware of the political pressure being exerted on the NEA and recalling the intensity of congressional reactions to controversial grants, artists desirous of NEA funding will confine their works to ideas, themes and issues that fall well within politically-imposed definitions of artistic excellence. The reality of the role played by NEA grants in obtaining funding from other sources will exacerbate the chilling of artistic expression as artists who choose not to comply with the NEA’s content-restrictive grant making procedures find it difficult to obtain private or other public funding without the NEA “seal of approval.”

The NEA’s reaction to the Mapplethorpe Controversy—establishing an obscenity pledge, pulling funds, rejecting grants, and admitting through its Chairman the political motives behind such decisions—illustrates that self-censorship results from congressional interference in grant making procedures which were intended to be politically independent. The NEA is aware of its precarious position, and in its urgency to avoid another Mapplethorpe Controversy, it is undermining the very purpose for which it was formed twenty-five years ago. Once the NEA’s ability to facilitate freedom of artistic expression through relatively unrestricted grant making procedures is curtailed, the larger goals of encouraging innovation and presenting art to the American people will go unfulfilled.

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