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# THE ARTISTIC VOICE: IS IT IN DANGER OF BEING SILENCED?

## INTRODUCTION

Art does not have to be liked or beautiful or innocent to be art. It must, however, be seen or heard, and it must strike your soul, your mind or both. Good art moves your emotions or makes you think. We should be ever thankful that we have artists among us who can make us cry, scream, or wonder. Disliked art and art with disliked subjects can be as powerful as liked art, sometimes more powerful. It deserves both our attention and our protection.<sup>1</sup>

Many people have a deep and committed interest in the arts.<sup>2</sup> In recent years, the arts have been threatened and compromised by the American government and people. The focus of this battle has been “controversial art,” pitting the National Endowment of the Arts (NEA) against artists, conservative congressmen, and the religious right.

Part I of this Comment lays a historical foundation of America’s funding of the arts. Public funding of the arts started with the Works Progress Program in the 1930s (the first government-sponsored funding of art) and moved on to the creation of the NEA in 1965. Additionally, Part I highlights the genius of the enabling legislation and the structure of the NEA.

Part II examines the changing law surrounding the NEA and the many attempts by Congress to restrict the content of federally funded art, including the 1989 Obscenity Oath and the 1990 Decency Clause. Both the Obscenity Oath and the Decency Clause have been deemed unconstitutional by federal courts.<sup>3</sup> The United States Supreme Court has yet to squarely decide the issue of governmental restrictions on federally funded art. However, the recent case of *Rust v. Sullivan* can be applied to the artistic setting. To

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1. Julie Ann Alagna, *1991 Legislation, Reports and Debates over Federally Funded Art: Arts Community Left with an “Indecent” Compromise*, 48 WASH. & LEE L. REV. 1545 (1991).

2. Marjorie Heins summarized the belief of many that creative works play a critical role in society:

Artistic expression not only provides information and communicates ideas; it also expresses, defines, and nourishes the human personality. Art speaks to our emotions, our intellects, our spiritual lives, and also our physical and sexual lives. Artists celebrate joy and abandon, but they also confront death, depression, and despair.

MARJORIE HEINS, *SEX, SINS, AND BLASPHEMY: A GUIDE TO AMERICA’S CENSORSHIP WARS* 5 (1993). See also FREDERICK HARTT, *ART: A HISTORY OF PAINTING, SCULPTURE, ARCHITECTURE* 13 (3d ed. 1989) (defining art as “all of human experience, beautiful and ugly, pleasurable and painful, even humorous and absurd . . . crystallized in a work of art, and preserved to be experienced by the observer as long as that work lasts.”).

3. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 744 (C.D. Cal. 1991); *Finley v. National Endowment for the Arts*, 795 F. Supp. 1475 (C.D. Cal. 1992).

provide insight into what the Supreme Court would decide if presented with the issue, Part II analyzes *Rust* and shows that federally funded art is much like federally funded education: in both settings, the government may not intervene in the flow of free expression.

Throughout the Comment, there is a historical repertoire of the arts, showing how artists have always walked the narrow line between the acceptable and unacceptable in our society. This history shows how their tradition is not to conform to tradition at all, but to strive for the new, different, and experimental. Throughout the Comment are examples of art that are some of today's most cherished works, but at one time they were some of the most controversial.

This Comment concludes with a plea to all readers to wholeheartedly support the arts because every society needs its artists: "Artists are society's watchers, critics, and champions. They speak the unspeakable, even if it manifests itself in horrifying, untidy, or esoteric matters."<sup>4</sup> "It is a commentary on the strength and wisdom of a government which supports the arts without content restraints."<sup>5</sup>

## I. HISTORICAL BACKGROUND: FEDERAL AID TO THE ARTS

*"It is through art that we can understand ourselves"*<sup>6</sup>

### A. Works Progress Administration

The American government did not financially support the arts until the twentieth century. Although the wording of the U.S. Constitution tells us that the framers recognized the importance of "useful arts,"<sup>7</sup> the government was reluctant to fund the arts because it felt the young nation needed to encourage the useful arts before the fine arts.<sup>8</sup> Consequently, it was not until the Great Depression that the United States contributed to the arts in any significant

4. CULTURAL WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS 166 (Richard Bolton ed., 1992) [hereinafter CULTURAL WARS] (statement of late Congressman Ted Weiss). Congressman Weiss also said, "Art that challenges existing prejudices serves a most important function; it helps us grow and reach a higher state of humanity." *Id.*

5. Allan Parachini & Joe Velazquez, *Creativity will be the Currency of the 21st Century*, L.A. TIMES, Mar. 6, 1990, at F1 (quoting former NEA Chairman John Frohnmayer).

6. National Endowment for the Arts, Guide to the National Endowment for the Arts 2 (Dec. 1991) (National Endowment for the Arts Statement of Mission).

7. U.S. CONST. art. I, § 8 ("to promote the progress of science and useful arts. . .").

8. Letter from John Adams to his wife Abigail (May 12, 1780), reprinted in JOSEPH W. ZEIGLER, ARTS IN CRISIS: THE NATIONAL ENDOWMENT FOR THE ARTS VERSUS AMERICA 1-3 (1994). John Adams regretfully accepted that he could not spare the time to study the fine arts: "I must study politics and war that my sons may have liberty to study . . . mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce and agriculture in order to give their children the right to study painting, poetry, music, architecture, statuary, tapestry and porcelain." *Id.* at 2.

manner.<sup>9</sup> Funding came as part of the New Deal, whereby Congress created the Works Progress Administration (WPA), a nationwide program to finance art projects and create jobs.<sup>10</sup> The main impetus for the program was economic, rather than a desire to promote or preserve American art.<sup>11</sup>

Over an eight-year period, the WPA arts project spent a total of \$160 million and put hundreds of people to work.<sup>12</sup> Jackson Pollock and Mark Rothko were two of the many painters who contributed to the creation of over 50,000 paintings.<sup>13</sup> "John Steinbeck and Robert Frost were among many authors working for the Writers' Project" along with Orson Welles in the Theater Project.<sup>14</sup> Despite the WPA's success, many of the projects were criticized for their political and social content.<sup>15</sup> For example, in 1933, Mexican artist Diego Rivera painted a mural for the RCA Building in Rockefeller Center. There was such a public outcry over the pro-communist sentiments of the mural that Rivera was paid-off and the work was destroyed.<sup>16</sup>

Similarly, criticism of a 1943 mural by Anton Refregier in the Rincon Annex Post Office in San Francisco led to a House resolution calling for its destruction because it "cast a derogatory and improper reflection on the character of the pioneers and history of the great State of California."<sup>17</sup> Because of political intolerance to artistic works and the advent of war, the WPA came to an end.<sup>18</sup>

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9. *Id.* at 1-8.

10. *Id.* at 6.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 7-8. See mural in the Palace of Fine Arts in Mexico City, Mexico painted by Diego Rivera in 1934. A smaller version of the mural was painted by Rivera in Rockefeller Center in New York City in 1933 and was destroyed in 1934 because of its communist undertones. It included Lenin's face, Mussolini being blessed by the Pope, and Hitler leaping into the air and shouting. In one corner, a woman with her head shaven wore a poster around her neck with the words, "I have given myself to a Jew." MOSHE CARMILLY-WEINBERGER, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART 153-56 (1986).

16. *Id.* at 154.

17. Matthew Josephson, *The Vandals are here: Art is not for Burning*, THE NATION, Sept. 26, 1953 at 245-46. Anton Refregier painted a mural in the Rincon Annex Post Office in San Francisco in 1943. It was a depiction of the anti-Chinese riots of the 1870s. The mural was attacked as communist oriented. After a hearing on the matter, the mural was ordered destroyed. The artist was accused of painting the San Francisco pioneers "in an unpatriotic and offensive way." CARMILLY-WEINBERGER, *supra* note 15, at 156.

18. Zeigler, *supra* note 8, at 8. See also Miriam Horn & Andy Plattner, *Should Congress Censor Art?*, U.S. NEWS & WORLD REP., Sept. 25, 1989, at 22 ("[the WPA] was scuttled in 1939 when the House Committee on Un-American Activities charged it with producing socialist propaganda.").

*B. The National Endowment for the Arts*

It was twenty years after the demise of the WPA that America once again made a direct commitment to support the arts. This came with the creation of The National Endowment for the Arts (NEA) which was a result of President John Kennedy's New Frontier program.<sup>19</sup> When Kennedy ran for president in 1960, he called for the development of a federal advisory council on the arts.<sup>20</sup> Subsequently, a bill was introduced in Congress to create an advisory council, but "was laughingly put aside when a representative from Virginia proposed an amendment that would make poker playing an art."<sup>21</sup> Kennedy disregarded Congress' short-sightedness and issued an executive order to set up the council. The order was sitting on his desk, unsigned, the day of his assassination.<sup>22</sup>

After Kennedy's death, President Lyndon Johnson moved forward with Kennedy's plan and, in 1964, pushed through Congress a bill establishing a National Council on the Arts as an advisory body.<sup>23</sup> In March 1965, Congress passed the National Foundation on the Arts and Humanities Act.<sup>24</sup> This legislation created individual endowments for both the arts and the humanities.<sup>25</sup>

Unlike the WPA, the NEA's goal is not to provide employment, but rather to make the arts more widely available to Americans, to preserve our culture and to encourage the creative development of our nation's finest

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19. ZEIGLER, *supra* note 8, at 13. President Kennedy and his wife, Jacqueline, routinely surrounded themselves with artists. "Robert Frost recited a poem at Kennedy's inauguration, and a hundred artists—some of them avant-garde and radical—were invited to participate in those festivities." *Id.* at 13.

20. *Id.*

21. *Id.* at 14.

22. *Id.* Less than a month before his assassination, President Kennedy spoke on the arts at Amherst College:

I see little of more importance to the future of our country . . . than full recognition of the place of the artist . . . . Society must set the artist free to follow his vision wherever it takes him . . . . And the nation which disdains the mission of art invites . . . the fate of having nothing to look backward to with pride and nothing to look forward to with hope. . . . I look forward to an America which will steadily raise the standards of artistic accomplishment and which will steadily enlarge cultural opportunities for all our citizens.

*Id.*

23. *Id.* at 15.

24. *Id.*

25. The National Foundation on the Arts and the Humanities Act, Pub. L. No. 89-209, 79 Stat. 845 (1965).

artistic talent.<sup>26</sup> “[T]he idea was to advance artistic freedom and creativity, not government-approved, officially ‘acceptable’ art.”<sup>27</sup>

### C. Enabling Legislation

The authors of the enabling legislation creating the NEA understood the nature of artistic creativity and the conditions necessary for it to flourish.<sup>28</sup> They also understood the difficult territory into which they and the NEA were headed.<sup>29</sup> Recalling the nationalist art of other countries, they feared that government funded art might evolve into government approved art.<sup>30</sup> Worried about the fragile threshold between government support and government interference, the authors wisely prohibited the government from deciding the appropriate content of funded works and established artistic excellence as the primary criteria for the funding.<sup>31</sup> To make its intentions perfectly clear, Congress stressed in the original legislation that “funding is to foster free inquiry and expression. Conformity for its own sake is not to be encouraged, nor shall undue preference be given to any particular style or school of thought or expression. The sole standard should be artistic excellence.”<sup>32</sup>

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26. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 325-26 (1977). See also ZEIGLER, *supra* note 8, at 17. On the day he signed the National Foundation on the Arts and the Humanities Act into law, President Lyndon Johnson said:

Art is a nation's most precious heritage. For it is in our works of art that we reveal to ourselves and to others the inner vision which guides us as a nation. And where there is no vision, the people perish. We in America have not always been kind to the artists and the scholars who are the creators and keepers of our vision. Somehow, the scientists always seem to get the penthouse, while the arts and humanities get the basement. . . . This bill . . . bring[s] active support to this great national asset, to make fresher the winds of art in this great land of ours.

*Id.*

27. HEINS, *supra* note 2, at 117.

28. *Id.* at 117-19.

29. *Id.*

30. *Id.* During the French Revolution, artists who did not align themselves with the official National Assembly were arrested, harassed, and killed. CARMILLY-WEINBERGER, *supra* note 15, at 62-65. One of the most famous artists to align himself with the National Assembly was Jacques Louis David (1748-1825). *Id.* He contributed to the revolution with some of the times' most outstanding paintings. David painted *Death of Marat* in 1794. Marat was a martyr of the revolution who was stabbed to death by Charlotte Corday while he was bathing. *Id.* David also painted *Coronation of Napoleon and Josephine* in 1805-7. *Id.* With the rise of Napoleon, David was ready to serve him and was appointed Bonaparte's premier painter. David's life was probably spared because he could easily change political views with the times. *Id.* To view reproductions of David's painting, see HARTT, *supra* note 2, at 790-91.

31. S. REP. NO. 300, 89th Cong., 1st Sess. 3-4 (1965).

32. *Id.* See also 20 U.S.C.A. § 953(c) (West 1990); Courtney R. Nea, Note, *Content Restrictions and National Endowment for the Arts Funding: An Analysis from the Artist's Perspective*, 2 WM. & MARY BILL OF RTS. J. 165, 168 n.19 (1993). (“The 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

*D. How the Agency Works*

Congress' goal was to create an agency insulated enough from political pressures to be able to encourage and support artistic innovation. "It needed to prevent situations in which pressure groups intent on exploiting hot-button issues" (sex, perceived insults to organized religion, traditional values, race, or political views) could exploit and distort "particular works and earn political capital by complaining that these artists or grants offended the American public's moral, political, or religious beliefs."<sup>33</sup>

To achieve its goal, Congress placed funding decisions in the hands of three distinct governing bodies: (1) an Advisory Peer Panel, (2) a National Council on the Arts, and (3) the Endowment Chairperson.<sup>34</sup> The Advisory Peer Panel is composed of rotating experts (no member may serve longer than three consecutive years) in the relevant fields of art.<sup>35</sup> Those experts review the incoming grant applicants and make recommendations to the National Council on the Arts.<sup>36</sup>

The National Council (Council) is composed of twenty-six distinguished citizens who have broad experience in various artistic disciplines.<sup>37</sup> They are appointed by the President with the advice and consent of the Senate.<sup>38</sup> Council members serve for a six-year term, staggered so that roughly one-third of the members rotate every two years. "If the Council rejects an application, that decision is final."<sup>39</sup> If the Council recommends an application, it is reviewed by the Chairperson of the NEA, who makes all final grant awards.<sup>40</sup> The Chairperson is also appointed by the President with the advice and consent of the Senate.<sup>41</sup>

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the administration or operation of any . . . non-Federal agency."'). See generally NATIONAL ENDOWMENT FOR THE ARTS, GUIDE TO THE NATIONAL ENDOWMENT FOR THE ARTS 5 (1994-95) ("In fulfilling its mission, the Endowment must exercise care to preserve and improve the environment in which the arts have flourished. It must not, under any circumstances, impose a single esthetic standard or attempt to direct artistic content." (quoting the Endowment's Mission Statement)).

33. HEINS, *supra* note 2, at 119.

34. *Id.*

35. Horn & Plattner, *supra* note 18, at 23. "The panels are composed of art experts, drawn from college faculties, museums and galleries, and working artists." *Id.* The panel is chosen with an emphasis on cultural diversity. *Id.* See also Catalina Camia, *NEA's Brushes with Controversy*, CONG. Q., July 30, 1994, at 2129. The Peer Panel determines if the application meets requirements for artistic excellence, merit, and decency. They recommend who should receive funding and how much money should be allocated. In 1990, Congress required that at least one of the panelists be a lay person with no background in the arts. *Id.*

36. CONG. Q., *supra* note 35, at 2129.

37. 1993 NEA ANN. REP. 13.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

This elaborate peer panel structure worked well to insulate the Endowment from partisan pressure for twenty-four years.<sup>42</sup> However, in 1989, the system went awry.

## II. CONGRESSIONAL RESTRICTION ON ARTISTIC CONTENT

*"If Congress doesn't do something about obscene art, we'll have to build galleries twice as big to hold the people who want to see it."*<sup>43</sup>

### A. Why the Arts Crisis Started

It is not altogether clear why the crisis started. A number of factors contributed to its cause;<sup>44</sup> only the leading factor will be explored here because to examine all is beyond the scope of this Comment.<sup>45</sup>

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42. HEINS, *supra* note 2, at 119. Heins discusses some of the early works funded by the NEA that brought criticism. For example, Erica Jong's *Fear of Flying* was criticized by Senator Jesse Helms who complained that the taxpayers' "money was 'now supporting the scurrilous and pornographic, and further, that since ladies were present, a reading of the text would be inappropriate.'" *Id.* at 120. The author notes the irony of Helms' remark, "given that a 'lady' had written the book." *Id.* See also STEVEN C. DUBIN, *ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL ACTIONS* 282 (1992). Jong received five thousand dollars from the NEA which helped her to complete *Fear of Flying*, published in 1974. Jesse Helms used the sponsorship of the book to debate reappropriation of the agency in 1975. *Id.* See also RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 174 (1992).

The record of the National Endowment for the Arts has been impressive, and for the most part not controversial. Over the course of twenty-five years the Endowment has made over 85,000 grants. And of these, no more than twenty-five grants have aroused any significant degree of controversy.

∴∴∴ Congress never once attempted to place substantive limitations on the professional discretion of the Endowment . . .

*Id.*

43. Garrison Keillor, *Statement to the Senate Subcommittee on Education*, Mar. 29, 1990, reprinted in *CULTURAL WARS*, *supra* note 4, at 159.

44. HEINS, *supra* note 2, at 122. *But see* Sen. Claiborne Pell, *Introduction to Zeigler*, *supra* note 8, at xviii ("I think the controversy will repeat itself every five or ten years. It has come up in the past, and it will come up again in the future, as long as we continue to fund the arts.").

45. Heins discusses several contributing factors to the art crisis. These factors include first, the problem of scapegoating speech for social ills. Historically, periods of frustration or insecurity are breeding grounds for demagogues who distract attention from social problems by attacking artistic rebels and other dissenters, and by scapegoating symbols. The second factor is antagonism on the part of many Americans toward the arts or high culture. A long standing tradition of suspicion against cultural elites and a suspicion of artists whose works may be difficult, obscure, or avant-garde. The third factor is the inability of the art world to counter the attacks with a unified defense. HEINS, *supra* note 2, at 122-24. *But see* Jesse Helms, *Is it Art or Tax-Paid Obscenity?*, 2 J. L. & POL'Y 99, 101 (1994). Helms attributes the recent crisis to "the NEA's encouragement, promotion, financial support, and legitimation of immoral and perverse artistic activities." *Id.*



The main impetus for the arts crisis involves the divergent interests of two sociocultural groups.<sup>46</sup> The first group comprises the increasingly powerful and visible religious fundamentalists and political conservatives.<sup>47</sup> The second is an emerging segment of artists composed mainly of feminists, lesbians and gay men, and a wide range of racial and ethnic groups.<sup>48</sup> The former groups' primary interests are the preservation of tradition, religion, and moral values.<sup>49</sup> Those of the latter are to produce art that expresses "who they are and what they desire."<sup>50</sup> Their art, undeniably the product of a changing society, presents alternative lifestyles, frank representations of sexuality, and new and diverse views on social, political, and religious themes.<sup>51</sup>

Given the divergent interests of these two groups, it is no surprise that the NEA has been attacked by the first group whenever it funds gay artists (three-fourths of the NEA four), or women artists who declare their sensual interests, straight or not, or works with perceived threatening political views or perceived insulting religious themes.<sup>52</sup> Such was the case when the NEA funded the Mapplethorpe and Serrano exhibitions. Both exhibitions contained everything needed for a controversy to ensue: the religious aspect of a crucifix immersed in a cup of urine (seen as anti-religious), the sexual demeanor of homoerotic photographs (seen as anti-family), all at a time of growing popularity among religious fundamentalists and political conservatives defending their idea of the status quo.<sup>53</sup> Consequently, the two

46. CULTURAL WARS, *supra* note 4, at 3.

47. Stephen N. Sher, Note, *The Identical Treatment of Obscene and Indecent Speech*, 67 CHI.-KENT L. REV. 1107, 1108 (1991) (Sher defines fundamentalist as "one who denounces anything they do not understand under the guise of God and family.").

48. DUBIN, *supra* note 42, at 2 (discussing the self conscious emergence of groups that were previously marginalized: women, gays, lesbians, Hispanics, Asians, and African Americans). See also Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the NEA*, 12 CARDOZO ARTS & ENT. L.J. 79 (1994) ("Without question, the debate largely has focused upon the funding of artistic works that present lesbian and gay images.").

49. HEINS, *supra* note 2, at 122. See also CULTURAL WARS, *supra* note 4, at 10 ("[Senator Jesse Helms] warned that 'the homosexual community,' the feminists, the civil libertarians . . . the flag burners . . . are more active than ever in promoting their dangerous anti-family and anti-American agendas.").

50. DUBIN, *supra* note 42, at 2.

51. *Id.* See also Richard Bernstein, *Subsidies for Artists: Is Denying a Grant Really Censorship?*, N.Y. TIMES, July 18, 1990, at C11 ("These artists [gays, women, etc.] are saying, 'We're part of the culture too.'" (quoting Ms. Wilson, the curator of Franklin Furnace Theater in New York City)).

52. CULTURAL WARS, *supra* note 4, at 5. Many conservatives believe that artists are "trying to introduce a progressive agenda into society, an agenda based on multiculturalism, gay and lesbian rights, feminism, and sexual liberation. For conservatives, this meant that artists were engaged in antisocial activity—challenging the family, traditional religious beliefs, and the existing structure of power." *Id.*

53. HEINS, *supra* note 2, at 122-24. John Frohnmayer, NEA chairman from late 1989 to early 1992 said, "[T]he battle was not so much over dirty words, nudity, or homosexuality; the 'real debate is about the nature of tolerance . . . and the willingness of people to encounter differences.'" *Id.* at 122. See also Douglas Davis, *Multicultural Wars*, ARTS IN AM., Feb. 1995, at 38. In a changing world, why should we ask people and the art they make to remain constant?

exhibitions aroused the ire of fundamentalists and conservatives who denounced the art as threatening, blasphemous, and obscene.<sup>54</sup>

### 1. Serrano's *Piss Christ*

In 1987, Andres Serrano, a Hispanic New York artist, photographed a plastic crucifix emerged in his own urine.<sup>55</sup> For years, Serrano had explored the meanings of sacred symbols in his work. A Catholic, Serrano was interested in the way these powerful symbols are cheapened and commercialized. He also was interested in "the Catholic obsession with the 'body and blood of Christ.'"<sup>56</sup>

In late 1987, Serrano was one of ten artists chosen by the Southeastern Center for Contemporary Art in North Carolina to receive a visual arts award. Each artist received \$15,000 in grant money and a combined tour of

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Davis argues, "we cannot ask 'change' to be our friend in every field other than the arts; and we cannot honor innovation in every field other than the arts." *Id.* Because our society has changed in many ways, Davis claims that the requests "by fundamentalists and senior senators to the NEA to 'clean up your act' . . . [are] based on values and practices . . . [that are] . . . no longer . . . relevant to a significant portion of our citizens." *Id.* Cf. Mervyn Rothstein, *The Endowment: Sending Helms a Message from Home*, N.Y. TIMES, Aug. 14, 1990, at C13 ("The homosexuals are in a battle against American values . . . Their ultimate aim is to have the American people accept the proposition that their perverted 'life style' is as worthy of protection as race, creed and religion. I do not buy that. I say to them, 'Bosh and nausea.'" (quoting Sen. Jesse Helms' words from a congressional meeting as part of a script for a New York play entitled *Indecent Materials*)). *Id.*

54. HEINS, *supra* note 2, at 122-24. See also ZEIGLER, *supra* note 8, at 170-72.

55. ZEIGLER, *supra* note 8, at 69. Compare *Piss Christ* to *L'Enterrement a Ornans* (Burial at Ornans) by Gustave Courbet painted in 1855. *Burial* is a group portrait of the citizens of Ornans, Courbet's birthplace. In the left corner stand the priest and his entourage dressed in colorful robes. On the right are two rows of women, one in black, with simple robes and white headcovers turning away from the funeral ceremony, looking in another direction. Another row of women with dark headcovers turn their faces in toward the funeral service. The man in the center with the outstretched hand looks at the priest as if to ask, "what is the purpose of this clerical function?" CARMILLY-WEINBERGER, *supra* note 15, at 68-69.

"Courbet . . . teaches a great lesson with that painting. People do not need the pomp, . . . the priest, the cross . . . *Unus est finis hominis!* (The end is the same for all men!). The tears of the mother, of sisters, husband, and wife are important; anything else is but a comedy." *Id.* at 69. The painting was rejected by the Salon and Courbet was criticized by the church; but today, it is one of the world's greatest paintings. *Id.* See also HARTT, *supra* note 2, at 833 (for a photographic representation of *Burial*). See also CULTURAL WARS, *supra* note 4, at 309 (for a photographic representation of *Piss Christ*).

56. DUBIN, *supra* note 42, at 99. Serrano's description of his photograph *Piss Christ* is as follows:

I think it's charged with electricity visually. It's a very spiritually . . . comforting image, not unlike the icons we see in church. . . . At the same time, it's meant to question the whole notion of what is acceptable and unacceptable. There's a duality here, of good and evil, life and death.

ZEIGLER, *supra* note 8, at 69.

their works.<sup>57</sup> Serrano's *Piss Christ* was included in the traveling exhibition.<sup>58</sup>

## 2. Mapplethorpe's *Perfect Moment*

The second event that fueled the fires of the crisis was "the cancellation by Washington's Corcoran Gallery of 'The Perfect Moment,' a 150-piece exhibition of photographs by Robert Mapplethorpe."<sup>59</sup> The exhibition was put together by the University of Pennsylvania's Institute of Contemporary Art, using a \$30,000 NEA grant for part of the funding. The show encompassed a wide range of Mapplethorpe's work, including photographs of ordinary people, celebrities, flowers, and homoerotic photographs of naked men.<sup>60</sup>

The director of the Gallery canceled the exhibition, fearing future financial repercussions and the growing political controversy over the issue of funding provocative artists.<sup>61</sup>

57. HEINS, *supra* note 2, at 129-30 (The museum received \$75,000 total from the NEA, which covered about a quarter of the show's cost).

58. *Id.* at 130.

59. ZEIGLER, *supra* note 8, at 73. On the evening of June 30, the day the exhibition was scheduled to open at the Corcoran, more than one thousand protesters gathered around the Corcoran Gallery as giant images of the Mapplethorpe exhibition were projected onto the stone face of the gallery. Nicols Fox, *Art Funding: The Fight over Sex, Money, and Power*, 14 NOVA L. REV. 369, 382 (1990).

The often controversial Robert Mapplethorpe first began to display his work in 1977. "By the early 1980s, he was universally regarded as one of America's most original photographers. He held successful museum exhibits in Paris, Amsterdam, [and] London." He died in 1986, at the age of 42, of AIDS. Sher, *supra* note 47, at 1108 n.11.

"Mapplethorpe's work is threatening because it documents the possibility of other forms of desire and makes beautiful forms of sexuality that conservatives consider 'shameful' and 'sinful.'" Peggy Phelan, *The New Aesthetics and Its Critics* 21 J. ARTS MGMT. & L. 329, 330 (1992).

Further, Mapplethorpe's "homoerotic depictions challenge the sexual hierarchy, and his portrayals of White and Black men together also contest the racial hierarchy." Dubin, *supra* note 42, at 5. For an example of this, see Mapplethorpe's work, *Ken and Tyler*, taken in 1985. *Id.*

60. ZEIGLER, *supra* note 8, at 73. Mapplethorpe's last portrait assignment was a shot of Surgeon General C. Everett Koop for *Time*. As Dr. Koop recalled, "It was a poignant experience to have my picture taken by a man dying of a disease I've spent so much time trying to educate the public about." DUBIN, *supra* note 42, at 172.

61. ZEIGLER, *supra* note 8, at 73-79. "The Corcoran canceled the show on June 12[ 1989,] out of fear that it might cause a firestorm on Capitol Hill" and fear of losing future grants. *Id.* at 74. "The Washington Project for the Arts, an alternative gallery down the street from the Corcoran," arranged to have the show open there on July 20. *Id.* at 75.

Response to the Corcoran's cancellation was vocal and heated in the arts community. "Charlotte Murphy, executive director of the National Association of Artists' Organization [said], 'In canceling the show, the Corcoran may have escaped immediate financial repercussions. . . . However, it has betrayed all who believe in democracy and the right to freedom of expression. It has weakened all of our efforts to withstand the bullying of a vocal few.'" *Id.* (citation omitted).

Corcoran Director Dr. Christina Orr-Cahall said, "[T]he issue of federal funding for 'provocative artists and their work is becoming a major political controversy,' and . . . 'by presenting this show, we were doing so at the wrong place at the wrong time. We had the strong potential to become some persons' political platform.'" Nea, *supra* note 32, at 180 n.30.

B. The 1989 Obscenity Oath

When Congress learned the NEA had funded Serrano<sup>62</sup> and Mapplethorpe, it began a resounding criticism of the organization.<sup>63</sup> The NEA began receiving letters from the Senate, the House, and several

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See also Anne Salzman, *On the Offensive: Protecting Visual Art with Sexual Content under the First Amendment and the "Less Valuable Speech" Label*, 55 U. PITT. L. REV. 1215, 1216 n.6 (1994). Out of the 175 photographs in the exhibition, only five were homoerotic images that were allegedly obscene. The City of Cincinnati instituted a lawsuit against both the Contemporary Art Center and its director after the exhibition went on display. "The [five] images at issue included those of a whip inserted in a man's anus and a man urinating in another man's mouth. The jury acquitted both the Center and the director of the obscenity charges." *Id.* See also *City of Cinn. v. Contem. Arts Ctr.*, 566 N.E.2d 214 (Ohio Mun. Ct. 1990).

62. Lindy Zesch, *Tough Images Spur Council Rejections*, AMERICAN THEATRE, Oct. 1994, at 90. In 1994, Serrano once again applied for a fellowship grant from the NEA. The Peer Panel unanimously recommended funding for Serrano; however, the Council denied funding. Consequently, the Peer Panel sent a scathing letter to the Council accusing it of "fail[ing] [its] mandate to use aesthetic criteria in reviewing the fellowship recommendations . . . and instead [making] a seemingly political decision." *Id.* at 91. It appears from the discussions among the Council members that they were disturbed by the content of several of Serrano's images. The images were photographs taken in a mortuary and included details of feet, torsos, and faces, as well as full bodies. All the titles were consistent with the cause of death: *Killed by Police*, *Broken Bottle Death*, and *Death from Pneumonia*. *Id.* at 90.

63. 135 CONG. REC. S5594 (daily ed. May 18, 1989) (statement of Sen. Alfonse D'Amato).

Mr. President, several weeks ago, I began to receive a number of letters, phone calls, and postcards from constituents throughout the State concerning art work by Andres Sarrano [sic]. They express a feeling of shock, of outrage, and anger.

They said, 'How dare you spend our taxpayers' money on this trash.' . . . This so-called piece of art is a deplorable, despicable display of vulgarity.

*Id.* The record continues with a quote from Senator Jesse Helms: "I do not know Mr. Andres Seranno [sic], and I hope I never meet him. Because he is not an artist, he is a jerk." *Id.* Senator Helms also said of Mapplethorpe:

[His] exhibit endangered Federal funding for the arts because the patently offensive collection of homo-erotic pornography and sexually explicit nudes of children was put together with the help of a \$30,000 grant from the Endowment. . . .

I have a catalog of the show and Senators you need to see it to believe it.

CULTURAL WARS, *supra* note 4, at 75. *But see* Phelan, who summarizes a different view of Serrano's *Piss Christ*:

The power of Serrano's images does not derive, as Senator Alphonse D'Amato—who called the work a 'deplorable, despicable display of vulgarity'—would have us believe from the equation between excrement and Christ. Rather, it comes from the much more unsettling idea that our images and dreams of divinity and salvation cannot be distinguished from the fact of our waste and death.

. . . In the age of AIDS, when love and death promenade more boldly down the boulevards of our erotic and spiritual imaginations, Serrano's photograph is a mournful lament for an authentic personal image of the beloved's suffering body. . . .

*Piss Christ* is too beautiful, too perfectly lit, too precisely balanced between biological indifference and the thundering emptiness of spiritual hope, to be simply a pagan's way to attack Christ, as the New Right argued.

Phelan, *supra* note 59 at 329-30. It seems many of Serrano's critics never considered that *Piss Christ* might be a work that interrogates religion rather than insults it.

Christian organizations, all denouncing the organization's funding choices.<sup>64</sup> The timing of the controversy could not have been worse for the NEA because the congressional appropriations process for fiscal year 1990 was to begin in a few days.<sup>65</sup> Somehow, the organization survived the appropriations process, but not unscathed. Its budget was cut by \$45,000, the total allocation of NEA funds to Serrano (\$15,000) and Mapplethorpe (\$30,000).<sup>66</sup> Furthermore, Congress called for the creation of a temporary Independent Commission to review the organization's procedures for grant-making.<sup>67</sup> In addition, new legislation was enacted to prohibit funding of obscene art.<sup>68</sup> The amendment provided in pertinent part:

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64. ZEIGLER, *supra* note 8 at 76-78. "Pat Robertson and his Christian Coalition sponsored a \$200,000 [national] advertising campaign [with ads in major newspapers, radio, and television] taunting Congress to 'make my day' and vote for the NEA." SMOLLA, *supra* note 42, at 175. The advertising asked "whether 'working folks' in your districts 'want you to use their money to teach their sons how to sodomize one another.'" *Id.* Cf. CULTURAL WARS, *supra* note 4, at 108.

In moral campaigns, fundamentalists select a negative symbol which is highly arousing to their own constituency and which is difficult or problematic for their opponents to defend. The symbol, often taken literally, out of context and always denying the possibility of irony or multiple interpretations, is waved like a red flag before their constituents.

*Id.* But see HEINS, *supra* note 2, at 7.

To interpret [art] literally and reductively is to miss the point. Like the ancient Greeks, who invented tragic theater . . . , modern artists and their audiences may respond powerfully to the words, ideas, and images in music, movies, visual art, even pornography, but that doesn't mean they're ready to go out and imitate what they see. Most men who attend a performance of *Oedipus Rex* do not proceed to kill their fathers and marry their mothers.

*Id.*

65. ZEIGLER, *supra* note 8, at 78 (the 1989 appropriations process for fiscal year 1990 was coming up in the late Spring).

66. *Id.* at 79.

67. Nea, *supra* note 32, at 170. In September 1990, the Commission came out strongly against specific content restrictions and declared "questions of obscenity should be answered by courts employing the *Miller* standard." *Id.* See also CULTURAL WARS, *supra* note 4, at 261-65 (for a full account of the Independent Commission's recommendations).

68. SMOLLA, *supra* note 42, at 176. Senator Helms had proposed legislation that would have been more restrictive than what was ultimately accepted and enacted by Congress. The so-called "Helms Proposal" barred funding for:

(1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; and (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.

ZEIGLER, *supra* note 8, at 79. Helms' amendment was so encompassing that it even put the classics in jeopardy. "Shakespeare's *Merchant of Venice* would be banned for its insult to Jews . . . as would Wagner's *Ring Cycle* for its depiction of incest, and countless Rubens and Rembrandt nudes." Horn & Plattner, *supra* note 18, at 22. *Tom Sawyer* and *The Color Purple*

None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious . . . artistic . . . value.<sup>69</sup>

The new restrictions were a clear departure from the long established policy of independence in NEA funding decisions.<sup>70</sup> Following enactment of the new legislation, NEA Chairman John Frohnmayer inserted into all grant applications an Obscenity Oath, whereby all grant applicants had to "pledge not to create obscene work" before they could be considered for funding.<sup>71</sup> Frohnmayer added the oath requirement in hopes of encouraging a law suit because then the court could declare the newly enacted legislation unconstitutional.<sup>72</sup> It was not long before he got his wish.

In *Bella Lewitzky Dance Foundation v. Frohnmayer*,<sup>73</sup> two arts organizations, the Bella Lewitzky Dance Foundation (Foundation) and the Newport Harbor Art Museum (Museum),<sup>74</sup> viewed the Obscenity Oath as a violation of freedom of expression and refused to sign the Oath during their application process.<sup>75</sup> Following the NEA's refusal to award funding to either of the applicants, both organizations filed suits alleging violations of their First and Fifth Amendment rights.<sup>76</sup>

The United States District Court for the Central District of California consolidated the two actions and held that the Obscenity Oath requirement was unconstitutional because under *Miller v. California*,<sup>77</sup> it is the court and

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would probably also be banned for their racial undertones.

69. CULTURAL WARS, *supra* note 4, at 121.

70. SMOLLA, *supra* note 42, at 176. See also HEINS, *supra* note 2, at 32-33 ("The obscenity exception . . . has no basis in history, logic, or constitutional law. Instead, it finds its origin in repressive social and cultural attitudes about sex. . .").

71. ZEIGLER, *supra* note 8, at 105.

72. *Id.* at 106. Frohnmayer had other reasons for inserting the clause as well: "[T]o assure Congress that it had gotten our attention and to make our applicants aware of the law so they would not inadvertently run afoul of it." *Id.*

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

74. *Id.* at 775. The Foundation has been a recipient of NEA grants since 1972 and in that time has been awarded \$1,400,000. The Museum has been a NEA recipient since 1973 and has received 56 grants totaling \$1,263,000. *Id.*

75. *Id.* at 776-77.

76. *Id.* at 781-82.

77. *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Supreme Court rendered its first majority opinion in an obscenity case since *Roth* in 1957. The *Miller* formulation has remained the prevailing legal standard of obscenity. Under *Miller*, to be legally obscene the material in question (image, literature, etc.) must meet all the following requirements: (1) It must depict or describe certain explicit sexual conduct that has been defined as prohibited in applicable state or federal law. (2) The prohibited sexual depiction or descriptions must be patently offensive to an average person based upon contemporary community standards. (3) Taken as a whole, the material must appeal to the prurient interest, again when judged against contemporary community standards. (4) Taken as a whole, the material must also lack serious literary, artistic, political,

not the NEA who should determine what constitutes obscenity.<sup>78</sup> Further, the Foundation and the Museum had to “speculate as to how the NEA will assess obscenity”<sup>79</sup> because no criteria for the applicants to abide by were included in the legislation.

The court stated further that the legislation had a “chilling effect” on the creative process because NEA applicants would avoid creating certain legitimate works of art out of fear that they would violate the Obscenity Oath.<sup>80</sup> Further, “the chilling effect was exacerbated by the practical realities of funding in the artistic community.”<sup>81</sup> The NEA plays a significant role in the funding of the arts, “requiring co-funding from private sources for every grant given.”<sup>82</sup> “[M]ost non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient’s artistic merit and value.”<sup>83</sup> An NEA grant “lend[s] prestige and legitimacy to projects” and therefore is “critical to the ability of artists and companies to attract non-federal funding sources.”<sup>84</sup> Consequently, “[g]rant applicants rely on the NEA well beyond the dollar value of any particular grant.”<sup>85</sup>

### C. The 1990 Decency Clause

Responding to the judicial challenge in *Lewitzky*, Congress once again debated NEA reauthorization.<sup>86</sup> While Congress deliberated over the organization’s future, the Peer Panel and Council recommended four individual performance artists for grants: Holly Hughes, Tim Miller, John Fleck, and Karen Finley.<sup>87</sup> The first three artists are openly homosexual and focus on issues of gay experience, homophobic bigotry, and AIDS in their

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or scientific value. *Id.* at 23-24. For a good description of the *Miller* standard and how it applies to artists see generally KENNETH P. NORWICK & JERRY S. CHASEN, *THE RIGHTS OF AUTHORS, ARTISTS, AND OTHER CREATIVE PEOPLE* 226-36 (1992).

78. *Lewitzky*, 754 F. Supp. at 781-82.

79. *Id.* at 781.

80. *Id.* at 782.

81. *Id.*

82. *Id.* See 136 CONG. REC. S17981 (daily ed. October 24, 1990) (statement of Sen. Chafee) (stating that NEA funds are matched 3:1 by private sector funds). In 1989, “\$153 million in Federal support helped generate \$1.4 billion in private sector arts funds.” *Id.* See also Guide to the National Endowment for the Arts, *supra* note 32, at 7. The organization provides “matching” grants; which “means that the applicant must match the Endowment award at least dollar-for-dollar with non-Federal contributions. Thus Federal funds cover no more than half of any project’s cost.” *Id.* See also Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 KAN. L. REV. 437, 440-41 (1992) (discussing how the NEA “serves as a catalyst for private dollars”).

83. *Lewitzky*, 754 F. Supp. at 783.

84. *Id.*

85. *Id.*

86. ZEIGLER, *supra* note 8, at 117.

87. *Id.* at 112. All four artists create works based on themes of sexuality, including opposition to male dominance over women and the endorsement of equal legitimacy for heterosexual and homosexual practices and lifestyles. *Id.* at 110-12.

work.<sup>88</sup> The fourth, Karen Finley, a self-described feminist, uses themes of rape, sexual harassment, homelessness, discrimination, and violence toward women in her work.<sup>89</sup>

Chairman Frohnmayer, feeling tremendous pressure to avoid controversial grants at the time, overruled the Panel and Council's recommendation to fund the four artists and publicly announced his denial of the grants. He stated that political realities required him to veto some grants recommended by the Peer Panel and Council.<sup>90</sup>

The four artists sued, challenging the legality of Frohnmayer's action.<sup>91</sup> Shortly after the suit was filed, Congress reauthorized the NEA for three more years. The new appropriations bill deleted the Obscenity Oath and replaced it with the Decency Clause.<sup>92</sup> The Decency Clause requires the NEA Chairperson to ensure that all funded works incorporate the "general standards of decency and respect for the diverse beliefs and values of the American public."<sup>93</sup>

Subsequently, the *Finley* lawsuit was amended to challenge the constitutionality of the new decency requirement.<sup>94</sup> In June 1992, the United States District Court for the Central District of California<sup>95</sup> held that the decency

88. *Id.* at 112 ( Holly Hughes said of the grant refusal, "I think the reason my work was returned is because it is chock-full of good old feminist satire and secondly, I am openly lesbian." Tim Miller said, "My work explores my identity as a gay person and as a person dealing with the AIDS crisis in an active, political way. So much of this is a homophobic attack on gay people and the visibility of gay people.").

89. *Id.* at 110-11. *See also* Phelan, *supra* note 59, at 332. Phelan argues that Finley and Hughes were targeted for non-funding because:

- (1) Finley refuses to be beautiful—still the biggest taboo for a visible woman whose primary obligation is to appeal to men;
- (2) Finley insists on talking about sexism, racism, and homophobia and thus is "political," when the NEA would prefer her to be "artistic" or at least "polite";
- (3) Finley mourns, rather than excoriates, people with HIV and hence "identifies" with them, that is to say, she shows loyalty to the enemy;
- (4) Hughes believes lesbian desire is powerful and is not afraid to say so;
- (5) Hughes's work suggests that men are more comic than compelling—the biggest dismissal of man is not to take him seriously;
- (6) because Hughes is an out-and-out lesbian, the New Right believed she could be easily slammed by the intensity of communal homophobia. This last belief was enough to not fund Miller and Fleck, and it operates in the *Finley* decision, too, given points two and three.

*Id.*

90. DUBIN, *supra* note 42, at 153.

91. *Id.* at 157.

92. 20 U.S.C.A. § 954(d) (West 1994) (reads in pertinent part: "The Chairperson shall ensure that (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.").

93. *Id.*

94. HEINS, *supra* note 2, at 133.

95. This was the same court that ruled on the unconstitutionality of the Obscenity Oath in *Lewitzky v. Frohnmayer*.



requirement was unconstitutionally vague and subjective and hindered free expression.<sup>96</sup> The NEA appealed the decision and oral arguments were completed on February 3, 1994. A decision is pending.<sup>97</sup> Below are the key arguments made on appeal in support of the District Court's holding.

### 1. The Statutory Language is Vague and Subjective

Neither "general standards of decency" nor "diverse beliefs and values of the American public" are terms that can be understood without guesswork. As the District Court in *Finley* recognized, "[t]here is no question that persons of common intelligence must necessarily guess at [the] meaning and differ as to [the] application of . . . [the decency clause]."<sup>98</sup>

According to the American Heritage Dictionary, "decency" is defined as "[t]he state or quality of being decent; . . . [c]onformity to prevailing standards of propriety or modesty."<sup>99</sup> Further, "decent" is defined as "[c]haracterized by conformity to recognized standards of propriety or morality . . . meeting accepted standards."<sup>100</sup>

Such definitions do not save the "general standards of decency" from being unconstitutionally vague "because the phrase provides artists and arts institutions no guidance whatsoever about what qualities or elements, if found in an artistic work, would trigger rejection . . ."<sup>101</sup> "Just as 'what is contemptuous to one man may be a work of art to another' and 'one man's vulgarity may be another's lyric,' so too may works of art be 'decent' or not depending on a viewer's own particular background and personal philosophy"<sup>102</sup> and the times.

96. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992). See also Amy M. Adler, *Why Art is on Trial*, 22 J. ARTS, MGMT. L. & SOC'Y 322, 331 (1992) ("There are artists right now who are changing their art because they are scared." (quoting artist Karen Finley)).

97. Telephone call to Clerk of the Court, United States Court of Appeals for the Ninth Circuit (Dec. 5, 1995).

98. *Finley*, 795 F. Supp. at 1472 (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 355, 390 (1926)).

99. AMERICAN HERITAGE DICTIONARY 371 (3d ed. 1992).

100. *Id.*

101. Amicus Brief of Oldenburg et al. in support of Appellees at 12, *Finley v. NEA*, 795 F. Supp. 1457 (9th Cir. 1992) (No. 92-56028, 92-56387, 93-55089) (filed June 7, 1993) (decision pending). The amici curiae are sixteen renowned artists whose work, sculpture, paintings, prints, and photographs represent visual artistic expression in a variety of media and exemplifies many of the major artistic movements since the 1940s. Works of these artists are included in the permanent collections of major museums in the United States and abroad, including the Metropolitan Museum of Art, the Museum of Modern Art, the National Gallery of Art, and the Los Angeles County Museum of Art. Three of the amici hold teaching positions at universities and arts institutions. Many have received NEA grants and served on NEA peer review panels. *Id.* at 1-2.

102. *Id.* (quoting *Smith v. Goguen*, 145 U.S. 566, 573 (1974); *Cohen v. California*, 403 U.S. 15, 25 (1971)). See also CARMILLY-WEINBERGER, *supra* note 15, at 90-92. In 1863, Edouard Manet painted *Le Dejeuner sur l'Herbe* (Luncheon on the Grass). The painting was shown in the Salon des Refuses (Salon of the Rejected) because of the angry condemnation that it provoked.

Assuming an artist applying for a grant could guess what decency means in the statute, she still would not know with certainty "what general standard NEA officials [used]," or whether the standard was the same in New York City as it is in Kansas City.<sup>103</sup> The Decency Clause seems to be a "statute which may truly mean all things to all people."<sup>104</sup> Accordingly, "such a standard applies no standard at all."<sup>105</sup>

Similarly, the meaning of "respect for the American public's beliefs and values [is as vague as the] general standards of decency."<sup>106</sup> "Although the statute recognized that the beliefs and values of the American public are 'diverse,' it fails to indicate which values should prevail if respecting one set of values means offending another."<sup>107</sup>

Further, "diverse beliefs and values of the American public" include religious, political, racial and ethnic attitudes, and attitudes about sexuality.<sup>108</sup> "Within each of these . . . is ample potential for discordant views and attitudes, depending upon the point of view of the person doing the evaluating."<sup>109</sup> Since the Decency Clause designates the NEA's Chairperson as the final arbiter, the Chairperson is empowered to reject any grant she believes questions the political, religious, or moral values of some part of the

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The nude woman in the picture is calm and collected and makes a striking contrast to the fully dressed men. What was shocking at the time was that she met her companions on equal ground, with no feelings of inferiority despite her sex and lack of clothes. Napoleon III (who in private life was no paragon of sexual morality) called the painting "indecent and scandalous." *Id.* at 90.

In 1865, Manet caused another uproar when he exhibited *Olympia*, a nude painting of a highly paid prostitute. The principle public objection concerned once again the unabashed nakedness of the figure. Although Manet's purpose in painting *Olympia* was to call public attention to the sexual exploitation of women in 19th century France, reality was not adequately disguised and the general public found the work obscene. *Id.* at 91.

Yet, the same public approved other erotic female figures like *The Sleep*, painted by Gustave Courbet in 1866. *The Sleep* is a depiction of lesbianism among professional prostitutes. Females in the brothel became a frequent theme for painters of the time. This work was shown to the public, without any question of decency. Nea, *supra* note 32, at 174. To see photographic representations of the above-mentioned paintings, see EDWARD LUCIE-SMITH, *SEXUALITY IN WESTERN ART* 131-35 (1993).

"[T]he standards [for judging art] change over time as artists push us into new realms of awareness about art and the world around us. . . . [H]istory is replete with examples of artists whose work is now recognized as outstanding, even though it failed to receive critical acclaim in their lifetime (such as Van Gogh), or whose work was pilloried by mainstream critics when it was first shown . . ." (as the works listed above). Amy Sabrin, Essay, *Thinking about Content: Can it Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1226 (1993).

103. Amicus Brief in Support of Appellees, *supra* note 101, at 13.

104. *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, 715-16 (1966).

105. Amicus Brief in Support of Appellees, *supra* note 101, at 13.

106. *Id.*

107. *Id.* at 18.

108. *Id.*

109. *Id.*

American public.<sup>110</sup> Further, her decision is unreviewable and final.<sup>111</sup> In essence, the entire determination of what Americans find “decent” and “respectful” is entirely in the hands of one person: the NEA Chairperson.<sup>112</sup>

Another concern the District Court voiced in *Finley* is the “chilling effect” that such a limitless standard will have on artists and art organizations who seek NEA support for their work.<sup>113</sup> An artist may be discouraged from applying for support “out of fear that her subject may be too provocative.”<sup>114</sup> Or worse, “she may decide not even to create a piece of art out of fear of being rejected under some interpretation of the decency clause.”<sup>115</sup> The effect of the statute is to force artists and arts institutions alike to “steer far wider of the unlawful zone, than if the boundaries of the forbidden areas were clearly marked.”<sup>116</sup>

Thus, if decency is measured in terms of conformity to acceptable standards of propriety, “artistic work could be at risk whenever an artist experiments with new, unconventional, and provocative subjects, something artists traditionally do.”<sup>117</sup> “Given that tradition, a standard for judging artistic merit that focuses upon general standards of decency—and . . . the idea of conformity—is fundamentally antithetical to the making of art.”<sup>118</sup>

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110. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992). (“[The] panelists, the Council and the Chairperson are given no guidance in administering the standard; each apparently is expected to draw on her or his own personal views of decency or some ephemeral “general American standard of decency.””). See also LIVINGSTON BIDDLE, *OUR GOVERNMENT AND THE ARTS: A PERSPECTIVE FROM THE INSIDE* 422 (1988) (“[The] National Council on the Arts is the ultimate guardian against a cultural czar, a final individual arbiter of taste and dispenser of patronage.” The fundamental involvement of the Council members in the funding process of the NEA was intended to ensure trust, integrity, and fairness in the process. “So it was conceived. So it must remain.”).

111. *Finley*, 795 F. Supp. at 1460. See also 1993 NEA ANN. REP., *supra* note 37, at 13.

112. *Finley*, 795 F. Supp. at 1460.

113. *Id.* at 1469-75.

114. Amicus Brief in support of Appellees, *supra* note 101, at 26.

115. *Id.*

116. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Finley*, 795 F. Supp. at 1471.

117. Amicus Brief in support of Appellees, *supra* note 101, at 27-28. See also Nea, *supra* note 32, at 177 (“By its nature, art questions any definition that critics ascribe to it. Continually, artists violate boundaries, as that is what artists do.”); See also Tom Prideaux, *Cubism, LIFE*, Dec. 27, 1968, at 51-54. In 1907, Picasso painted *Les Femmes d'Alger (O.J.)* (The Young Ladies of Avignon), a cubist depiction of five prostitutes in a brothel. For an entire generation, the painting was ridiculed. Today, it hangs in the New York Museum of Modern Art and is considered “the first cubist picture” and the “first truly 20th Century painting.” *Id.* at 53.

118. Amicus Brief in support of Appellees, *supra* note 101, at 27-28.

## 2. The Decency Clause Has the Purpose and Effect of Suppressing "Dangerous Ideas"

The NEA operated successfully for twenty-five years, making grants on the basis of artistic merit and excellence.<sup>119</sup> In 1990, Congress imposed on it the existing artistic determination considerations of "decency" and "respect."<sup>120</sup> "[T]he purpose and effect of the . . . 'decency' criteria is to single out for suppression meritorious art that espouses 'indecent' or 'disrespectful' views."<sup>121</sup>

The legislative history of the 1990 reauthorization includes repeated attacks on art addressing subjects repugnant to some representatives and senators.<sup>122</sup> The Congressional Record is replete with criticism of the perverted homoerotic content of Robert Mapplethorpe's work<sup>123</sup> and the work of other artists referring in any way to homosexuality, and many references to Andres Serrano's blasphemous use of a crucifix in a photograph.<sup>124</sup> The debates leave little doubt that the purpose of the Decency Clause was to deny funding to artistic works dealing with specific subjects that particular members of Congress opposed.<sup>125</sup>

119. Amicus Brief of Center for Constitutional Rights in support of Appellees at 42-43, *Finley v. NEA*, 795 F. Supp. 1457 (C.D. Cal. 1992) (No. 92-56028, 92-56387, 93-55089) (filed June 4, 1993) (decision pending).

120. *Id.* at 42.

121. *Id.* at 43.

122. 135 CONG. REC. S 5594 (daily ed. May 18, 1989) (statement of Sen. D'Amato) (The Senator dramatically ripped up a copy of Serrano's *Piss Christ* on the Senate floor as he announced, "This work is shocking, abhorrent, and completely undeserving of any recognition whatsoever."). See also *Finley*, 795 F. Supp. at 1470 n.16 ("[T]he plethora of comments in the Congressional Record indicates that the 'decency' provision was intended to act as a bar to funding controversial projects or artists."). See also CULTURAL WARS, *supra* note 4, at 107 (By June 8, 1989, Rep. Arney started a letter-writing campaign to all congressmen. He wanted the NEA to end sponsorship of "morally reprehensible trash," and he wanted new guidelines that would "clearly pay respect to public standards of taste and decency.").

123. 136 CONG. REC. H9433 (daily ed. Oct. 11, 1990) (statement of Rep. Crane); CONG. REC. H9439 (daily ed. Oct. 11, 1990) (statement of Rep. Dornan); 136 CONG. REC. S16,627 (daily ed. Oct. 24, 1990) (statement of Sen. Helms).

124. 136 CONG. REC. H9438 (daily ed. Oct. 11, 1990) (Rep. Dornan); 136 CONG. REC. H9442 (daily ed. Oct. 11, 1990) (Rep. Rohrabacher); 136 CONG. REC. S16,627 (daily ed. Oct. 24, 1990) (Sen. Helms); 136 CONG. REC. S17,980 (daily ed. Oct. 24, 1990) (Sen. Helms).

125. 135 CONG. REC. H3511-13 (daily ed. June 29, 1989) (statement of Rep. Dannemeyer) (depicting the homosexual movement's political agenda as primarily an "attempt to delude the public into viewing homosexuality as an innocuous alternative lifestyle, with well placed proponents in many fields, including the obvious fields of entertainment, literature, and certain creative occupations."); 135 CONG. REC. H 5635 (daily ed. Sept. 13, 1989). Rep. Dannemeyer states:

Let us not kid ourselves. The toleration of . . . homosexuality is not the decline, the cause of the decline of a civilization; it is the symptom of a moral decay in a society that has lost the ability to say that there are standards in this world that governed mankind down through time and that are valid, traditional family values. . .

*Id.* See also CULTURAL WARS, *supra* note 4, at 106-12 (discussing the desire of political conservatives and fundamentalists to eliminate ideas they do not like from the public space).

Yet the Supreme Court has consistently said that Congress may not legislate to suppress undesirable speech. “[R]egulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view . . . is the purest example of a law . . . abridging the freedom of speech . . . .”<sup>126</sup> Further, Congress must not allocate funding on the basis of criteria that are “[aimed] at the suppression of dangerous ideas.”<sup>127</sup> If the authors of the Decency Clause look to the NEA’s enabling legislation<sup>128</sup> or to basic First Amendment premises, they will find that in a free society government may not enforce conformity. It may neither punish those who espouse unconventional ideas nor reward those who promise to give them up.<sup>129</sup> The First Amendment means that “the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>130</sup>

Nor may Congress suppress undesirable speech under the guise of protecting society from ideas that they find offensive<sup>131</sup> or to protect tax payers from unwanted expenditures.<sup>132</sup> Yet, the Congressional Record is replete with these two justifications for the Decency Clause.<sup>133</sup>

### 3. What are the Compelling Interests?

#### A. *Protecting People From Offensive Speech*

The Supreme Court has consistently held that protecting the citizenry from offensive speech does not qualify as a compelling interest justifying content-based legislation.<sup>134</sup> “[T]he fact that society may find speech offen-

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126. *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 546 (1980).

127. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).

128. The National Foundation on the Arts and the Humanities Act, Pub. L. No. 89-209, 79 Stat. 845 (1965). Freedom of expression was a central goal of Congress in creating the NEA. “Conformity for its own sake is not to be encouraged, no undue preference should be given to any particular style or school of thought or expression.” *Id.*

129. 111 CONG. REC. 4594 (1965) (“[n]or should any government seek to restrict the freedom of the artist to pursue his calling in his own way [for f]reedom is an essential condition for the artist . . .”).

130. *Police Dep’t v. Mosley*, 408 U.S. 92, 95-96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.”).

131. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

132. *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976).

133. 136 CONG. REC. H9410 (daily ed. Oct. 11, 1990) (statement by Rep. Coleman).

134. *See, e.g., Johnson*, 491 U.S. at 414.

sive is not a sufficient reason [to suppress] it.<sup>135</sup> Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."<sup>136</sup>

Further, is Congress protecting the American public when it shields society from artistic expression that may give offense? Several commentators say the answer is clearly no.<sup>137</sup> They argue this "protection" is a form of scapegoating speech as an excuse for refusing to deal with real-world problems.<sup>138</sup> "Messages in art are influenced by social conditions and

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135. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). See also *CULTURAL WARS*, *supra* note 4, at 41 ("Art often deals with extremities of the human condition. It is not to be expected that, when it does that, everyone is going to be pleased or happy with it."); NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 22 (1995). In 1992, at Pennsylvania State University, officials had to remove a reproduction of Goya's painting entitled *Maja* because an English teacher insisted that "it embarrassed her and made her female students 'uncomfortable.'" *Id.* No matter that the painting hung with other masterpiece reproductions in the room where art history classes were routinely conducted. *Id.* To view Goya's *Maja*, see HARTT, *supra* 2, at 801.

136. *Pacifica*, 438 U.S. at 745 (the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive audience" cannot avoid objectional speech). However, this does not seem to be the concern with NEA funded art, since a taxpayer usually sees a work created with an NEA grant only if she has ventured out to a museum, gallery, or other exhibition space.

137. HEINS, *supra* note 2, at 185-86. See also Fox, *supra* note 59, at 383 ("[W]hatever is wrong [with society] is more likely to be changed by seeing these photographs, whether [they are of] Vietnam or [one from] Mapplethorpe's camera, than by not seeing them. To be offended by harsh reality is not only our right, but our responsibility.").

138. HEINS, *supra* note 2, at 186.

139. *Id.* at 185. See also CARMILLY-WEINBERGER, *supra* note 15, at 66-70. "To create living art' meant . . . to paint reality, the world as it is . . . . It is then the purpose of art to further socialism, social justice, and truth . . ." These words were spoken by Gustave Courbet, one of the first painters to paint the social problems of the day on canvas in order to call attention to them. *Id.* at 66.

Courbet went out into society and "saw the great efforts of workers, young and old, to earn their daily bread." He brought that effort to light in *The Stone Breakers*, painted in 1849. *Id.* at 67-68. The painting created an uproar because it brought people's attention to the burning social problems of the day. *Id.*

Scandal erupted with another of Courbet's paintings: *The Studio: A Real Allegory Concerning Seven Years of My Artistic Life* painted in 1854. This painting was rejected by the Salon, so Courbet and friends funded a show on their own. They entitled the show "The Pavilion of Realism." *Id.* For the exhibition, Courbet described in the catalogue the meaning of the painting. "First, he accentuated that realism [is] a fact of life and that the subject matter of the painting was divided in two parts: 'I am in the middle, painting. To the right are all the shareholders . . . that is to say, [my] friends, my [fellow] workers, and amateurs from the art world.'" *Id.* Included among these friends are Proudhon, Champfleury, and the poet Buchon. Also included are three leaders of revolutions for national independence of their people in Russia, Italy, Hungary, and Poland. On the left, "is the other world of the trivial life, the people, misery, poverty, wealth, the exploited, the exploiters, people who live on death." *Id.*

attitudes, not the other way around.”<sup>139</sup> The realities of society influence the production of art, art does not produce society.<sup>140</sup>

Thus, “protecting” people from words or images that depict societal realities is not only an ineffective way to address social problems, it also has a scapegoating effect on art and artists as the reason for real world problems.<sup>141</sup> “[I]f society can see itself through the mirror of art, it will be more likely to pay attention to social ills than if unfortunate ideas or realities are suppressed and ignored.”<sup>142</sup> For if ignored, feelings of anger, frustration, protest, or desperation are likely to explode into antisocial behavior.<sup>143</sup>

### *B. Protecting the Taxpayer from Unwanted Expenditures*

One need only state the second justification for the Decency Clause, that taxpayers should not be required to subsidize the expression of views with which they disagree, to highlight its defects. The Supreme Court has repeatedly struck down this premise:

[V]irtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object. Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech.<sup>144</sup>

Taxpayers fund many things that individual citizens may not like: savings and loan bailouts, foreign military adventures, or \$600 toilet seats for

Another artist who painted the realities of life was Theodore Gericault. In 1819, Gericault painted his famous *Raft of the Medusa*. *Id.* at 73. This painting was a testimony to the struggle for freedom and the suffering of women and men. It is the depiction of a real life story.

The ship *Medusa* had sailed from France for Senegal on July 2, 1816, with 150 men, women, and children aboard, among them blacks and colonial officials. They intended to establish a colony [free] from oppression and subjugation. . . . The *Medusa* grounded, and 49 survivors were transferred to a raft, which drifted on the open seas for 13 days without provisions.

*Id.* A ship finally rescued them but there were only 15 survivors. A mutiny had occurred against the officials on the raft. People had been handled with brutality; some were murdered, while others starved. Gericault heard the story first-hand from one of the survivors. He thought the mutiny on the raft symbolized revolution and saw in the tragic story an excellent opportunity to voice his socialist views. This painting was also rejected by the Salon. *Id.* To view representations of the above paintings see HARTT, *supra* note 2, at 805, 831-32.

140. Fox, *supra* note 59, at 380. Congress is “blaming the ills of society on Andres Serrano and Robert Mapplethorpe . . . as if art produced society instead of the other way around. Art is the mirror we hold up to our society, whether we like the reflection or not.” *Id.*

141. HEINS, *supra* note 2, at 186.

142. *Id.*

143. *Id.*

144. FCC v. League of Women Voters, 468 U.S. 364, 385 n.16 (1984) (citations omitted).

much higher than the NEA's.<sup>145</sup> Further, just because Congress chooses to fund artistic creations does not mean Congress or the taxpayer endorses every work funded.<sup>146</sup> Nor does it mean that Congress and the taxpayer are responsible for the views or attitudes expressed in specific works.<sup>147</sup> The Government funds Fullbright scholars, charitable organizations, and scientific research,<sup>148</sup> but it does not require these grant recipients to produce works only approved by the government.<sup>149</sup> Why should funding of the arts be any different?

The "taxpayers' money" has been a popular slogan used by conservative members of Congress for many years to suppress unwanted speech.<sup>150</sup> When used in this regard, the slogan is not only unconstitutional (as indicated above) but unconvincing.

[A] nationwide survey conducted in 1993, [shows] that four out of five [Americans] agreed that the arts and humanities "contribute to the economic health and well-being of society" and "[made their] own local community a better place to live." Eighty-three percent agreed that "the

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145. 136 CONG. REC. H9437 (statement of Rep. Hertel). See also Peter Eisler, *NEA Finds Itself Immersed in Art of Survival*, USA TODAY, Feb. 20, 1995, at 4D ("This year's \$167.4 million in NEA spending accounts for .01% of the \$1.5 trillion federal budget, or about 64 cents per taxpayer."). See also John Willett, *GOP's Big Broom May Sweep Away Local Arts Funds*, SAN DIEGO DAILY TRANSCRIPT, Feb. 21, 1995, at 1A, 3A (1995 NEA budget is eight million dollars less than the federal appropriation for military bands and costs each taxpayer 64 cents per year, compared with \$1,100 per person per year for defense and \$200 per person per year for education).

146. Amicus Brief in support of Appellees, *supra* note 101, at 41.

147. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 749 n.258. Former NEA Chairman John Frohnmayer analogized the NEA to a public forum: "The government is not the speaker—and is not the sponsor (of the idea)—the [government] enables but is (should be) blind to the content—[government] provides [the] soap box—not the script." *Id.*

148. Bd. of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 476-478 (D.D.C. 1991) (The district court declared unconstitutional a requirement that researchers obtain government approval before publishing or even discussing preliminary research results funded by a federal grant.). See also Cole, *supra*, note 147, at 727-28 ("Scientific research is largely funded by the federal government; in 1991 . . . federal research and development spending approximately \$65 billion . . . [F]unding decisions are made by a variety of separate agencies, . . . [which] typically use peer review panels to make grants, entrusting the decisions to scientists rather than politicians.").

149. HEINS, *supra* note 2, at 128.

150. 135 CONG. REC. S5594 (daily ed. May 18, 1989) (statement of Sen. D'Amato) ("This is not a question of free speech. This is a question of abuse of taxpayers' money."); 136 CONG. REC. H9439 (daily ed. Oct. 11, 1990) (statement of Rep. Dornan). See also Dan Mayer, *The Religious Right and Arts Funding*, 21 J. ARTS MGMT. & L. 341, 344 (1992). In April 1991, at a hearing held by the House Appropriations Interior Subcommittee, Reverend Sheldon said "[T]here is a war raging in America . . . . The elitist avant-garde arts community uses the NEA to advertise and disseminate their political beliefs. The NEA then uses our scarce tax dollars to fund works which are intended to shock Americans into an acceptance of dysfunctional behavioral lifestyles and to destroy the family." *Id.*



arts and humanities provide a form of expression that is essential to a democratic society.”<sup>151</sup>

Further, sixty-nine percent were willing to increase their taxes in order to provide more funding for the arts.<sup>152</sup> To “Americans of the 1990s, the arts stand in the center of life, not on its margins or in its shadows.”<sup>153</sup> Americans “welcome—not fear [art]” and are willing to expend their taxes in support of the arts.<sup>154</sup>

*D. Applying Rust v. Sullivan - Is Funding the Arts like  
Funding Public Universities?*

The discussion thus far has shown that Congress has done what it is not constitutionally authorized to do: enact legislation restricting the content of federally funded art. All Congress’ arguments in support of the constitutionality of the Decency Clause have failed. There is one more argument Congress has, which is probably its best. Or, unlike the others, one which the Supreme Court has yet to squarely decide. This argument is based on the holding in *Rust v. Sullivan*.<sup>155</sup>

In *Rust*, the Supreme Court held in a tight five-to-four decision that government can, when funding family planning counseling, instruct family planning counselors not to tell women about abortion options, while at the same time, require the counselors to tell pregnant women about taking care of their unborn child.<sup>156</sup>

Using *Rust*, the NEA analogized federally-funded family planning counseling to federally funded art and argued that, if the government can bar federally-funded family planning counselors from mentioning abortion in pregnancy counseling, surely it can require artists who receive federal grants

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151. James Quay, *Congress Swoops Down on Endowments for the Humanities and Arts*, S.D. UNION TRIB., Jan. 27, 1995, at B7. See also Alberta Arthurs & Douglas Davis, *News Flash to Washington: Americans like the Arts*, L.A. TIMES, Jan. 25, 1993, at B7. A 1993 Harris poll showed that “69% of all Americans would pay an additional \$5 in taxes to support the arts; 75% oppose government restrictions on content; [and] 91% favor vigorous arts education in the schools.” *Id.*; Davis, *supra* note 53, at 38. The arts are one of our most dynamic and productive economic sectors. The arts generate “six percent of the Gross National Product, more than rubber or steel production.” *Id.* They also generate “13 million jobs in the U.S.” *Id.*; Christopher Knight, *Why is Congress After the NEA? It’s Simple*, L.A. TIMES, Feb. 27, 1995, at F1 (“The nonprofit arts industry . . . generates \$5.4 billion in taxes back to federal, state, and local governments.”).

152. Arthurs & Davis, *supra* note 151, at B7.

153. *Id.*

154. *Id.*

155. *Rust v. Sullivan*, 500 U.S. 173 (1991).

156. *Id.* at 192-93.

to refrain from creating indecent art.<sup>157</sup> This broad reading of *Rust* is based on the two most far-reaching sentences in the entire opinion,<sup>158</sup> where the Court stated that it is not necessarily a First Amendment violation for government to fund one activity to the exclusion of another. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not . . . required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism."<sup>159</sup>

Therefore, the NEA argued that since it is constitutional for the government to fund democracy to the exclusion of Communism and Fascism and it is constitutional for the government to fund family planning and childbirth without funding abortion, it must be constitutional for government to fund art which conforms to Congress' idea of decency to the exclusion of art Congress deems indecent.<sup>160</sup>

The danger in reading *Rust* so broadly is that the case could be used by those who want to use Federal funding as a weapon to limit discussion of controversial issues.<sup>161</sup> If read this broadly, conservative members of Congress and other opponents of the NEA funding choices would be able to argue for every conceivable restriction, "withholding funding on grounds that art is un-American, blasphemous, anti-Christian or rejects family values."<sup>162</sup> Fortunately, the Court did not intend such a broad reading of the case. In fact, it cautioned that its reasoning does not mean that "funding by the Government . . . is invariably sufficient to justify government control over the content of expression."<sup>163</sup> In public forums and public universities, First Amendment dictates restrict the government's ability to control

157. Brief for the National Endowment for the Arts at 36-38, *Finley v. NEA*, 795 F. Supp. 1457 (9th Cir. 1992) (No. 92-56028, 92-56387, 93-55089) (filed April 26, 1993) (decision pending); Amicus Brief of National Family Legal Foundation in support of Appellants at 10-13, *Finley v. NEA*, 795 F. Supp. 1457 (9th Cir. 1992) (92-56028) (filed April 1, 1993) (decision pending). See also James F. Fitzpatrick, *Decency Clause Still Haunts the NEA*, AM. THEATER, Nov. 1993, at 56-57 (Arguing that the *Rust* decision "laid out a blueprint for those who want to use federal funding as a weapon to limit discussion of controversial issues.").

158. Cole, *supra* note 147, at 687.

159. *Rust*, 500 U.S. at 193-94 (citations omitted). It is noteworthy that the National Endowment for Democracy was the Court's only example of permissible viewpoint-based funding of speech. Further, the National Endowment for Democracy is an institution directed not at United States citizens at all, but at the rest of the world. Cole, *supra* note 147, at 735.

160. Fitzpatrick, *supra* note 157, at 57 (The rationale used in a brief filed by the Justice Department in the pending *Finley* case: "[A] straight forward application of the general rule in *Rust* means that the government can limit its subsidies to art projects that are not indecent."). See also Amicus Brief of National Family Legal Foundation in support of Appellants *supra* note 157, at 10-13.

161. Fitzpatrick, *supra* 157, at 56.

162. *Id.*

163. *Rust*, 500 U.S. 173, 199. See also *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983); *Leathers v. Medlock*, 499 U.S. 439, 450 (1991) (subsidies or taxes that are based on expressive content or are aimed at the suppression of ideas cannot survive under the First Amendment).

expression where it is subsidizing speech.<sup>164</sup> The *Finley* Court logically carried the *Rust* holding further and implied that the arts are one of those special preserves that the Supreme Court recognizes as falling outside the holding of *Rust*.<sup>165</sup> Just as the university and public forums serve as "traditional sphere[s] of free expression so fundamental to the functioning of our society,"<sup>166</sup> so do the arts.<sup>167</sup> This connection between art and academics was recognized in the NEA's original enabling legislation:

(3) An advanced 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 in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.

(4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located the masters of their technology and not its unthinking servants.

(7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

(9) Americans should receive in school, background and preparation in the arts and humanities 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.<sup>168</sup>

Further, many courts have recognized that the arts contribute to the exchange of ideas, with a vitality equal to the pursuit of ideas in the humanities, social sciences, and natural sciences.<sup>169</sup> Past presidents have also acknowledged that the arts are more like the pursuits of the university to which people should aspire. When John Adams stood in the gardens of Versailles, admiring the beauty of the statues, he said:

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164. *Rust*, 500 U.S. at 199-200.

165. *Finley*, 795 F.2d at 1473-75.

166. *Id.* at 1473; *Rust*, 500 U.S. at 200.

167. *Finley*, 794 F. Supp. at 1473.

168. 20 U.S.C. § 951 (1988). These findings were reaffirmed by Congress through the revision and republication of this section as part of the 1990 Amendments. *Finley*, 795 F. Supp. at 1473-74

169. Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 474 (D.D.C. 1991). Here the government argued that *Rust v. Sullivan* permitted it to limit the researcher's speech as a condition of funding. The court rejected that argument and held that the grant recipient is a university, and First Amendment protections applicable to universities should similarly be applied to academic research funding. *Id.*

I must study politics and war that my sons may have liberty to study . . . mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce and agriculture in order to give their children the right to study painting, poetry, music, architecture, statuary, tapestry and porcelain.<sup>170</sup>

The Supreme Court in *Rust* recognized that government, even if it funds the university or public forum, is constrained by the First Amendment from interfering in that dialogue. *Finley*, applying *Rust*, recognized the same principle: Just as the educational system requires that government tolerate the free exchange of ideas in public universities, so the institution of art requires freedom to challenge conventional wisdom and values, even if the government funds the challenge.<sup>171</sup> As Justice Frankfurter said, “a sense of freedom is also necessary for creative work in the arts.”<sup>172</sup> Because artistic expression, no less than academic speech, is at the core of a democratic society’s cultural and political vitality,<sup>173</sup> public funding of art should be treated like the funding of public universities.<sup>174</sup> And as government cannot impose restrictions or control expression in the federally funded university, it should not be able to control the content of federally funded art.

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170. See ZEIGLER, *supra* note 8, at 2.

171. *Finley*, 795 F. Supp. at 1475. In comparing artistic and academic freedom, Judge Wallace Tashima wrote in full:

[T]he fact that the exercise of professional judgment is inescapable in arts funding does not mean that the government has free rein to impose whatever content restrictions it chooses, just as the fact that academic judgment is inescapable in the university does not free public universities of First Amendment scrutiny. The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom . . . .

*Id.*

172. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

173. CARMILLY-WEINBERGER, *supra* note 15, at 159.

As long as artists are at liberty to feel with high personal intensity, as long as our artists are free to create with sincerity and conviction, there will be healthy controversy and progress in art. When artists [in totalitarian states] are made the slaves and tools of the state, when artists become the chief propagandists of a cause, progress is arrested and creation and genius are destroyed.

*Id.* (quoting President Eisenhower).

174. *Finley*, 795 F. Supp. at 1473-75.

## IV. CONCLUSION

"When all else fails and disappears, art endures."<sup>175</sup>

Exploring, defining, questioning, and sometimes ridiculing have always been, and will probably always be, fundamental functions of academics and the arts. Throughout the ages, artists and educators have protested against oppressive governments. They have provided the voice for those who cannot speak and the impetus for change. Their dissent has often made them the targets of repressive governments. This has happened throughout history, and continues today.<sup>176</sup> One of the most frightening examples happened in Germany.

In 1936, in an attempt to "shape [their] society and clear it of filth," Hitler rounded up over five thousand paintings he considered unpatriotic,<sup>177</sup> blasphemous, and decadent.<sup>178</sup> He seized the works from private and public collections. Among them were paintings by Picasso, Van Gogh, Gauguin, Cezanne, Schiele,<sup>179</sup> Marc,<sup>180</sup> and Rouault.<sup>181</sup> He gathered the works in an exhibition he called *Entartete Kunst* (Degenerate Art).<sup>182</sup> The paintings were hung helter-skelter on the walls. Many were affixed with red stickers stating "paid for by taxes of the German working people."<sup>183</sup> Most

175. *Hearings on National Endowment for the Arts before the U.S. Senate Committee on Labor and Human Resources* (Jan. 26, 1995) (statement of Jane Alexander, the current NEA Chairwoman) [hereinafter Statement of Jane Alexander].

176. Cole, *supra* note 147, at 749 nn.250-53 (such as Stalinist Soviet Union, China, Spain, Hungary, and other Eastern block countries).

177. On April 26, 1937, the small Basque town of Guernica was bombed by German planes. After hearing of the tragedy, Pablo Picasso painted *Guernica* to lament the suffering of the Spanish people under the Franco regime. Picasso took only six weeks to paint the huge work. It is perhaps one of the most eloquent and dramatic war paintings in the history of art. CARMILLY-WEINBERGER, *supra* note 15, at 116. See also HARTT, *supra* note 2, at 901.

178. PETER ADAM, *ART OF THE THIRD REICH* 123 (1992).

179. SIMON WILSON, EGON SCHIELE 8 (1980). Schiele's *Autoportrait Se Masturbant*, painted in 1911, was one of the many paintings shown in Hitler's *Entartete Kunst*. Schiele, an Austrian born artist, was arrested and imprisoned several times in his life for his "immoral art." *Id.* at 58. Often, the same order that sent him to prison ordered his art destroyed. While in prison, Schiele wrote on one of his drawings, "To hinder an artist is a crime, to do so is to murder burgeoning life." *Id.*

180. Adam, *supra* note 178, at 127. One of the paintings displayed at Hitler's *Entartete Kunst* was *Blue Horses* painted by Franz Marc in 1911. This is one of my favorite paintings. Hitler said of the painting, "Horses aren't blue! How could anyone paint horses blue!" CARMILLY-WEINBERGER, *supra* note 15, at 109. Obviously, Hitler had little imagination. Fortunately, this painting survived the show and hangs today in the Walker Art Center in Minneapolis. See also H. HARVARD ARNASON, *HISTORY OF MODERN ART* 117 (3d ed. 1986).

181. Adam, *supra* note 178, at 122.

182. *Id.* at 123.

183. *Id.*

were given degrading titles.<sup>184</sup> After the show ended, many of the works were burned.<sup>185</sup>

“Although we need to be careful about making facile comparisons to other nations and other times, there’s no question that the rhetoric used in the [recent “arts crisis”] during the eighties and nineties bears uncanny resemblance to the way that the Nazi regime in Germany demonized unconventional groups . . . .”<sup>186</sup>

In 1991, an exhibition entitled “Degenerate Art” toured America, documenting Hitler’s *Entartete Kunst* of the thirties.<sup>187</sup> It “provided a vivid reminder that before the Nazis mocked, segregated, disenfranchised, and then destroyed Jews, radicals, and homosexuals, they mocked, segregated, banned, and burned allegedly ‘degenerate’ Jewish, modernist, [and] sexually suspect . . . art.”<sup>188</sup>

We must not lose sight of the fact that the NEA was created to enhance opportunities for free expression, not to limit them. The guiding principles surrounding the formation of the NEA suggest that the agency should be free from governmental interference. The content restrictions found in the 1989 and 1990 amendments conflict with the basic intent and language of the enabling legislation.

To support content controls, government could abandon funding the NEA. In fact, this is something the government is currently considering.<sup>189</sup> However, if the government wishes to continue to provide funding for the NEA, content controls cannot survive. To thrive and fulfill the promise of the First Amendment, the art funded by the NEA must evolve free from personal and political prejudices.

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184. *Id.* at 121-27 (Some of the titles were, “Mirrors of the Decadence in Art,” “Chambers of Horrors,” “The Harlot is Elevated to a Moral Ideal,” “Farmers Seen by Jews,” “Insult to German Womanhood,” “Mockery of God,” “Stupidity or Impertinence,” “The Mulatto,” “The Niggerizing of Music and Theater”).

185. *Id.* at 127.

186. HEINS, *supra* note 2, at 183.

187. *Id.*

188. *Id.*

189. Knight, *supra* note 151, at F1 (“The current Republican plan being advanced in Washington is to demolish the National Endowment for the Arts goes like this: slash next year’s budget by 40%, slash another 40% the following year and zero out the agency the year after that.”).

\* This paper is dedicated to CL, who through his life became my teacher in love, understanding, courage, and compassion. And Lars, thank you for your love and support.

