IN SEARCH OF ARTISTIC EXCELLENCE: STRUCTURAL REFORM OF THE NATIONAL ENDOWMENT FOR THE ARTS

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I. INTRODUCTION

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' *Don Quixote*, Shakespeare's *Venus* and *Adonis*, or Zona's *Nana*. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings the public will pick and choose.[1]

The National Endowment for the Arts (the "NEA" or the "agency") was established in 1965 to provide funding to support the creation of artistically excellent works of art. In the past few years, the NEA has come under intense scrutiny from groups who opposed the agency's funding of certain controversial works of art. A number of important questions have been raised, centering primarily on the issue of control: Who can and should decide what art will be funded? Can the government, because it created an agency to support the arts, control the content of the art it will fund? Can it do so by imposing content-based funding restrictions on recipients of grants? Or does the First Amendment protect against such content control?

A number of recent events reveal an important, ongoing struggle for control over the NEA and its funding decisions. Beginning in 1989, advocates of increased government control over the content of NEA subsidized art have successfully lobbied for amendments to the NEA charter. Senator Jesse Helms (R-North Carolina) attempted to eliminate the NEA after it funded the controversial works of Robert Mapplethorpe and Andres Serrano.

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[1] Hannegan v. Esquire, Inc., 327 U.S. 146, 157-58 (1946) (footnotes omitted).

Although Helms failed to eliminate the NEA, he succeeded in convincing Congress to enact amendments that allow for a level of government content control over funded art.[2]

In 1991, NEA Chairperson John Frohnmayer was forced to resign by President Bush less than a week after Republican presidential hopeful Patrick Buchanan's surprisingly strong showing in the New Hampshire primary race. Frohnmayer had been caught in the middle of a political war between the President and Buchanan over the appropriate level of government support for the agency.

At the same time, the Justice Department embarked on a mission to expand the applicability of the recent Supreme Court decision in *Rust v. Sullivan*[3] to the NEA subsidized art context. In *Rust*, the Court held that regulations prohibiting recipients of Title X funds from counseling patients regarding abortion did not violate the First Amendment. The Justice Department is now attempting to expand this reasoning to allow the government greater control over NEA funding decisions.

Thus, the NEA currently faces pressure to control its grantmaking authority from all three branches of government. Congress, pressured by Senator Helms, has amended the NEA's grantmaking structure to open the agency up to political pressures to regulate the content of its funded art. The executive branch, by the forced resignation of the NEA's chairperson and through the Justice Department's actions, is trying to impose its version of what is acceptable and, thus, fundable, art by the independent agency. The judiciary, if it adopts the Justice Department's argument that *Rust* should be interpreted to allow the government to regulate the content of its subsidized speech, would make constitutional such content-based restrictions and control over the subsidized arts.

The controversy and pressure surrounding the NEA may come to a peak in early 1994 when the NEA faces its next reauthorization hearing. Congress may then choose to eliminate the NEA as an agency. If Congress elects to reauthorize the NEA, it should address certain structural weaknesses through legislative amendment. While the NEA's enabling legislation was a noble attempt by its founders to create an independent agency insulated from government control from the left or the right over the content of the funded art, the controversy that has raged in recent years has re-

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[2] Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (to be codified at 20 U.S.C. § 954); Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-512, 104 Stat. 1915, 1972-74 (to be codified at 20 U.S.C. § 960).

[3] 111 S. Ct. 1759 (1991).

vealed increasingly serious structural flaws. Legislative reform could correct these structural flaws and help insulate the agency from future content control efforts from either the political right or left.

This Article suggests structural reforms to the grantmaking authority of the NEA that will allow the agency to return to its mission of encouraging and financially supporting the creation of excellent art. This Article is divided into six sections. Section II traces the creation of the NEA and highlights the concerns Congress had over an agency that would subsidize the arts. Section III examines First Amendment jurisprudence as it applies both to the arts and to the subsidized arts to determine whether the Constitution prohibits the government from exerting content control over the subsidized arts. This section also examines whether public policy points to a need for the government to subsidize the arts. Section IV focuses on recent Congressional influences over the agency. Specifically, this section analyzes the 1989 and 1990 amendments to the NEA's grantmaking structure and highlights the structural weaknesses caused, and constitutional issues raised, by these amendments. Section V examines the recent attempts by the Executive branch to establish control over the content of funded art. Section VI offers suggestions for structural reform which if implemented will help to return the NEA to its original mission of funding, free of government-imposed content restrictions, artistically excellent art.

II. THE CREATION OF THE NEA: IN SEARCH OF ARTISTIC EXCELLENCE

Congress established the NEA in 1965[4] in response to President Johnson's support of the arts as a means for "the United States . . . [to] increase its contribution to the advance of civilization" and to increasing citizen interest "for greater exposure to cultural excellence."[5] Congress justified the NEA on several grounds, including the practical—many artists could not afford to work at their art unaided,[6] the categorical—America's pluralistic cultural

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[4] *See* National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 485 (codified as amended at 20 U.S.C. §§ 951-958 (1988)).

[5] *See* H.R. REP. No. 618, 89th Cong., 1st Sess. 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3186, 3190 [hereinafter HOUSE REPORT].

For a history of the NEA, see LIVINGSTON BIDDLE, OUR GOVERNMENT AND THE ARTS 38 (1988); Kevin V. Mulcahy & Harold F. Kendrick, *Congress and Culture: Legislative Reauthorization and the Arts Endowment*, 17 J. ARTS MGMT. & L. 39 (1988) (historical overview of first six NEA reauthorizations).

[6] *See* HOUSE REPORT, *supra* note 5, at 3190 ("The Foundation would have a profound

heritage deserved encouragement and preservation,[7] and the instrumental—introducing the arts to a greater range of people would promote cultural democratization.[8] Congress also believed that a leadership position in the international arts arena would increase international respect for the United States.[9]

However, Congress did not create the NEA without controversy. Both sides of the political aisle expressed grave doubts about the appropriateness of the government undertaking a funding role for the arts.[10] Senator Strom Thurmond, a Republican from South Carolina, sparked the attack with the charge that "[g]overnment subsidization of the arts will inevitably lead to the stifling of creativity and initiative."[11] Those opposed to the creation of the agency feared that "such a program could lead to attempts at political control of culture."[12] Although these doubts were overridden, from its inception the NEA was plagued by concerns over the need for it to be structurally independent from political pressures over its funding decisions as well as by uncertainty over how to maintain accountability if the desired independence were attained.

A. *The NEA's Structure As An Independent Agency*

Congress attempted to address these conflicting concerns by creating an independent agency[13] that was accountable to Con-

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impact on the burgeoning desire on the part of our citizens for greater exposure to cultural excellence.").

[7] The enacted legislation declared that "encouragement and support of national progress and scholarship in the humanities and the arts . . . is . . . an appropriate matter of concern to the Federal Government," a "high civilization . . . must give full value and support to . . . cultural activity . . ." and that citizens needed "wisdom and vision . . . and access to the arts and the humanities." The Act sought to "create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of . . . creative talent." 20 U.S.C. § 951 (1988).

[8] John D. Rockefeller III, testifying at the October 1963 hearings on the establishment of the National Council on the Arts, said, "[D]emocratic government and the arts are, in my opinion, in league with one another, for they both center on the individual and the fullest development of his capacities and talents. To free men, the arts are not incidental to life but central to it." *National Arts Legislation: Hearings on S. 165 and S. 1316 Before the Special Subcomm. on the Arts of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 191, 198 (1963) (statement of John D. Rockefeller III).

[9] *See* Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969 (1990) [hereinafter Note]. *Cf.* HOUSE REPORT, *supra* note 5, at 5 ("[T]he Foundation would serve not only to deepen our understanding of our friends and allies throughout the world, but would strengthen the projection of our Nation's cultural life abroad and enable us better to overcome the increasing 'cultural offensive' being waged by Communist ideologies.").

[10] For a discussion concerning whether the government may constitutionally fund the arts, see BIDDLE, *supra* note 5, at 38.

[11] *Id.* at 179.

[12] *See* HOUSE REPORT, *supra* note 5, at 3205 (paraphrasing Russell Lynes, a former editor of *Harper's* magazine).

[13] Traditionally, an independent agency is freed from the political influences inherent

gress fiscally[14] but was structurally independent in its grantmaking decisions. The agency's "intent . . . [would be] the fullest attention to freedom of artistic . . . expression . . . [and] the encouragement of free inquiry and expression" which would be achieved through sponsorship of works of "artistic . . . excellence"[15] without "government interference."[16] The statutory purpose was for a national policy not "on" the arts but "of support" for the arts.[17] Congress envisioned that the government's role would not be to define the content of art but to "develop and promote a broadly conceived national policy of support for . . . the arts. . . ."[18]

B. *The NEA's Grantmaking Structure: Designed to Protect Artistic Integrity*

The NEA's grantmaking structure was designed to achieve a balance between the agency's independence and the need for accountability. Congress mandated that the grantmaking criteria would be "substantial artistic or cultural significance;"[19] individual grants were to be awarded only to "individuals of exceptional talent."[20] Congress believed that any government control over the content of art outside the criteria of artistic excellence would result in the production of mediocre art. Admitting that artistic excellence was "an abstract and subjective standard,"[21] the Senate,

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in an "executive agency[ ] by statutory provisions which require that the heads of independent agencies not "serve at the pleasure of the President." NOTE, *supra* note 9, at 1972. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935), which is recognized as having legitimized the "independent agency" as a constitutional matter. "The general reason why some agencies are informally denominated 'independent agencies' is that certain of their features are designed to mitigate the degree to which [presidential] politics can dominate their decisionmaking. . . .Well-accepted accoutrements of independence include the adoption of collegial decisionmaking, staggered terms for the agency's prime decisonmakers, [and] terms of office that are longer than the four-year presidential term. . . ." JERRY MASHAW & RICHARD MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM ch. 3, 49 (3rd ed. 1991) [hereinafter ADMINISTRATIVE LAW] (on file with author). The NEA has these accoutrements of independence.

14 To maintain the NEA's accountability, Congress retained fiscal control over the NEA's budget. Additionally, the NEA's authorization periods are statutorily limited, which provides Congress with a simple periodic means to abolish the NEA by declining to reauthorize its operation if it does not meet its mission of support for the arts. The head of the agency, the Chairperson, is appointed by the President, insuring day-to-day accountability to the executive branch.

15 NOTE, *supra* note 9, at 1972. *See also* BIDDLE, *supra* note 5, at 148-50.

16 BIDDLE, *supra* note 5, at 149.

17 20 U.S.C. § 953(b) (1990).

18 *Id.*

19 20 U.S.C. § 954(c)1 (1990).

20 20 U.S.C. § 954(c) (1990).

21 *National Arts and Humanities Foundations: Hearings Before the Special Subcomm. on Arts and Humanities of the Comm. on Labor and Public Welfare*, 89th Cong., 1st. Sess. 737 (1965) [hereinafter *Senate Hearings*]. While it is beyond the scope of this Article to attempt to determine what artistic excellence is, it should be noted that sharply differing views exist

through its statutory language, made clear its intent that artistic excellence should not, however nebulous, be defined by government officials outside the agency. Congress also made clear its intent that the NEA's grantmaking structure was designed to insure that the standard of artistic excellence would be the only content-based criteria used in grantmaking decisions.[22] Congress attempted to give content to the meaning of artistic significance by referring to "professional excellence," "professional standards,"[23] and "artistic and humanistic excellence,"[24] when describing the art the NEA would fund.[25] With this vision of art and artists in mind, Congress sought to create a structure that would ensure that government could not dictate or control the policies of any recipient or potential recipient organization. Congress addressed the issue of independence from political pressures[26] and the "assurance against federal interference in the arts"[27] by inserting the following statutory language:

> In the administration of this subchapter no department, agency, officer or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or

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over what artistic excellence means, if anything. Constitutional scholar and Dean of the University of Chicago Law School, Geoffrey Stone, sees a "central purpose of serious art, like serious political discourse, is to challenge conventional wisdom and values." Geoffrey Stone, Dean of the University of Chicago Law School, Statement Before the Independent Commission on the National Endowment for the Arts 12 (July 31, 1990) (transcript available from author). On the other hand, Justice Antonin Scalia believes that "it is quite impossible to come to an objective assessment of at least literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can." Pope v. Illinois, 481 U.S. 497, 504 (1987) (Scalia, J., concurring).

22 *See* HOUSE REPORT, *supra* note 5, at 3200.

This Article accepts Congress' conclusion that artistic excellence is the best criterion for the agency to use when determining what grants should be funded. Given the controversies outlined in Section II of this Article, many commentators disagree that artistic excellence is the "correct" criterion. *See, e.g.*, Jesse Helms, *Art, the First Amendment, and the NEA Controversy: Tax-Paid Obscenity*, 14 NOVA L. REV. 317, 321 (1990) (arguing that artistic merit allows the NEA to fund obscene work by making them non-obscene); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L. J. 2087, 2100-01 (1991) (rejecting a criteria-based ("artistic excellence") approach to funding decisions and advocating instead an effects approach designed to enrich public debate) [hereinafter Fiss]. *But see* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992) (criticizing Fiss' effects approach and asserting it will lead to suppression of speech). Disagreement exists as well over the meaning of "artistic excellence."

23 *Senate Hearings*, *supra* note 21.

24 BIDDLE, *supra* note 5, at 149.

25 This language also pointed toward Congress' decisions to focus on providing support for professional, rather and amateur artists, and "that acknowledged community leaders in the arts [be] significantly included in implementing contributions to the purposes of the Act." *Id.*

26 Note, *supra* note 9, at 1972.

27 HOUSE REPORT, *supra* note 5, at 3200.

association.[28]

To highlight the importance of governmental non-interference, Congress placed this language immediately after the NEA's statement of purpose.

1. The NEA's Grantmaking Authority: A Three-Tiered Structure

The key to the success of the NEA's grantmaking structure was the institution of peer review panels. These panels were the first of three structural screens to identify those works that met the Congressionally mandated standard of artistic excellence.[29] The panel members were not government bureaucrats but professional artists who were expert in the various areas of art that the NEA would fund. Over time the use of panels of arts experts was recognized as the best structural device to insure that the NEA's grantmaking judgments regarding artistic excellence and the content of the art it would fund would not be tainted by political influences or patronage.[30] Former NEA Chairperson Livingston Biddle, author of the NEA enabling legislation, explained that "panels of knowledgeable private citizen experts, refreshed periodically by new points of view yet representing a continuity of trusted opinion, are the best guarantees of quality in the application process."[31] The Senate report that accompanied the proposed legislation shared this view: "It is intended that the advisory panels which shall be composed of highly qualified professionals will give added assurance that *government aid does not lead to government interference in the practice or performance of the arts.*"[32] When the panel structure was codified into the NEA's legislation, panel members were authorized and instructed to "recommend applications for projects, productions, and work-

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[28] 20 U.S.C. § 953(c) (1990).

[29] The enacting legislation provided for the chairperson "to utilize from time to time, as appropriate, experts and consultants, including panels of experts, who may be employed as authorized by section 55a of Title 5." 20 U.S.C. § 959(a)(4) (1990). In 1973, Public Law No. 93-133, § 2(a)(10), 87 Stat. 465, provided that any advisory panel appointed to review or make recommendations with respect to the approval of applications or projects for funding shall have broad geographic representation. A 1980 amendment inserted the words "and culturally diverse." Public Law No. 96-496, § 107(a), 94 Stat. 2588 (codified at 20 U.S.C. § 959(a)(4) (1990)). However, Public Law No. 99-194, § 110(1)(E), 99 Stat. 339, in 1985, eliminated these two criteria for the peer panels as well as substituted "section 3109 of Title 5" for "section 55a of Title 5." In 1990, Public Law No. 101-512, § 109, 104 Stat. 1960, amended the entire language relating to the peer panels which will be discussed in Part IV of this Article.

[30] Note, *supra* note 9, at 1973. For an example of the problems inherent in approving a grant for an artistic work without such a peer review panel using an artistic excellence criterion, see Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976).

[31] BIDDLE, *supra* note 5, at 479.

[32] *Id.* at 33 (emphasis added).

shops *solely on the basis of artistic excellence and merit.*"[33] The use of peer panels of arts experts who are the most knowledgeable about what constitutes works of artistic excellence, then, was the best structural mechanism to insure that professional judgment remained independent from political influence and to insure that the boundaries of legitimacy were set by the experts—those in the arts community.[34]

Applications for grants that passed the panel's initial screening on the merits were then passed on to the second level of review—the National Council on the Arts (the "NCA"). The NCA consists of presidentially appointed and Senate approved private citizens who are widely recognized for their expertise in the arts.[35]

The chairperson of the NEA is the final screen for grant applications. A "citizen widely recognized for knowledge of, or experience in, or for a profound interest in the arts,"[36] the chairperson is appointed by the President, by and with the advice and consent of the Senate. As the head of an independent agency, the chairperson does not serve "at the pleasure of the President" but for a four-year term staggered against the President's four-year term. Congress attempted to ensure that the chairperson could not undermine the political independence of the peer advisory panels' and the NCA's grant determinations by forbidding the chairperson from reviewing a grant until she received the recommendation of the NCA on such an application.[37] Historically, the chairperson, recognizing that the expert status of the peer review panels uniquely qualified them to make the artistic excellence determination, deferred to this expertise in her grantmaking decisions.[38]

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[33] 20 U.S.C. § 959(c)4 (Supp. 1991) (emphasis added).

[34] Note, *supra* note 9, at 1973.

[35] This group was created to deal with both independence and accountability concerns. Accountability was addressed by providing that the NCA membership consist of persons "appointed by the President, by and with the advice and consent of the Senate." 20 U.S.C. § 955(b) (1990). Independence was provided for by stipulating that the NCA members would be private citizens "widely recognized for their broad knowledge of, or expertise in, or for their profound interest in, the arts and have established records of distinguished service, or achieved eminence, in the arts. . . ." § 955(b). Additionally, the NCA members were to hold office for six years with the terms of office staggered. Both of these requirements lend the NCA a degree of independence from a four-year term President. The NCA was established not only to offer advice to the chairperson regarding the chairperson's duties, but also to review applications for grants and make grant recommendations to the chairperson.

[36] *See* Note, *supra* note 9, at 1972.

[37] 20 U.S.C. § 955(f) (1990). There are two exceptions to this rule: the chairperson could review an application prior to a recommendation from the NCA if it failed to make the recommendation within a reasonable time, and, for grants of small dollar amounts, the chairperson could make determinations if the power was delegated to the chairperson from the NCA and it reviewed his determination. *Id.*

[38] Interestingly, the need for a chairperson who was a government employee was seen

2. A Structure with Informal Process

Congress put great thought into creating a grantmaking structure that was designed to balance grantmaking independence with fiscal accountability. Beyond the stipulated three-tiered review structure, however, Congress failed to formalize the grantmaking process. Congress did not outline any procedures for grant review and did not require the chairperson to issue regulations other than those pertaining to his office.[39] Congress made no provisions for offering explanations to those denied grants[40] or for judicial review of agency determinations.[41] The agency's informal grantmaking process, then, offered those outside the agency who sought to exert influence over the grantmaking process the opportunity to do so.

III. The Subsidized Arts: Constitutional and Public Policy Concerns

The NEA's informal grantmaking process has contributed to the current controversy surrounding the agency. Advocates of increased government control over the content of NEA subsidized

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by those who developed the NEA's structure as merely procedural, inasmuch as a group of private citizens could not legally dictate the expenditure of federal funds. *See* Biddle, *supra* note 5, at 138. Thus, that the chairperson until recently has consistently approved those applications recommended by the peer panels and the NCA fits with this procedural necessity. *See* William H. Honan, *2 Who Lost Art Grants Are Up for New Ones*, N.Y. Times., Aug. 2, 1990, at C19 (describing NEA records showing that from 1982-89 the chairperson reversed recommendations of peer panels on only 35 out of 33,700 proposed grants).

In fact, in a study conducted by a statutorily-required Independent Commission, regarding government funding of the arts, the Commission recommended that this "rubberstamping" by the chairperson end and suggested "a system. . .be established to require that the grant advisory panels and the National Council recommend more grants than funds available for them, thereby giving the chairperson a genuine chance in awarding grants." National Endowment for the Arts, Year of Change: Management Improvement at the National Endowment for the Arts 3 (1990). The NEA responded to this recommendation by asserting that the proposal "is one the Endowment has not heard nor considered thus far." *Id.*

[39] *See* 20 U.S.C. § 959(a)(1) (1990). See *infra* Part IV.B regarding additional regulations mandated by Congress in 1990.

[40] In 1983, however, the agency did issue a regulation which provided that those who are denied grants are entitled to only an "explanation" and may request "reconsideration" on only very narrow procedural grounds. *See* 48 Fed. Reg. 13,118 (1983).

[41] Compare the informality of the NEA's procedures to those Congress legislated for the FCC. Before imposing a "forfeiture penalty" on a broadcaster who violates Section 1464 (which prohibits a station from broadcasting "obscene, indecent, or profane" language), the Commission may, at its discretion, afford the person an adjudicatory hearing and that person may obtain judicial review of the decision. 47 U.S.C. § 503(b)(1)(D), (3)(A) (1990). If the Commission chooses not to hold a formal hearing, the Commission must issue a Notice of Apparent Liability and give the person an opportunity to appeal in writing the Commission's penalty. 47 U.S.C. § 503 (b)(4) (1990). In either case, if the person refuses to pay the forfeiture penalty, the Commission refers the case to the Justice Department. 47 U.S.C. § 503 (b)(3)(B), (b)(4) (1990).

art have, in recent years, exploited the opportunity created by the informal grantmaking process by attempting to control the content of the art funded. Opponents of such government control argue that the First Amendment prohibits the government from controlling the content of the art it will fund. This Section reviews First Amendment jurisprudence, first, as it applies to the arts and then, as it applies to the subsidized arts, in an attempt to see whether the Constitution places limits on government control over the content of subsidized art.[42] This Section then examines whether public policy points to a need for the subsidization of the arts.

A. *First Amendment Theory and its Application to the Arts*

The First Amendment Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech."[43] The Supreme Court has found art to be a type of speech that is protected by the First Amendment. In *Kaplan v. California*, decided in 1973, the Court said, "[P]ictures, film, paintings, drawings, and engravings . . . have First Amendment protection."[44] In a 1981 case, *Schad v. Borough of Mt. Ephraime*, the Court added: "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[45]

Prevailing First Amendment jurisprudence protects from governmental "restraint" all types of speech and expression but four: "fighting words," words that incite lawless action, words that are libelous, and obscenity.[46] The obscenity restriction is the most relevant restriction in the arts context. That obscene material is not as such protected by the First Amendment has been definitively established.[47] Less definite has been the Court's notion of what

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[42] This analysis is based, in part, on First Amendment jurisprudence found in James F. Fitzpatrick, Constitutionality of Content-Based Restrictions on NEA Grantmaking (June 1990) (on file with the author) [hereinafter Fitzpatrick].

[43] U.S. CONST. amend. I.

[44] Kaplan v. California, 413 U.S. 115, 119 (1973).

[45] Schad v. Borough of Mt. Ephraime, 452 U.S. 61, 65 (1981).

[46] The "fighting words" exception is given content in *Chaplinsky v. New Hampshire*, which held that words that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" are not constitutionally protected. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942). *Brandenburg v. Ohio* held that speech is also unprotected if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969). *Chaplinsky* also held that among "the well defined and narrowly limited classes of speech the prevention and punishment of which has never been thought to raise any constitutional problem [are] the libelous." *Chaplinsky*, 315 U.S. at 571-72 (1941).

[47] Roth v. United States, 354 U.S. 476, 485 (1957).

constitutes obscene material. For example, in an attempt to describe the obscene, Justice Stewart once declared "I know it when I see it."[48] The prevailing definition was announced by Chief Justice Warren Burger in 1973, in a move to rein in the expansive interpretations of the *Roth* test that the Warren Court had evolved over the previous fifteen years.[49] *Miller v. California* established a three-pronged test, each element of which must be satisfied before a work may be judged obscene.

> [T]he basic guidelines for the trier of fact must be: (a) whether "the average person applying contemporary community standards" would find the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole lacks serious literary, artistic, political or scientific value.[50]

Of great significance for the art world, the last prong of the *Miller* test frees from governmental restraint as being "obscene" any work that has "serious artistic value."

The NEA's original legislation, although enacted nearly ten years before the *Miller* test was announced, seems indirectly at least to have preempted the agency from funding any "obscene" works as defined by that test. The agency was statutorily precluded from making grants in support of any but artistically meritorious works, and the *Miller* test excludes from the notion of suppressible obscenity any expression having artistic value. The agency's commitment to funding only those works that are artistically excellent is reflected throughout the statute. Moreover, the peer review panels which constitute the first tier of grant selection, must consist of experts in the arts. The members are, thus, qualified to determine whether particular works possess "serious artistic value" within the meaning of the third prong of the *Miller* test. The sole criteria for selection that is statutorily required is "artistic excellence and artistic merit." This strict criteria language, coupled with the expert qualifications of panel members, generates a strong presumption

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[48] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[49] *See* Roth v. United States, 354 U.S. 476 (1957). The *Roth* test asks "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. Additionally, the Court said that the obscene was "utterly without redeeming social importance." *Id.* at 484.

[50] *Miller* was one of five obscenity 5-4 decisions announced the same day. The four dissenters (Justices Douglas, Stewart, Marshall, and Brennan) all believed the use of obscenity law to regulate sexual expression aimed at, or between, consenting adults was unconstitutional because the notion of "obscenity" was irremediably vague and overbroad. Miller v. California, 413 U.S. 15, 40-41 (1973) (Douglas, J., dissenting).

that any work judged by the panels to be worthy of an NEA grant is not and could not correctly be found obscene by a court of law.[51] The further review of potential grant applications by the Council members and the chairperson—all statutorily required to have broad knowledge of, experience in, or a profound interest in the arts and also required to apply an artistic excellence and artistic merit standard[52]—provides ample assurance that any application to produce or disseminate an obscene work will not be favorably acted upon.[53]

The Supreme Court has held that the obscene is not protected by the First Amendment and that non-obscene sexual content in speech or expression is ordinarily protected. "[T]he portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech . . . ."[54] Sexually oriented but non-obscene speech is thus presumed to be constitutionally protected.[55] This places art having

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[51] Dean Geoffrey Stone of the University of Chicago Law School agrees, stating,

> *It is important to note that the legislation that currently governs the NEA* already provides that grants may be made only to works that have serious artistic value. Because art can constitute obscenity only if it lacks serious artistic value, the existing legislation already prohibits the NEA from funding obscene art.

Geoffrey Stone, Dean of the University of Chicago Law School, Statement Before the Independent Commission on the National Endowment for the Arts (July 31, 1990) (transcript available from author).

[52] While the original statutory language did not bind the chairperson and the Council to a standard of "artistic excellence and artistic merit," the standards to be applied are similar: "substantial artistic and cultural significance," "professional standards . . . of significant merit," and "standards of professional excellence." 20 U.S.C. § 954(c)(1).

[53] In 1987 the Supreme Court fleshed out the third prong of the *Miller* test by requiring the trier of fact to refer to the standard of "a reasonable person" when determining whether a work lacked serious literary, artistic, political, or scientific value. Pope v. Illinois, 481 U.S. 497, 500-01 (1987). *But see id.* at 504-05 (Scalia, J., concurring) ("Since ratiocination has little to do with esthetics, the fabled 'reasonable man' is of little help in the inquiry, and would have to be replaced with, perhaps, the 'man of tolerably good taste'—a description that betrays the lack of an ascertainable standard.").

A reasonable-person standard may weaken my assertion that the expert members of the peer panels are the ideal deciders of what does not constitute an obscene work by their determination that a work is artistically excellent. The range of works an expert considers artistically excellent may be broader than the range considered so by the "reasonable" or average person. However, that the Council members and the chairperson are not experts but knowledgeable about the arts provides ample opportunity in the grantmaking process for "reasonable persons" to assess the artistic excellence of a work, and thus, whether it is obscene. Additionally, in the Robert Mapplethorpe suit, Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214 (Ohio Mun. 1990), the jury members, when asked after the trial why they decided that his works were not obscene, said that they deferred to the arts experts who testified. Those experts asserted that in their view, the photographs were artistically excellent and thus, not obscene. *See* Isabel Wilkerson, *Obscenity Jurors Were Pulled 2 Ways*, N.Y. TIMES, Oct. 10, 1990, at A12; Andy Grundberg, *Cincinnati Trial's Unanswered Question*, N.Y. TIMES, Oct. 18, 1990, at C17. Perhaps reasonable people recognize that they need to defer to experts when deciding what constitutes artistic excellence. *See infra* notes 100-102 and accompanying text.

[54] Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted).

[55] Sable Communications of California, Inc. v. FCC, 492 U.S. at 115, 126 (1987).

a sexual content or message beyond the reach of the obscenity law. The sort of sexual content that currently is viewed as being controversial, and, therefore, liable to be targeted by those sensitive to such content for suppression can be categorized into: the indecent, homoeroticism, sadomasochism, and individuals engaged in overt sex acts.

The Supreme Court, in the broadcasting and telephone communications arenas, has held that "indecent" speech does not fall within the scope of the suppressible obscenity exception of the First Amendment. While "indecency" is less clearly definable than "obscenity," the Supreme Court has noted that "the normal definition of "indecency" merely refers to nonconformance with accepted standards of morality."[56] Despite the obvious difficulty in crisply defining the "indecent," the Supreme Court has stated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[57] While the Court has not yet said that indecent *art* is protected by the First Amendment, given its precedental declarations in the area, it would be unlikely to find that art that was indecent but not obscene was not protected by the First Amendment.

While the Supreme Court has held that indecent speech and expression that is not obscene is accorded First Amendment protection, it has not had an occasion to decide whether non-obscene speech or expression that depicts homoeroticism, sadomasochism, or individuals engaged in sex acts also can lay claim to such protection. Depictions of such sexual conduct may well fall within the types of conduct that meet the second prong of the *Miller* test which asks "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[58] The Supreme Court has found in several cases that explicit "hard-core" homosexual or sadomasochistic expression constitutionally may be deemed obscene.[59] However, such cases have focused on whether particular examples of homoeroticism, sadomasochism, and individuals engaged in sex acts constitute the type of "hard-core" sexual content comprehended by *Miller*'s second prong.[60] The Supreme Court has never said that such sexual content is obscene absent a showing of appeal to a "prurient inter-

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56 FCC v. Pacifica Foundation, 438 U.S. 726, 740 (1978).

57 *Sable Communications*, 492 U.S. at 126.

58 Miller v. California, 413 U.S. 15, 24 (1973).

59 *E.g.*, Ward v. Illinois, 431 U.S. 767, 773-74 (1977); Smith v. United States, 431 U.S. 291, 303 (1977).

60 The Court offered as an example of sexual conduct that met the *Miller* second prong, "[p]atently offensive representations of ultimate sexual acts," even if not statutorily

est" or lack of "serious value". Moreover, in the arts context, the implication is that the Supreme Court would have to decide that such content, whether expressed through a photograph, a painting, or performance, was *thereby* stripped of its artistic value, to be deemed obscene under *Miller*, which seems unlikely.

Other types of speech and expression that are highly controversial yet protected by the First Amendment include all sacrilegious or blasphemous content and some statements derogatory toward private individuals and groups, public figures and officials, or government symbols and institutions. Such speech has been held to fall outside the narrow categories of unprotected speech or expression that have been created by the Court. They are not "obscene" in as much as the latter is limited to "works which depict or describe sexual conduct."[61] And, they fall outside the "fighting words," the "imminent incitement to unlawful acts," and the libel[62] exceptions to protection.[63] With respect to speech having anti-religious content, the Supreme Court has stressed that, "from the standpoint of speech . . ., the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine."[64]

Non-defamatory but offensive or otherwise derogatory speech has also been held protected by the First Amendment. "[A]ny suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."[65] Indeed, as the Court has recognized repeatedly, First Amendment values are often served by controversial speech. "A principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people

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listed. *Miller*, 413 U.S. at 25. Given this example, representations of ultimate sexual acts that are not patently offensive could not be found obscene.

61 *Id.* at 24.

62 New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

63 *See* Texas v. Johnson, 491 U.S. 397, 409 (1989).

64 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952). Another part of the First Amendment is implicated in the funding of religious speech. The First Amendment also provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Supreme Court has stated that an attempt to regulate art having a particular religious content may threaten freedom of religion: "[a]pplication of the 'sacrilegious' test . . . might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all." *Wilson*, 343 U.S. at 505. *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940).

65 United States v. Eichman, 110 S. Ct. 2404, 2409 (1990).

to anger.'"[66] In a similar manner, art that is controversial because it outrages, offends or denigrates persons, symbols, or institutions can be seen as serving the function of free speech by inviting dispute.

In summary, the Supreme Court has firmly established that art falls under First Amendment protection of speech and expression. This protection is limited to art that is not obscene under *Miller.* Art that contains sexual content or is otherwise sexually oriented is not *per se* obscene; a determination of obscenity requires a case-by-case judicial determination under the *Miller* test that may reach as high as the Supreme Court. If any work has "serious artistic value," it cannot be branded obscene. Art that is indecent, offensive, subversive, derogatory, or sacrilegious also is protected by the First Amendment; it may indeed further important First Amendment goals. As Justice Brennan asserted in *New York Times v. Sullivan,* such speech contributes to "uninhibited, robust and wide-open"[67] debate.

B. *First Amendment Theory and its Application to the Subsidized Arts*

While the First Amendment protects all non-obscene art, it does not require that the government subsidize art. Thus, Congress is under no constitutional obligation to fund the NEA or to provide subsidies of any kind to artists. However, if it decides to do so, neither it nor any agency such as the NEA can impose conditions that "restrain" constitutionally protected expression through government imposed viewpoint or content restrictions. In this context the Supreme Court has said, "[E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny . . . the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech."[68]

More specifically, the Supreme Court has indicated that the government cannot base its allocation of subsidies on the viewpoint

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[66] Texas v. Johnson, 491 U.S. 397, 408-09 (1988) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[67] New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Justice Brennan was referring to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan,* 376 U.S. at 270. While this case centered on speech directed at a public official, the concept of ensuring "uninhibited, robust, and wide-open" debate has been extended to cover all speech within First Amendment protection.

[68] Perry v. Sinderman, 408 U.S. 593, 597 (1972).

or content of the expression to be funded. In *Regan v. Taxation With Representation*, for example, the Court asserted that the government may not "discriminate invidiously in its subsidies in such a way as to "'ai[m] at the suppression of dangerous ideas.'"[69] In *Arkansas Writer's Project v. Ragland*, the Court found that a statute which conditioned the receipt of tax exemptions for magazines based on their subject matter or content was "particularly repugnant to First Amendment principles"[70] and "entirely incompatible with First Amendment's freedom of the press."[71]

In a similar vein, the Court has held that Congress may not enact legislation which broadly conditions the receipt of grants for public broadcasting with a ban on editorializing. Here, the statute's ban was found unconstitutional because it required the "enforcement authorities . . . [to] necessarily examine the content of the message that . . . [would be] conveyed" and, thus, the ban was unconstitutionally "defined solely on the basis of the content of the suppressed speech."[72]

Similarly, the D.C. Circuit has held that the Internal Revenue Service may not constitutionally deny a tax exemption to a feminist newspaper because of its viewpoint—the support of lesbian rights. To do so would unconstitutionally "afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's goals and views and therefore to discriminate against those engaged in protected First Amendment activities."[73]

This principle was extended by the Court to prevent subsidized governmental discrimination against materials having sexual content. In *American Council of the Blind v. Boorstin*, the Court held that the Library of Congress' refusal (as directed by Congress) to produce and distribute a braille edition of *Playboy* because of its sexual content was an unconstitutional action.[74] The court described the action as "viewpoint discrimination" because "the sole reason defendant [Librarian of Congress] eliminated *Playboy* from the braille program was because he adopted . . . [the] view that the inclusion of *Playboy* . . . [was] inappropriate given the sexual orien-

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69 Regan v. Taxation With Representation, 461 U.S. 540, 548 (1982) ((quoting Cammarano v. United States, 348 U.S. 498, 513 (1959) (quoting Speiser v. Randall, 357 U.S. 513 (1958))).

70 Arkansas Writer's Project v. Ragland, 481 U.S. 221, 229 (1987).

71 *Id.* at 230.

72 FCC v. League of Women Voters, 468 U.S. 364, 383 (1984). Despite the Supreme Court's assertion that its holding was narrowly tailored to the facts at issue, the Court has since relied on this holding and expanded its principles to apply to Rust v. Sullivan, 111 S. Ct. 1759 (1991).

73 Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1033, 1040 (D.C. Cir. 1980).

74 American Council of the Blind v. Boorstin, 644 F. Supp. 811, 815-16 (D.D.C. 1986).

tation of the magazine."[75] "This dispute is not about the value or merit of *Playboy* but about a viewpoint-based denial of a subsidy."[76] In the recent *Rust v. Sullivan* decision,[77] the Court reaffirmed this position, stating that in this case the First Amendment was not violated inasmuch as "the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."[78] Thus, the Court continues to recognize the impermissibility of government-imposed viewpoint restrictions.

A second concern regarding government-imposed content restrictions is that such restrictions could affect both publicly and privately funded works. In *FCC v. League of Women Voters*, the Supreme Court invalidated a condition of receiving grants for public broadcasting in part because it prevented local stations from paying for editorializing with non-federal funds, such that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing . . . and, more importantly, it is barred from using even wholly private funds to finance its editorial activity."[79] The Court determined that the content restrictions impermissibly burdened the broadcasters' use of private funds. In the *Rust* case, the Supreme Court reemphasized this concern. There, the Court's conclusion that a regulation prohibiting Title X funds from being used in abortion-related activities, including counseling about the option of abortion, did not violate freedom of speech rested in part upon its finding that Title X recipients remained free to use non-federal monies to finance abortion-related activities, "leaving the grantee unfettered in his other activities."[80] It did so by distinguishing between permissible restrictions on "projects" and prohibited restrictions on "recipients."[81] The Court adopted the *League of Women Voters* reasoning by distinguishing the situation at hand from those "unconstitutional conditions" cases which "involve situations in which the govern-

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[75] *Id.* at 814.

[76] *Id.* at 816.

[77] The District of Columbia District Court recently heard a First Amendment case dealing with government imposed speech conditions for federal medical research grants. Stanford v. Sullivan, 773 F. Supp. 472 (1991). In the course of his opinion, Judge Greene cited several of the cases discussed in this Article and noted, "to the extent that prior decisions of the Supreme Court or the lower courts conflict with *Rust*, they have of course been expressly or impliedly overruled." *Id.* at 3 (referring to Rust v. Sullivan, 111 S. Ct. 1759, 1744 (1991)). Recognizing the possibility of *Rust*'s impact on the earlier mentioned cases, this Article defers analyzing the totality of the impact of *Rust* on the subsidized art context until Part V.B.

[78] Arkansas Writer's Project v. Ragland, 481 U.S. 221 (1987).

[79] FCC v. League of Women Voters, 468 U.S. 364, 400 (1984).

[80] *Rust*, 111 S. Ct. at 1774 (1991).

[81] *Arkansas Writer's Project*, 481 U.S. at 258.

ment has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[82] Thus, the Supreme Court reaffirmed that government-imposed conditions on subsidies may not infringe on a recipient's ability to engage in conduct, speech or expression outside the realm of the subsidy.

This "recipient" versus "program" distinction is of potential importance for the art field. The unconstitutional condition described above would likely exist if the recipient in question were an artist, for "[t]he individual artist who has received an Endowment fellowship is generally unable to 'separate himself into publicly and privately supported affiliates,' while supporting himself even partially with Endowment funds, an artist will be wholly barred from pursuing the full range of expressive activities and will even be barred from soliciting private parties to underwrite activities the Endowment might consider unseemly" and, thereby, unconstitutionally restrained by grant viewpoint conditions.[83]

In summary, although the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech,"[84] it does not require Congress or any government agency to facilitate the exercise of that right. However, having decided to fund artistic speech by means of the NEA, Congress cannot impose conditions on grant recipients that serve to suppress particular viewpoints or the content of the expression, however objectionable it may seem to be. As Dean Geoffrey Stone asserted, "Government need not fund any art. But it does not necessarily follow that, if it chooses to fund some art, it is free to fund only that art that supports its point of view . . . . [T]here can be no doubt that the use of NEA funds selectively to support only those points of view that are congenial to government is . . . unconstitutional."[85] The First Amendment has regularly been interpreted as protecting against government imposed viewpoint or content restrictions in speech and expression contexts outside the subsidized arts arena. The Supreme Court should extend this protection to the subsidized arts arena in order to protect artists and arts organizations from extra-

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82 *Id.* at 257-58.

83 Note, *supra* note 9, at 1983 (quoting Floyd Abrams, Memorandum to Volunteer Lawyers for the Arts, *In re* Interior Department and Related Agencies Appropriations Bill, H.R. 2788, 101st Cong., 1st Sess. (1989) 15 (Aug. 23, 1989)).

84 U.S. CONST. amend. I.

85 Geoffrey Stone, Dean of the University of Chicago Law School, Statement Before the Independent Commission on the National Endowment for the Arts 6-7 (July 31, 1990) (transcript available from author).

artistic, or "political," influences that condition the award of grants to the avoidance of particular viewpoints or content specifications. Such viewpoint or content prohibitions on funding would be a way of exerting political influence over the grantmaking process. The injection of criteria for arts selection in the grantmaking process other than that of artistic excellence are at best invitations and at worst commands for the NEA to discriminate in its grantmaking process against an artist that produces or is likely to produce works that are controversial.

C. *Policy Concerns Regarding Government Subsidization of the Arts*

Aside from the constitutional issues facing government subsidization of the arts, there are many policy issues that point toward a need for such subsidization. As mentioned in Section II of this Article, members of Congress had expressed concern regarding the proposed relationship between government and the arts, focusing on the potential for a stifling of artistic creativity through government control of the arts. In fact, then and today, this lingering concern has led many to question whether the NEA should exist at all. Russell Lynes, a former editor of *Harper's* magazine, stated during the congressional debate surrounding the proposed Endowment, "The less the arts have to do with our political processes, I believe, the healthier they will be."[86] Granted, the government's funding of art should be removed from political processes, however, it does not necessarily follow that the only way to ensure this is for the NEA to be abolished. In fact, there exist several policy reasons why the NEA must not be abolished. Dick Netzer, an economist, provides very convincing economic arguments why the arts and the public both benefit from government subsidization of the arts.[87] His analysis begins with the assumption that the arts are a "valued good."[88] He then offers two economic arguments that support government subsidization of the arts: art is a "merit good" and art provides "external benefits."

Netzer first offers the argument that art is a "merit good," whose production and consumption should be encouraged by public subsidy. This is so because they are meritorious rather than because the market alone would not supply enough of them or because income barriers deprive some people of access to them.[89] He strengthens this argument by noting that private demand for

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[86] BIDDLE, *supra* note 5, at 69.
[87] *See* DICK NETZER, THE SUBSIDIZED MUSE (1978).
[88] *Id.* at 18.
[89] *Id.* at 16.

some art forms, such as poetry, is low. As such, these art forms would be produced in very small quantity if the market were left to its own devices.[90] Without subsidies, art forms such as the performing arts and museums tend to be strongly centralized. Subsidies would help to defray the extra costs for touring or traveling exhibitions that would bring these arts to consumers living in smaller communities.[91] Netzer also advances the "Baumol-Bowen" thesis that productivity in the arts is inherently stagnant. This is so because

> the performing arts are labor-intensive services with limited means of substituting machinery and other forms of capital for labor or for reorganizing the use of labor. Services with these characteristics . . . have little capacity to increase in productivity over time . . . . And unless demand on the part of paying customers is completely insensitive to these rising prices, the result will be a decline in the production of the performing arts.[92]

Because paying customers' demand curve is *not* insensitive to increasing ticket prices, government subsidization is necessary to insure artistic viability.

Netzer also offers an "external benefits" argument. External benefits are benefits to people other than the transacting parties.[93] He offers four types of external benefits which are pertinent to the subsidized arts. First, the arts are *interdependent* and tend to support each other. Thus, the consumer of one form of music is likely to derive some benefit from the flourishing of another form even if he does not patronize it and may actively dislike it.[94] Second, the arts *benefit future generations* by preserving the cultural heritage.[95] Third, artistic creations are essentially *experimental* and risky. While many fail in their undertakings,

> others artists and society at large may learn a lot from the failed experiment and thus profit from it. . . . Under this rubric, government should provide subsidies to support risk-taking artistic institutions and individual artists. . . . Of course, not all experiments are failures; but the high costs of possible failure inhibit artists and organizations that may wish to undertake experiments on their own. Subsidy removes this inhibition.[96]

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90 *Id.* at 26.
91 *Id.* at 27.
92 *Id.* at 22.
93 *Id.* at 23.
94 *Id.*
95 *Id.* at 24.
96 *Id.*

Finally, Netzer argues that the arts and culture are an important *element of economic life* in large cities, in that they attract visitors, keep the affluent attached to the city, and generate income for those in supporting services.[97]

These external benefits have a strong nexus with the stated objectives of the NEA.

> For example, the [NEA's] objective of wider availability is consistent with government efforts to overcome income barriers to access to the arts, to overcome the high costs of informing people about the arts, and to offset the market pressures to provide the arts on a highly centralized basis. The problem of information cost, the centralizing tendency, and the Baumol-Bowen thesis (where it is truly applicable) justify intervening to strengthen cultural organizations. Concern for future generations ('positive externalities') justifies subsidy to preserve the cultural heritage. The theoretical arguments concerning the income distribution, public goods elements, interdependence among art forms, information costs, and the thin markets for some art forms justify subsidies to encourage the creative development of talented individuals.[98]

Once the argument has been made that the government should subsidize the arts, there is the remaining concern whether there are policy justifications for having the government fund "controversial" art—art that some taxpayers may dislike. One strong policy argument for allowing the NEA or a similar such agency to fund art that some taxpayers dislike is that taxpayers often dislike the specific projects for which Congress appropriates the taxpayer's money. "[W]hen Congress decides whether to fund the Contras, to provide comprehensive medical care or to raise the salaries of federal officials, a significant minority (sometimes even a majority) of our people will disagree with what they do."[99] There is no justification to hold the NEA and its funding decisions to a higher standard than those of any other federal agency.

However, if the NEA were to be held to a higher standard than other federal agencies and forbidden to fund any art that taxpayers may find objectionable, the question remains as to who should be making the "controversial" determination. This article asserts that if such a determination is to be made, it must be made by the ex-

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97 *Id.*

98 *Id.* at 71.

99 Arthur Jacobs, *One if by Land, Two if by Sea*, 14 NOVA L. REV. 343, 355 (1990) [hereinafter Jacobs]. *See also* Nicols Fox, *Art Funding: The Fight over Sex, Money and Power*, 14 NOVA L. REV. 369, 379 (1990) [hereinafter Fox].

pert peer review panels, not a congressperson. Apparently, the American public agrees, with fifty-eight percent believing that "experts should judge what is art."[100] Additionally, "only twenty-two percent of the American public polled believe that federal officials should exercise more control over art projects to ensure that they do not offend the public."[101] There is the further issue as to whether there would be any art left to fund if only art that offended nobody was funded.[102]

The refusal of the government to fund controversial art will not only not encourage the creation of controversial art but will actually discourage the creation of such art in the private sector. This is so because private funding of art follows the lead of the NEA's grantmaking.[103] The NEA is seen by private benefactors, be they corporations, foundations, or individuals, as a "seal of approval" for projects, and thus, will prefer to donate to those projects having the NEA's seal. Further, many of the NEA's grants require matching grants from the private sector. Thus, those projects which have received NEA grants and require matching grants divert private monies away that might otherwise have been available for non-NEA-funded controversial art. If the NEA refused to fund controversial art, such art would be directly and indirectly disadvantaged from obtaining funding from the private sector.

Additionally, the Supreme Court has recognized the function of art as a communicator of opinions and ideas by its award of constitutional protection from suppression to art and artists. Like the press, artists have a First Amendment function. Controversy, dispute, and debate, uninhibited and robust, should be the hallmark of the press. Just as a uniform, noncontroversial press would not serve the purposes of First Amendment principles, so too would art that is noncontroversial. "Government art—art officially sanctioned and inoffensive, totally apolitical and capable of pleasing all those voters who make a practice of writing their representatives—is virtually guaranteed to be the art that history quickly forgets."[104] Many, if not all, of the greatest artists have created controversial works such as Michelangelo's 'David', Bosch's 'Garden of Earthly Delights,' Rodin's 'The Kiss,' Shakespeare's *Merchant of Venice*, and

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100 Jacobs, *supra* note 99, at 343.
101 *Id.* at 346.
102 *See infra* Part IV.
103 *See* Enrique Carrasco, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1521 (1986).
104 Fox, *supra* note 99, at 371.

Twain's *Huckleberry Finn.*[105] Art is always evolving; it necessarily breaks current standards and conventions and naturally excites controversy. "To fund artistic expression only if it is 'safe' art or 'responsible' art is simply to ignore the qualities of art that should lead Congress to fund it in the first place—its freshness of vision, [and] its willingness to look anew at what the rest of us overlook or are incapable of seeing."[106]

IV. The NEA in Recent Years: Congress Adds to the Deficiencies in the NEA's Grantmaking Structure

When Congress created the NEA's three-step grantmaking authority, it attempted to reach a viable compromise between agency accountability and independence—an agency that was accountable fiscally and in process to the appropriating Congress but independent with respect to its substantive determinations of artistic excellence. For most of the agency's existence, this grantmaking structure successfully balanced these two interests as evidenced by the agency's longevity and success. However, in recent years, the agency has been anything but uncontroversial. Controversies over art the endowment funded, initiated from sources outside the agency, have revealed previously latent structural flaws within the agency's original grantmaking process as well as created new cracks on their own. And, as will be shown, these structural cracks have only widened with time.

A. *The 1989 Amendments: The NEA's Independent Grantmaking Structure Begins to Weaken*

The 1989 and 1990 amendments to the NEA legislation, specifically to its grantmaking process, occurred while the NEA was under intense criticism for some of its funding decisions.[107] The 1989 amendment[108] was a Congressional response to perceived public outrage over two endowment sponsored works. The first, "Piss Christ," an Andres Serrano photograph, was an image of a crucifix submerged in a container of urine. The second was an exhibition of Robert Mapplethorpe, a New York photographer who had died of AIDS, entitled "The Perfect Moment" which included,

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105 *See Hearings on S. 8806 Before the Constitution Subcommittee of the Senate Judiciary Committee*, 102 Cong., 1st. Sess. 14 (1990) (statement of James F. Fitzpatrick).

106 Jacobs, *supra* note 99, at 355.

107 For a detailed review of the events surrounding these amendments, see Edward de Grazia, Girls Lean Back Everywhere 230 (1992).

108 Department of the Interior and Related Agencies Appropriations Act of 1990; Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (to be codified at 20 U.S.C. § 954) [hereinafter 1989 Amendment].

among photographs of flowers, celebrities, and nudes, depictions of homoeroticism. Senator Helms of North Carolina focused his energy by attacking the NEA-funded Mapplethorpe exhibition,[109] and by proposing a Congressional amendment to the NEA legislation which would have had the practical effect of preventing the NEA from funding virtually any artistic works.[110]

While the Helms amendment ultimately succumbed to the more moderate Yates amendment,[111] Helms was successful in causing negative publicity for the NEA and in raising fear in Congesspersons who planned to support the NEA.[112] The Yates amendment did away with Helm's vastly overbroad language, instead making the NEA responsible for screening out from funding eligibility those arts projects that might be "obscene" under the obscenity test elaborated by the Supreme Court in *Miller*.[113] Quoting the language of *Miller*, the Yates amendment provided:

> None of the funds may be used to promote, disseminate, or produce materials which in the judgement 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 such, when taken as a whole, do not have serious literary, artistic, political, or scientific value.[114]

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109 Peter J. Boyer, *Mean for Jesus, Jesse Helms, for Eighteen Years the Bible-Thumping Scourge of the Senate*, VANITY FAIR, Sept. 1990, at 227. In June 1989, Helms learned that the Mapplethorpe show was to open in the Corcoran Gallery of Art, a private museum in Washington, D.C. He denounced Mapplethorpe's work as "garbage" and publicly objected to the use of federal funds to underwrite it. Elizabeth Kastor, *Senate Votes to Expand NEA Grant Ban; Helms Amendment Targets "Obscene" Art*, WASH. POST, July 27, 1989, at C1. The curator of the Corcoran, fearing the impact on the NEA or on future applications to the NEA by the Corcoran, cancelled the exhibition. *Id.* The curator, Christina Orr-Cahall, ultimately resigned from her post amid the controversy. While the cancellation outraged the artistic community, Congress reacted to the controversy by penalizing the NEA, withholding from the NEA's appropriations the amount the NEA had granted to the arts organizations that had sponsored the exhibitions containing the Serrano and Mapplethorpe works. Elizabeth Kastor, *House Trims NEA Budget as Reprimand; Drastic Cuts Rejected in Arts Funding Bill*, WASH. POST, July 13, 1989, at C1. For a review of the Helms amendment, see Kim M. Shipley, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991).

110 Senator Helms' amendment would have forbidden funding for any works that "denigrate the objects or beliefs of the adherents of a particular religion or non-religion, or 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." H.R. 2788, 101st Cong., 1st Sess. (1989).

111 135 CONG. REC. H6407 (daily ed. Oct. 2, 1989) (statement of Rep. Yates).

112 *See* Boyer, *supra* note 109, at 266; Elizabeth Kastor, *Compromise Eludes NEA Conferees; Arts Funding Debate to Continue Today*, WASH. POST, Sept. 28, 1989, at D1.

113 Miller v. California, 413 U.S. 15 (1973).

114 1989 Amendment, *supra* note 108. Under Yates' proposed legislation, any decisions by the NEA to deny funds to an artist or art project for possibly obscenity reasons would be reviewable in federal court. *Id.*

The Yates amendment was adopted. Although the amendment was considered a compromise designed to maintain the NEA's independence in its grantmaking decisions, it actually raised serious constitutional questions[115] while simultaneously weakening the NEA's grantmaking structure by leaving it susceptible to political influences over the content of subsidized art.

First, the NEA was given the power, usually reserved for the courts, to judge what was obscene. Because the *Miller* test would now be applied administratively, the opportunity existed for outside pressures on the NEA to eliminate from funding consideration those works whose content particular government officials or interest groups might disapprove. Additionally, to avoid even more controversy than that generated by the Mapplethorpe exhibition and the Serrano photograph, the NEA could apply the *Miller* test too vigorously and exclude works that were not legally obscene but questionable in the decisionmakers' minds.

The first constitutional question raised by the Yates amendment was whether an administrative agency, rather than a court of law, can make a determination in the first instance that the speech in question is unprotected.[116] Until the Supreme Court rules definitively as to whether an administrative agency can determine if speech is obscene, a question remains as to whether such an agency determination would be constitutional.[117]

Second, the chairperson issued regulations that instituted an oath requirement on grant recipients that incorporated the new statutory language. The art world interpreted this oath requirement as a pledge not to create works that in the judgement of the

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115 *Cf.* Fitzpatrick, *supra* note 42, at 52-65 (summarizing possible constitutional issues that Helms' amendment, had it been adopted, might have raised, some of which also apply to the Yates amendment).

116 *See* Fitzpatrick, *supra* note 42, at 54. This legal issue has been raised in the context of whether the Post Office Department, as an administrative agency, can decide whether materials are "obscene" and thus, "nonmailable." 18 U.S.C. § 1461 (1990). A plurality opinion in Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), set aside the agency's determination of obscenity. Three judges questioned in their concurrence "whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court." While the Court in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), upheld the FCC's authority to regulate indecent broadcast language, it did not address whether the FCC had authority to make determinations as to obscenity.

117 Even if such an administrative determination as to whether an artistic project is deemed, on its face, constitutional, for particular artists, it may chill their art and, thus, speech. The Yates amendment forces an artist who is applying for an NEA grant to guess at the NEA's judgment as to whether the project is obscene. Many artists expressed concern as to whether the NEA may, in order to avoid further controversies, interpret the *Miller*-test legislative provision more broadly than would a court of law. Fearing criminal prosecution and having to refund the grant monies, the bold artist may modify legally non-obscene art in order to be sure it is "acceptable" under the NEA's interpretation of the obscenity test. Such modification is a direct chilling of speech that should be constitutionally protected.

NEA were obscene. This oath requirement was ultimately struck down as unconstitutionally vague in *Bella Lewitsky Dance Foundation v. Frohnmayer.*[118]

Third, the 1989 amendment raised First Amendment prior restraint issues. The Supreme Court, in *Southeastern Promotions, Ltd. v. Conrad,*[119] explained:

> A free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.[120]

Thus, any determination of the unconstitutionality of speech without procedural safeguards is an unconstitutional prior restraint.[121] As the current NEA grantmaking process is informal and lacking in procedural safeguards, the NEA would have to substantially revise its governing legislation to abide by the prior restraint doctrine.[122]

B. *The 1990 Amendments: Some Cracks Patched, Others Created*

1990 found the Endowment in a politically charged re-authorization year. The NEA had barely survived its most controversial year yet. Congress was still smarting from the furor over the Serrano and Mapplethorpe controversies and the outrage from the artistic and legal communities over its likely unconstitutional 1989 legislation. Additionally, four performance artists (the "NEA Four") sued the agency alleging that the NEA had denied their grants because of the controversial social and political content of their work.[123] Although the agency denied the allegations, previ-

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118 754 F. Supp. 774 (C.D.Cal. 1991). For a review of the constitutionality of the 1989 and 1990 amendments and the oath requirement, see Anne L. Rody, *Federal Funding at What Cost? The Impact of Funding Guidelines on the First Amendment and the Future of Art in America,* 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 175 (1991).

119 420 U.S. 546 (1975).

120 *Id.* at 559.

121 Vance v. Universal Amusement Co., 445 U.S. 308 (1980). In *Freedman v. Maryland,* the Supreme Court set forth the procedural safeguards that must be present wherever suppression of speech is sought. First, there must be expeditious judicial review of the restraint within a specified brief period of time, during which the status quo must be maintained. Second, the censor bears the burden of bringing suit and bears the ultimate burden of proving that the speech in question is unprotected expression. Third, a final restraint may not be imposed until an adversarial hearing and judicial review have been held. Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

122 *See supra* notes 39-41 and accompanying text.

123 The "NEA Four," Karen Finley, John Fleck, Holly Hughes, and Tim Miller, because they learned that the agency had reviewed and rejected their applications in an atypical manner, suspected that their applications were rejected for political reasons. Allan Parachini, *Frohnmayer Denies 'NEA 4' Grant Appeals,* L.A. TIMES, Aug. 25, 1990, at F1. Before

ously confidential documents which were released for the lawsuit revealed otherwise.[124]

After debates lasting the entire year, Congress agreed on the last day of the session to extend the NEA's authorization, but for a limited three years.[125] While the new legislation wisely eliminated the 1989 explicit prior restraint language which gave the NEA, as an agency, the power to determine what was obscene, it added new language which raises new questions of constitutionality.

First, artists receiving NEA grants who later have their project declared obscene by a court will be required to return their grant monies.[126] This sanction is heightened by the artist's ineligibility to receive further funding until full repayment is made.[127] This new language is troubling because such sanctions can only increase the deterrent effect of state obscenity laws, which can discourage an artist who might otherwise create a work that would be constitutionally protected.[128]

Second, the chairperson is now to apply a new standard when making grant determinations that includes a decency and respect clause: "The chairperson shall ensure that . . . 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 . . . ."[129]

Third, the amendment now provides for laypeople to sit on the panel of previously exclusive arts experts.[130] While the expressed rationale to place laypeople on the panels was to ensure

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filing suit, the NEA Four unsuccessfully filed an administrative appeal because they had received no explanation of their rejection. *Id.*

124 These included transcripts of Chairperson Frohnmayer asking the panel to consider whether "in the very short political run" it would be more important to consider saving the endowment "in some sort of recognizable form" than to fund the controversial artists. A transcript of the Council's meeting revealed several members conceding that their decisions must be made in a "political world" and amid "political considerations." William H. Honan, *U.S. Documents Said to Show Endowment Bowed to Pressure*, N.Y. TIMES, Sept. 18, 1991, at C13.

The NEA Four won this suit. *See infra* Part V.B.1.

125 Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-512, 104 Stat. 1915, 1972-74 (to be codified at 20 U.S.C. § 960). These debates centered on not only whether amendments to the NEA's authorization language should be enacted, but also whether the NEA should be dissolved altogether. Elizabeth Kastor, *Arts Compromise Leaves Obscenity Issue to Courts; House Vote on Agency Extension Expected*, WASH. POST, Oct. 5, 1990, at D2. For a review of the 1990 amendment and a proposal for judicial strict scrutiny over funding decisions, see Alvaro Ignacio Anillo, *The National Endowment for the Humanities: Control of Funding Versus Academic Freedom*, 45 VAND. L. REV. 455 (1992).

126 *See* 20 U.S.C. § 954(l)(1) (1990).

127 *Id.*

128 *See* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

129 20 U.S.C. § 954(d) (1990)

130 20 U.S.C. § 959 (c)(2) (1990).

against cronyism[131]—artists funding artists—Frohnmayer, in asking the Senate to recommend laypeople for the panels revealed that the laypeople were also meant to "assure that general standards of decency and respect for the diversity of beliefs and values represented by the American public are considered."[132] Thus, this change in the membership of the panels sanctions the consideration of "decency and respect" in grantmaking decisions, a consideration that the peer panels are not authorized to consider statutorily.[133]

1. The New Structural Weaknesses Created by the 1990 Amendments

The 1989 and 1990 amendments to the grant-making process have not only widened latent cracks in the NEA's original grantmaking structure but have also created new cracks in the agency's grantmaking structure. The language regarding general standards of decency allows the chairperson to entertain pressures from Congresspersons and interest groups regarding whether the content of particular artistic works fall within such a standard. If the chairperson succumbs to such pressures, as he apparently did in the NEA Four case, he would be allowing considerations not intended by Congress to enter into the grantmaking process. Additionally, this new language conflicts directly with the original and unchanged prohibition against federal supervision over policy determination of recipient or potential recipient organizations.[134] The chairperson must now consider and pass on the content of the work beyond its artistic merit or excellence. Because potential grant recipients must now attempt to conform their works to what the chairperson would perceive as within general standards of decency in order to receive federal funding, the new legislation influences the potential grant recipient's policies over artistic content. The chairperson, a government official, is now authorized to do exactly what the original and unchanged Section 953 prohibited: "No . . . employee of the United States shall exercise . . . supervision, or control over the policy determination . . . or the administration or operation of any . . . institution, organization, or association."[135]

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131 Interview with Amy Sabrin, General Counsel of the NEA (Nov. 12, 1991).

132 See Letter from John E. Frohnmayer, Chairperson, The National Endowment for the Arts to the Senate (Jan. 3, 1991) (on file with author).

133 20 U.S.C. § 959 (c) (1990).

134 *Id.*

135 *Id.*

This decency standard, under First Amendment theory, presents three constitutional problems. First, it may create a prior restraint similar to that which existed under the 1989 amendment, because the determination of what is decent is administratively applied.[136] Second, the terms "decency" and "respect" may be unconstitutionally vague. At the very least, these terms require the artist or arts organization to guess at the chairperson's version as to what comports with general standards of decency and respect.[137] Finally, this language is far broader than the term "obscene," for what may be indecent may not be obscene. Nevertheless, the chairperson is now authorized to refuse to fund art that while not obscene, is beyond general standards of decency—art that should be protected by the First Amendment.[138]

2. The 1990 Amendments Widen Latent Deficiencies in the NEA's Enabling Legislation

The addition of the decency and respect language also highlights and widens formerly latent cracks in the NEA's enabling language. These structural flaws could allow outside pressures to influence the content of the art to be funded. First, the original prohibition against Federal supervision over policy determinations of recipient or potential recipient organizations is, unfortunately, limited to organizations only; it does not protect individual artists from such governmental policy supervision.[139] Thus, the new language authorizing the chairperson to consider general standards of decency, while in conflict with the spirit of the overall NEA enabling legislation,[140] is not in conflict with the letter of the law as applied to individuals. The result is that individual artists, who are often the most artistically controversial, can seek no protection from the express language of Section 953. It is also unclear whether individual artists, sponsored by organizations who have received NEA grants, would also be vulnerable under this new lan-

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136 *See infra* notes 227-35 and accompanying text.

137 *See supra* notes 36-38 and accompanying text. The NEA Four case held that this language was indeed unconstitutionally vague.

138 The Supreme Court has determined that art is pure speech. *See* Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) (holding entertainment, musical and dramatic works all within the First Amendment guarantee); Kaplan v. California, 413 U.S. 115, 119 (1973) (holding that pictures, films, paintings, drawings and engravings have First Amendment protection).

139 20 U.S.C. § 953(c). According to former General Counsel Amy Sabrin, the reason for this omission is quite simple: when the Endowment was created, it did not fund individuals. Interview with Amy Sabrin, General Counsel of the NEA (Nov. 11, 1991).

140 *See supra* Part II.

guage.[141] This structural flaw in the NEA's enabling legislation creates the potential for content control over individual artists and, in Senator Thurmond's words over thirty years before, "the stifling of creativity and initiative."[142]

The new language requiring laypeople on the peer review panels creates a structural flaw at the panel level as well. Since these laypeople are not government employees, they may be exempt by the original and unchanged provision that prohibits government officials and employees from influencing the policies of recipient and potential recipient organizations.[143] These panels were and still are statutorily authorized to recommend artistic applications "solely on the basis of artistic excellence and artistic merit."[144] The requirement that laypeople who are "qualified" in "general standards of decency and respect for the diversity of beliefs and values represented by the American public"[145] sit on these panels, then, is not necessary to ensure that artistic and merit standards are upheld. This crack in statutory coverage provides an opportunity for those officially outside the grantmaking process to pressure panel members to influence the recipient organization's policy decisions over artistic content without violating the letter of the statute.

V. The Executive Branch's Efforts to Establish Control Over the Content of Subsidized Art

The 1990 amendments did not end the controversy facing the NEA. As Congress attempted to exert increasing control over the NEA's grantmaking structure, the Executive Branch simultaneously increased its pressures on the agency to consider content restrictions other than the artistic excellence criteria originally mandated by Congress.

A. *The NEA: An Election Year Sacrifice*

As the 1992 election year battle began in earnest, the NEA chairperson was sacrificed in the process. Republican presidential candidate Patrick J. Buchanan attacked President Bush's arts pol-

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141 Mapplethorpe was an example of such an artist. He did not receive funding directly from the NEA. The grant recipient was a North Carolina art gallery, the Southeastern Center for Contemporary Art ("SCCA") which had sponsored the Perfect Moment exhibition and had scheduled its national tour.

142 *See* Biddle, *supra* note 5, at 38 (quoting Senator Thurmond's reasoning for *not* establishing the endowment).

143 20 U.S.C. § 953 (1990).

144 20 U.S.C. § 959(c).

145 20 U.S.C. § 959(2) (1990).

icy, calling the NEA a subsidizer of "filthy and blasphemous art" and an "upholstered playpen of the arts and crafts auxiliary of the Eastern liberal establishment."[146] On February 21, 1992, John Frohnmayer was "forced out of his job . . . apparently a casualty of the [Bush-Buchanan] political wars."[147] While Frohnmayer submitted a letter of resignation, he later admitted that he had been fired.[148] "As a result, the future integrity and very existence of the agency has been called into question."[149]

That President Bush could force the chairperson of an independent agency to resign points to another, formerly latent, crack in Congress' structural design of the NEA. Congress intended the NEA to be an independent agency.[150] Traditionally, an independent agency is freed from the political influences inherent in an "executive" agency by statutory provisions which require that the head of such an agency not serve at the pleasure of the President.[151] Congress, in its enabling legislation, stated that the "term of office of the chairperson shall be four years and the chairperson shall be eligible for reappointment."[152] This set term for the chairperson, along with the prohibition against government interference in the grantmaking process (of which the chairperson is a part),[153] indicates that Congress did not intend the chairperson serve at the President's pleasure. Yet, in the end, the NEA chairperson did serve at President Bush's pleasure and Frohnmayer was forced out by political pressures.[154] Interestingly, no arts advocate

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146 Judy Keen & Bill Nichols, *Buchanan Takes Aim at Arts Fund*, USA TODAY, Feb. 21, 1992, at 4A.

147 William H. Honan, *Head of Endowment for the Arts Is Forced From His Post by Bush*, N.Y. TIMES, Feb. 22, 1992, at 1.

148 *See* William A. Henry III, *A Cheap and Easy Target*, TIME, Mar. 9, 1992, at 22.

149 Donald B. Marron, *Don't Jeopardize the Arts*, N.Y. TIMES, Mar. 1, 1992, § 4, at 15.

Frohnmayer was immediately replaced by Anne-Imelda Radice, "handpicked by the White House to guide the Federal agency through an election-year mine field." Radice promptly revealed her "conservative views" when she vetoed two grants that had been strongly recommended by the NCA. William H. Honan, *Arts Chief Vetoes 2 Approved Grants*, N.Y. TIMES, May 13, 1992, at C-13.

150 For a review of independent agencies and GUAGOs (non-regulatory independent agencies), see Craig A. Masback, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 YALE L. & POL'Y REV. 177 (1992) [hereinafter Masback]. Interestingly, Masback outlines the NEA's independent structure and notes that Frohnmayer was fired, but fails to note the inherent contradiction in these two facts.

151 *See supra* text accompanying notes 13-18.

152 20 U.S.C. § 954(a)(2) (1988). Note also that Congress mandated that the members of the National Council of the Arts, the second screen in the grantmaking process, not serve at the pleasure of the President but serve overlapping six-year terms. 20 U.S.C. § 955(c) (1988).

153 *See supra* Part II.B.

154 While the forced resignation of Frohnmayer by President Bush cut directly against the intent of Congress to insulate the independent agency and its members from such political pressures, it was not illegal. This is because courts have construed statutory silence

or columnist who wrote about Frohnmayer's resignation noted the agency's independent status.[155] It seems that Congress, in its enabling legislation, failed to demarcate clearly its intent that the agency, particularly its grantmaking structure and members, be independent from such political pressures.

B. *The Justice Department's Spread of* Rust

The Executive Branch is also attempting to exert influence over the grantmaking decisions of the NEA through efforts by the Justice Department. Former Solicitor General Kenneth W. Starr said that the Administration was "pleased" that the Court had ruled that "government as financier . . . is able to take sides; it is able to have viewpoints when it is funding."[156] The Justice Department has seized upon the Supreme Court decision in *Rust v. Sullivan*[157] as a means to exert content control over other government subsidized arenas, including the subsidized arts.[158] While *Rust* was about the funding of abortion counselling, and thus, seems unrelated to other subsidized areas, the Justice Department has interpreted *Rust* as a green light to regulate the content of all government subsidized speech.[159] The Justice Department first attempted, unsuccessfully, to rely on *Rust* to assert that the federal government

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regarding removal power as giving whoever has appointment power the legal power to remove. Telephone interview with Professor Jerry Mashaw, Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School (Oct. 12, 1992).

155 *See, e.g.*, William H. Honan, *Head of Endowment for the Arts is Forced From His Post by Bush*, N.Y. TIMES, Feb. 22, 1992, at A1; William H. Honan, *Arts Figures Fear for the Endowment After Frohnmayer*, N.Y. TIMES, Feb. 14, 1992, at C1; William A. Henry III, *A Cheap and Easy Target*, TIME, Mar. 9, 1992, at 72; Masback, *supra* note 150, at 177. While some might argue that Frohnmayer submitted a letter of resignation and thus was not officially fired, he later admitted to being fired; even if such were not the case, political pressures created an environment in which Frohnmayer felt he could not successfully perform his duties as chairperson. The enabling Congress sought to prevent such government interference.

156 Robert Marcus, *Abortion-Advice Ban Upheld for Federal Funded Clinics*, WASH. POST, May 24, 1991, at A1, A18.

157 111 S. Ct. 1759 (1991).

158 *Rust* held that regulations prohibiting recipients of Title X funds from counselling patients regarding abortion violated neither freedom of speech nor the right to choose abortion. The 5-4 decision held constitutional regulations which conditioned a clinic's receipt of federal funding upon its doctors' silence about the option of abortion. In so holding, the Court asserted that "the government could restrict the subjects that recipients of federal funds may discuss because 'the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.'" Allan Parachini, *Widening* Rust, THE NATION, Oct. 21, 1991, at 468. The Court found that the Title X regulations did not violate the First Amendment because they did not prohibit the recipients from speaking, but merely forbade the use of government funds to speak on certain subjects deemed outside the public interest. Rust v. Sullivan, 111 S. Ct. 1759, 1772 (1991).

159 *See e.g.*, Stanford v. Sullivan, 773 F. Supp. 479 (D.D.C. 1991) (rejecting Justice Department's assertion that content restriction on scientific grant that would have required government permission to discuss results were constitutional and asserting that if *Rust* were given "the scope and breadth defendants advocate in this case, the result would be an

could impose silence on university researchers who were working on government funded projects.[160]

More recently, the Justice Department has asserted that the decision could apply directly to NEA grants,[161] particularly in light of the recent structural amendments. Leslie Southwick, a Deputy Assistant Attorney General, has argued that the NEA could constitutionally refuse to support on decency grounds "a play that advocated anti-Semitism or art work that glorified the Ku Klux Klan"[162] by relying on *Rust*, for that case "recognizes that when the government sponsors speech for certain purposes, it has the right to regulate the content of the government-funded portion of the message."[163] The Justice Department has asserted that it has "no doubt that *Rust* reaches the correct . . . decision."[164]

1. *Finley v. NEA*: The Justice Department's Attempt to Spread *Rust* to the NEA

The Justice Department, representing the NEA in the "NEA Four" case, *Finley v. NEA*,[165] has already attempted to extend *Rust* to the subsidized art context, in part by focusing on the agency's structural weaknesses. Because the District Court for the Central District of California did not adopt the Justice Department's line of reasoning, the Department is attempting to have Judge Tashima's Memorandum Opinion overturned on appeal in the Ninth Circuit.[166]

In the *Finley* case, the Justice Department attempted to convince the court that the subsidized arts do not fall within the "traditional sphere of free expression" exception raised by the *Rust* Court.[167] First, it not only ignored the exception as outlined in *Rust*, but also relied on the Court's language in the abortion-funding cases, cases which addressed conduct, not speech.[168] Second,

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invitation to government censorship wherever public funds flow. . . ."); Parachini, *supra* note 158, at 468.

160 Stanford v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991).

161 Finley v. NEA, 795 F. Supp. 1457 (C.D.Cal. 1992); Leslie Southwick, Statement Before the Subcommittee on the Constitution Committee on the Judiciary, United States Senate (July 30, 1991) [hereinafter Southwick]. For a review of the unconstitutional-conditions doctrine's culmination in *Rust* and that case's possible application to the NEA, see Michael Fitzpatrick, 45 STAN. L. REV. 185 (1992). *See also* James F. Fitzpatrick, *Constitutionality of Content-Based Restrictions on Federal Funding of the Arts After* Rust v. Sullivan, June 8, 1991 (reviewing the possible impact of *Rust* on the NEA).

162 Southwick, *supra* note 161, at 5.

163 *Id.* at 7.

164 *Id.* at 3.

165 795 F. Supp. 1457 (C.D. Cal. 1992).

166 Finley v. NEA, No. 92-56028 (9th Cir. filed Mar. 30, 1993).

167 *Finley*, 795 F. Supp. at 1473.

168 Defendant's Memorandum in Support of Motion for Judgment on the Pleadings at

the Justice Department drew on the *Rust* Court's finding that restrictions on abortion counselling were a logical outgrowth of earlier enacted restrictions on abortion funding.[169] It argued that "Section 954(c) ['s artistic excellence language] has always implicitly authorized the agency to deny a grant based on a subjective judgment that a work is 'indecent' and therefore that it lacks artistic merit . . . ."[170] This implied that such content-based restrictions in the subsidized arts context are a logical outgrowth of Congress' original intent regarding the NEA's mission.[171] The Justice Department attempted to leverage Congress' recent structural changes to the NEA's grantmaking authority, particularly, the decency content restriction, to its advantage.

The District Court did not accept either argument, finding that "the significance of the arts as a 'traditional sphere of free expression . . . fundamental to the functioning of our society,' is confirmed by the legislative 'Declaration of Findings and Purposes' that is a part of the NEA's authorizing statute."[172] The court stated that artistic expression is "at the core of a democratic society's cultural and political vitality,"[173] and thus, equated artistic expression to speech at a university, an area that the *Rust* Court itself had delineated as an exception.[174] The Justice Department next tried

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15-16, Finley v. NEA, 795 F. Supp. 1457 (C.D.Cal. 1992) (No. CV 90-5236) [hereinafter Defendant's Memorandum]. Note, however, that the Supreme Court has determined that art is pure speech. *See* Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) (holding entertainment, musical and dramatic works all within the First Amendment guarantee); Kaplan v. California, 413 U.S. 115, 119 (1973) (holding that pictures, films, paintings, drawings and engravings have First Amendment protection).

169 Rust v. Sullivan, 111 S. Ct. 1759, 1772 (1991). The *Rust* Court asserted that *Rust* was "a case of the government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 1773. The Court construed the Title X legislation as authorizing funding "only to support preventative family planning services, population research, infertility services, and other related medical, informational, and educational activities" and that abortion need not be found to fall within that ambit. *Id.* at 1765. *But see id.* at 1787 (Stevens, J., dissenting) (arguing that the Title X legislative history is clear and that Congress did not intend to prohibit counselling on abortion).

170 Defendant's Memorandum, *supra* note, 168 at 33.

171 *But see Hearings on S. 521 Before the Constitutional Subcommittee of the Senate Judiciary Committee*, 102d Cong., 1st Sess. 8 (1991) (statement of James F. Fitzpatrick, arguing that content-based restrictions other than artistic merit are not ancillary).

172 *Finley*, 795 F. Supp. at 1457 (referring to and quoting 20 U.S.C. § 951 (1990)). *See also supra* Part II.B.

173 *Id.*

174 Interestingly, the Justice Department attempted a similar argument in the *Stanford v. Sullivan* case. United States Attorney Jay Stephens argued there that *Rust* "does not support [the] theory that there should be a 'university exception' to the basic rule that the government is not obligated to subsidize the exercise of First Amendment rights," Defendant's Supplement Memorandum Regarding *Rust v. Sullivan* at 6, Stanford v. Sullivan, 773 F. Supp. 472 (D.D.C. 1992), despite Rust's statement that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to

to argue that content restrictions on government-subsidized art were not unduly vague or overbroad.[175] The Department focused on the general standards of decency language and, wisely, did not argue that this language was as similar in its specificity as was the specific statutory language at issue in *Rust*.[176] Instead, the Department argued that the requirement "to assess a work's 'decency,' [is] no more vague than the criteria [of artistic excellence] that the agency must already apply."[177] The Justice Department was attempting to argue that the recent structural changes to the agency's grantmaking structure were no more problematic than the agency's original grantmaking structure.

The District Court rejected this argument and found that "professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of 'decency' are not,"[178] as the "decency clause sweeps within its ambit speech and artistic expression which is protected by the First Amendment."[179]

The First Circuit in *Advocates for the Arts v. Thomson* has also stated that artistic excellence is a valid criterion for selecting NEA-funded projects.[180] In addition, Constitutional scholars have asserted that artistic excellence is a valid criterion upon which to judge NEA submissions.

> First, judgments about artistic quality, unlike judgments about political quality, do not implicate core first amendment concerns. Second, insofar as we have some confidence in our ability to make reasonable judgments about artistic quality, the decision to subsidize only that art that has "serious artistic value" represents an acceptable trade-off in a world of limited governmental resources.[181]

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the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines." *Rust*, 111 S. Ct. at 1776. The court rejected Stephens' argument.

175 Defendant's Memorandum, *supra* note 168, at 30-33.

176 The Act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1990). "[T]he speech restrictions in *Rust* were perfectly clear." Fitzpatrick, *supra* note 171, at 12.

177 Defendant's Memorandum, *supra* note 168, at 33. The Justice Department has made similar arguments to Congress. *Cf.* Southwick, *supra* note 161, at 6 (arguing that "the broad grant of statutory authority to the [NEA]. . .surely would permit the NEA to decline funding to racist propaganda, even if 'artistically' presented"). *But see* Amy Sabrin, *Thinking About Content*, 102 YALE L.J. 1209 (1992) (stating that such a view "falls apart on closer analysis, however, because one can think of many works of art that express repulsive views, that nonetheless are executed with outstanding technical merit and in coherent and effective form and style, thereby making them meritorious works for their genre") [hereinafter Sabrin].

178 *Finley*, 795 F. Supp. at 1475.

179 *Id.* at 1476.

180 532 F.2d 792 (1st Cir. 1976), *cert. denied*, 429 U.S. 894 (1976).

181 Geoffrey Stone, Dean of the University of Chicago Law School, Statement Before the

Such a criterion, aside from being constitutional, is also necessary to meet the Congressional goals of the NEA.[182] The meaning behind the term "artistic excellence" is elastic enough to embrace new forms of art as they develop.[183] A more structured term would fail to provide for the necessary and inevitable growth of art as a means of expression.[184]

The Justice Department also attempted to distinguish the subsidized arts context from, in the *Rust* Court's words, an unconstitutional condition "situation in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[185] In so distinguishing, the Justice Department argued that the NEA's decision to deny the plaintiff's grant

> applications must be viewed *only* as a refusal to subsidize the plaintiffs' work, not as a 'penalty' for their decision to speak on particular topics, because the NEA never conditions its awards on the plaintiffs' agreement to avoid certain topics when they

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Independent Commission on the National Endowment for the Arts 12 (July 31, 1990) (transcript on file with author).

182 *See supra* text accompanying notes 4-9. Alternative means of funding arts projects such as a lottery or on a first-come-first serve basis would frustrate Congressional intent in establishing the NEA.

183 The former General Counsel for the NEA states that the NEA examines the relationship among the subject matter, the point of view expressed about that subject matter, and the mode of expression as significant factors in assessing the artistic merit of an artistic endeavor. Sabrin, *supra* note 177, at 1227. Such a relationship is necessarily fluid. "Moreover, the standards change over time as artists push us into new realms of awareness about art and the world around us." *Id.* at 35.

184 For an innovative exploration of the meaning behind "artistic excellence" and the content-based determinations facing the NEA, see Sabrin, *supra* note 177. Ms. Sabrin's article outlines three subcategories within the meaning of artistic content—subject matter of the work of art, the point of view expressed about that subject matter, and the mode of expression—and argues that because an "artistic excellence" determination requires an examination of art's content, First Amendment doctrine is currently insufficient to address the issue of content-based determinations within the subsidized art context. She advocates that the NEA constitutionally examine the content of art as it pertains to the project's "mode of expression." *Id.* at 1219. However, the enabling Senate warned about government trying to regulate an artist's mode of expression: "[M]odes of expression are not static, but are constantly evolving. Countless times in history artist and humanists who were vilified by their contemporaries because of their innovations in style of mode of expression have become prophets to a later age." ESTABLISHING A NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES, S. REP. NO. 300, 89th Cong., 1st Sess. 18 (1965). *See also Hearing on S. 521 Before the Constitutional Subcommittee of the Senate Judiciary Committee*, 102d Cong., 1st Sess. 5 (1991) (statement of Lee Bollinger, arguing that "[i]f the NEA's [content-based restrictions] were justified on the ground that the artists could still express their views through 'words' but through their 'art'[alternative modes of expression], surely that would not survive constitutional scrutiny."). For a critique of Ms. Sabrin's proposal, see *infra* text accompanying notes 214-216.

185 Rust v. Sullivan, 111 S. Ct. 1759 (1991). In the abortion counselling context, the Court was convinced that a doctor had the ability to counsel patients on the option of abortion outside the federally-funded clinic in a privately-funded clinic.

> speak with private funds, as the FCC attempted to do in *League of Women Voters.*[186]

The District Court, in dicta, rejected this argument as well.[187] "An argument can be made that the decency clause constitutes a facially unconstitutional condition [because the matching funds requirement results in a situation where] . . . any statutory content control over an NEA-supported program or project necessarily imposes restrictions over a substantial proportion of non-NEA-funded expression."[188] Many have made this argument.

> "The individual artist who has received an Endowment fellowship is generally unable to 'separate himself into publicly and privately supported affiliates,' while supporting himself even partially with Endowment funds, an artist will be wholly barred from pursuing the full range of expressive activities and will even be barred from soliciting private parties to underwrite activities the Endowment might consider unseemly" and, thereby, unconstitutionally restrained by grant viewpoint conditions.[189]

As arts advocate Jim Fitzpatrick states, "The creative process is indivisible. An artist cannot compartmentalize one's creative life into a Dr. Jekyll who produces acceptable art when using federal funds, and a Mr. Hyde whose creativity ranges freely while using private funds."[190]

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186 Defendant's Memorandum, *supra* note 168, at 20. In *FCC v. League of Women Voters*, the Supreme Court invalidated a condition of receiving grants for public broadcasting in part because it prevented local stations from paying for editorializing with non-federal funds, such that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing . . . and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." 486 U.S. 364, 400 (1989). The Court determined that the content restrictions impermissibly burdened the broadcasters' use of private funds. *Id.* at 401.

187 *Finley*, 795 F. Supp. at 1463. The district court did dispose of plaintiffs contention that the decency clause constituted an unconstitutional condition on the ground that the NEA appraisal of funding applications includes an evaluation of each applicant's entire body of work —whether NEA funded or otherwise— because plaintiffs had brought a facial challenge to the statute, which rendered consideration of agency interpretation and application of the statute inappropriate.

188 *Id.* at 1472 n.18 (1992). This language is dicta only because the plaintiffs had raised the unconstitutional conditions issue incorrectly.

189 NOTE, *supra* note 9, at 1983 (quoting Floyd Abrams, Memorandum to Volunteer Lawyers for the Arts, *In re* Interior Department and Related Agencies Appropriations Bill H.R. 2788, 101st Cong., 1st Sess. (1989) 15 (Aug. 23, 1989)).

190 Fitzpatrick, *supra* note 171, at 15. Additionally, an NEA grant is viewed by private sources of funding as well as exhibitors of art as an imprimatur of the recipient's artistic merit and excellence. "As a result, NEA grants have an enormous multiplier effect, serving not only as a magnet for other funds, but also as a springboard for great visibility in the art community and concomitantly greater access to galleries, museums, theatres and concert halls—and audiences." *Id.* at 17. For a policy discussion as to why the NEA should continue to fund the arts, see *supra* Part III.

2. *Finley* on Appeal: The Added Challenge of *R.A.V.*

Since the Justice Department's first attempt to extend *Rust* to the subsidized arts context was rejected by the District Court, it has appealed Judge Tashima's Memorandum Opinion to the Ninth Circuit.[191] On appeal, the Department will need to address the recent Supreme Court holding in *R.A.V. v. City of St. Paul*[192] that the government can prohibit proscribed speech but may not make further content discriminations within that speech save for a few exceptions.[193] This case provides direct support for the proposition that the NEA cannot constitutionally impose content-based conditions on its grants other than the condition of requiring artistic merit.

The Court reached its conclusion in *R.A.V.* by establishing a two-tiered understanding of content-based speech discrimination. At the first level of speech discrimination, government can choose to enact a blanket proscription of that category of speech that is content-neutral.[194] In *R.A.V.*, the speech category was "fighting words."[195] However, within that category of speech exist subcategories which can, but must not, be grouped by subject matter or viewpoint. Discrimination at this second level is forbidden, save for four exceptions, because such discrimination fails the First Amendment's requirement of content-neutrality.[196] In *R.A.V.*, the ordinance at issue, prohibited fighting words on the basis of race, color, creed, religion, or gender, but did not prohibit fighting words based on homosexuality, for example.[197]

Justice Scalia named four exceptions to his new two-tiered First Amendment jurisprudence. The four exceptions exist in situations 1) when the market or media is, in a non-content-based manner, proscribed, 2) when "the basis or the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, [3) when] the subclass happens to be associated with particular 'secondary effects' of speech, . . . [and, 4) when] there is no realistic possibility that official suppression of ideas is afoot."[198]

Justice Scalia's two-tiered reasoning can be applied to the NEA grantmaking context. Because Congress can choose to eliminate

191 Finley v. NEA, No. 92-56028 (9th Cir. filed Mar. 30, 1993).
192 R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).
193 *Id.* at 2542.
194 *Id.* at 2545.
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.* at 2545-47.

the NEA, the proscribable category of speech is federally funded artistic expression. This would be Justice Scalia's first tier. However, once Congress chooses to fund the NEA, it cannot then impose content or viewpoint conditions on the agency's funding authority "based on hostility — or favoritism — towards the underlying message [that will be] expressed,"[199] by the artist or project funded. This would be Justice Scalia's second tier.

Applying the *R.A.V.* reasoning to the content-based criteria of artistic merit and decency currently employed by the NEA reveals that artistic merit is arguably the only content-based condition that Congress can impose on NEA grants without violating the First Amendment.[200] The decency criterion fails to fall within the exceptions outlined by Justice Scalia.[201] However, the artistic excellence criterion, while not content-neutral because it demands an examination of content, does fit within the Court's last exception. This exception requires that there be no possibility that official suppression of ideas be afoot.[202] The criterion of artistic excellence, especially when implemented by the peer review panels, meets this requirement.[203]

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199 *Id.* at 2545.

200 The Justice Department might counterargue, as it did in the district court, that the artistic-excellence standard simply internalizes the decency criteria. *See* Defendant's Memorandum, *supra* note 168, at 33. But as that court found, "Had Congress believed that 'decency' and 'respect for diverse views' were naturally embedded in the concept of 'artistic merit,' there would be no need to elaborate on that standard," by extra statutory language. *Finley*, 795 F. Supp. at 1471. If the Justice Department's counterargument were accepted, however, this fact would point to the need for great deference to the arts experts' decisions about artistic merit, for these panels of art experts are least vulnerable to political pressures over the content of funded art. As the *Finley* court said, "the 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. . . ." *Id.* (emphasis added).

201 The decency language, because it has nothing to do with medias or markets, fails Justice Scalia's first exception. As indecency is outside the traditionally proscribable areas of obscenity, fighting words and defamation, the decency restriction cannot be "the very reason [an] entire class of speech . . . is proscribable." *R.A.V.*, 112 S. Ct. 2538, 2545 (1992). The decency language also fails the secondary-effects exception in that "listener's reactions to speech are not the type of 'secondary-effects' we referred to in *Renton* [a secondary-effects case] . . . . The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* at 2549 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988).) *But see* CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 195-214 (1989) (arguing that the secondary effect of pornography has an effect on women through impact on its audience). The decency language even fails Justice Scalia's last "catch-all" exception, which states that selectivity based on content is valid, even if it does not identify a neutral basis, "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. For the government to determine what is indecent—necessarily a subjective determination regarding the art's content and, more invidiously, its viewpoint—can only result in a finding that official suppression of ideas abounds.

202 *R.A.V.*, 112 S. Ct. at 2547.

203 *See* Sabrin, *supra* note 177 (arguing that while determining what constitutes artistic excellence involves an examination of content, it can be done successfully by the NEA without official suppression of ideas).

It would seem that the Justice Department faces an uphill battle to successfully argue that *Rust* can constitutionally be extended to the context of NEA subsidized art. However, the *Rust* Court did accept the "reality" that a doctor's ability to counsel her patients regarding the option of abortion was not restricted by Title X regulations despite the American Medical Association's conclusion that the "regulations upheld in *Rust* restrict the substantive scope of medical counseling that a physician may provide to his or her patients."[204] The Court reached this conclusion knowing the high stakes involved in the abortion funding context.[205] Artists and arts advocates are understandably concerned then, that the Justice Department's enthusiasm coupled with the current structural vulnerability to content control over funding decisions may lead appellate courts, or even the Supreme Court, to reject the lower court's determination that *Rust* may not constitutionally be extended to the subsidized arts context.

VI. Returning the NEA to its Original Mission: Excising Content Control from the Grantmaking Process

In the past few years, the NEA has been faced with formidable attempts to alter and control its grantmaking authority. In addition to the 1989 and 1990 structural amendments, the NEA's chairperson was forced to resign amidst intense political pressure. The NEA also faces continuing challenges from the Executive branch's Justice Department through the courts.[206] These challenges are all the more potent because of the agency's current structural weaknesses against government content control. That the agency is so embattled as its heads towards its 1993 reauthorization year points to a need for the agency to determine its weaknesses and put forth a plan for change.[207] While some believe that eliminating the NEA is the best answer,[208] at least one study indicates that the NEA

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204 Statement of the American Medical Association of the Subcommittee on the Constitution, Judiciary Committee of the U.S. Senate 5 (July 30, 1991).

205 In so holding, the *Rust* court upheld the Second Circuit's determination, but overruled other circuits' opinions on the same issue. In *Massachusetts v. Secretary of HHS*, the First Circuit, *en banc*, struck down the restrictions as "a pure example of speech regulation" because the regulations were "both viewpoint and content-based in violations of the First Amendment." 899 F.2d 53 (1st Cir. 1990), *aff'g* 873 F.2d 1528 (1st Cir. 1989).

206 The Justice Department appealed the Finley case and then settled. Finley v. NEA, No. 92-56028 (9th Cir. filed Mar. 30, 1993).

207 The best plan for change would outline a means by which the agency could insulate itself from any political influences, whether they come from the political left or right.

208 Republican Congressman Dana Rohrabacher proposed an amendment to eliminate funding for the NEA in 1989, which was defeated. 135 Cong. Rec. H3637-55 (daily ed. July 12, 1989).

serves a useful purpose.[209] This Section offers possible structural reforms to the NEA which, if enacted, would enable the NEA to patch its structural flaws to better insulate itself from political pressures, left or right, over content which keep it from fulfilling its Congressionally mandated goal—funding artistically excellent works of art free of other content restrictions.

A. *Recent Suggestions*

A recently offered structural reform suggests vesting full grantmaking power in the peer review panels.[210] Such a scheme would render the chairperson a chief administrator with no grant decisionmaking power and "the peer panels would become the official decisionmakers in the grantmaking process."[211] While such a plan is elegantly simple, it ignores Congress' original reasoning for creating the position of chairperson. "A group of private citizens could not dictate the expenditure of federal funds—legally, that is."[212]

The former general counsel of the NEA has recently written on the subject of content controls over NEA funded art.[213] Sabrin first argues for greater judicial deference to the agency's determinations of artistic excellence and then, to combat the possibility that "the government could invoke 'lack of artistic merit' to mask what in reality is a denial improperly based on subject or viewpoint," offers only an ex post, and thus, necessarily, an ad hoc, solution to controlling improper government influence in

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209 RESEARCH & FORECASTS, INC., THE AMERICAN PUBLIC'S PERSPECTIVE ON FEDERAL SUPPORT FOR THE ARTS, AND THE CONTROVERSY OVER FUNDING FOR THE NATIONAL ENDOWMENT FOR THE ARTS 24 (1990) (concluding that the American Public: 1) stands strongly behind NEA's role in fostering arts; 2) is satisfied with NEA's performance and disagrees with Senator Helms' view on restricting artistic freedom; 3) believes that NEA in general, peer review panels specifically, are the right people to make funding decisions; 4) believes that politicians in Congress are the wrong people to make such decisions; 5) believes that NEA should fund controversial artists). *See also* DICK NETZER, THE SUBSIDIZED MUSE (1978).

210 *See* Masback, *supra* note 150, at 203 (arguing that the locus of decisionmaking power should be moved from the Chairperson to the peer panels).

211 *Id.* at 203.

212 BIDDLE, *supra* note 5, at 138. Apparently, the idea of vesting full authority in the peer review panels was considered during discussions about the NEA's original structure. Because the then-Bureau of the Budget informed those designing the structure that such an idea was illegal, the group finally decided that the three-screen process would be the most effective structure. *See* Part II.B.1. "The provisions for councils of eminent background, bolstered by panels of private citizen experts in each of the many areas involved, would have to mean guidance of the highest caliber. Would a chairman, in solitary decision, go against the majority viewpoint of such advisors? Only the foolish would take such action. . . ." *Id.* Unfortunately, Masback fails to address this legal issue in his Note.

213 Sabrin, *supra* note 177.

grantmaking decisions.[214] The courts can simply review the evidence to determine whether the government improperly examined content.[215] An evidentiary review by a court may find, ex post, evidence of an improper governmental interference in a particular case. A more comprehensive solution may be to examine critically the structural defects existing within the NEA's grantmaking form and to make the necessary changes to insulate, ex ante, the agency from improper outside pressures and potential grant applications from being denied through improper content-based determinations. That is what this Article attempts to do.

B. *In Search Of Artistic Excellence: Structural Reform at the NEA*

The controversies that have faced the NEA over the last three years have not only highlighted formerly latent weaknesses in the agency's enabling legislation, but also have created new structural flaws as well. Such structural cracks can, however, be corrected by Congress during its 1993 reauthorization legislation for the NEA. These structural reforms would help insulate the agency's grantmaking decisions from political pressures from the left and right.

1. *Correcting the Grantmaking Structure Through Legislative Reform*

First, Congress should repeal the statutory language requiring the chairperson to consider "general standards of decency" in her grantmaking decisions. In so doing, Congress would be realigning the standard the chairperson would use in her grantmaking decisions to accord with Congress' declaration of purpose language 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. . . ."[216] A repeal of the decency language would also return to the NEA the original standard for judging an art application on the basis of artistic excellence and merit. Such a change would limit the ability of Congresspersons and interest groups to pressure the chairperson to consider criteria other than artistic excellence and merit when making grantmaking decisions. A District Court has found the decency language to be unconstitutionally vague and overbroad,

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214 Sabrin, *supra* note 177. For a discussion of the constitutionality of improper content based determinations, see *supra* Part III.

215 *Id.*

216 20 U.S.C. § 951(5) (1990).

although the case is currently on appeal.[217] Excising this structural weakness from the statute would render the issue moot.

Second, Congress should amend Section 953(c), the prohibition against federal supervision over policy determination for recipient and potential recipient organizations, to include such protection for individual artists as well. This long-needed amendment would align the letter of the statute to its spirit—that of protecting all recipients and potential recipients from government and political influences over their policies on art content.

Third, Congress should amend the weaknesses in the current language governing the peer review panels. Congress should eliminate the current requirement of having laypeople on the panels to return the membership to those who can best ensure that the standard of artistic excellence is met by the accepted applications—experts in the particular artistic area of the panel. The reason for requiring laypeople on the panels—to protect against cronyism—is adequately addressed by 1990 language specifying that "the chairperson shall ensure that an individual who has a pending application for financial assistance under this chapter, or who is an employee or agent of an organization with a pending application, does not serve as a member of any panel before which such application is pending."[218] Additionally, Congress should insert specific language in Section 953 to unambiguously include members of the peer panels as persons who may not supervise the policy determination of recipient or potential recipient organizations and (hopefully) individuals.[219] Such amendments would prohibit, for example, any interest groups or members of Congress from attempting to influence the decisions of individual panel members regarding the content of a grant application. Both amendments

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217 *See supra* Part II.B.2.

218 20 U.S.C. § 959(c).

219 The General Counsel of the NEA stated that the peer-review panel members are considered government employees for payroll purposes during the weeks they are serving on the panels. However, this government-employee status is for payroll purposes only and only applies during the weeks the members sit on the panels. Thus, it is possible that if the payroll classification is not binding for the Section 953 language, such members could be subject to political pressures from Congress people and interest groups. Granted, during this time, the panel members may not know who will be applying for grants in the coming year, but they certainly know who received grants in the previous years and of those, which were controversial. The political pressures, however, are not limited to attempts to thwart pending applications only, but include any sort of pressures that taint a grant decisionmaker's ability to focus on artistic excellence and merit as the sole criteria for considering a grant application. While the General Counsel of the NEA never considered whether this omission in the statutory language of § 593 could invite political pressures directly aimed at the members of the peer review panels, she did admit that as long as the status of the peer review panels remained unclear, such a possibility existed. Interview with Amy Sabrin, former General Counsel of the NEA (Nov. 11, 1991).

would ensure that the peer review panels returned to their original role of screening applications for artistic excellence and merit by protecting the panel members from facing outside pressures stemming from recommendation decisions. Such amendments would also be in accord with the general public's view that experts should be the judge of what constitutes art.[220]

Fourth, Congress should fulfill its intention to make the NEA an independent agency "on the autonomous end of the federal spectrum"[221] and institute clear language that the chairperson may not be fired except for "good cause."[222] Congress should amend Section 954(2)'s current language to include a provision such as: "The Chairperson shall not be removed from office except for good cause."

Alternatively, Congress could restructure the relationship among the President, the NCA, and the chairperson to parallel that of the Corporation for Public Broadcasting ("CPB").[223] Currently, the President has appointment power, with the advice and consent of the Senate, over the NEA's chairperson and the twenty-member NCA. However, the CPB, another independent agency designed to be insulated from political pressures, has a different relationship among its Board, CPB President, and the United States President.[224] Although the CPB Board is appointed by the President, with the advice and consent of the Senate, *the Board* then chooses from among its ranks, who will serve as CPB President.[225] Congress did not include any removal provisions. Because courts have construed statutory silence regarding removal power as resting in the appointees the legal power to remove,[226] the President cannot fire the President of CPB. Only the CPB Board can remove the CPB President prior to the end of her term. Replicating this structure in the NEA would give the NCA the power to remove the chairperson. If Congress created such a structure within the NEA, forced resignations of the chairperson by the President would be much more difficult to accomplish.

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220 *When Taxes Pay for Art: Lawmakers Feel Heat*, NEWSWEEK, July 3, 1989, at 68.
221 MICHAEL STRAIGHT, TWIGS FOR AN EAGLE'S NEST 81 (1979).
222 *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935).
223 47 U.S.C. § 396 (1982). *But see* Masback, *supra* note 150, at 198-201 (criticizing the CPB as a structural model for the NEA because of its limited authorization periods).
224 *Id.*
225 47 U.S.C. § 396(c)(1), (e)(1) (1982).
226 *See* supra note 13.

2. Correcting the Grantmaking Structure Through Administrative Reform

Congress should also amend the NEA's legislation to require the chairperson to issue regulations that specify administrative safeguards against outside pressures over content of the art the agency funds. Such regulations should focus on protecting the agency from outside political pressures as well as shielding the agency from claims of political impropriety during its decisionmaking process.[227]

First, the NEA should issue regulations requiring all communications from outside the agency regarding the grantmaking process to be memorialized on paper. Such a requirement would discourage outside and otherwise confidential pressures from government officials and interest groups concerning their view of whether a work should be or should have been funded. Any communication by those outside the agency to those within the agency regarding a particular grant applicant would then be placed in the applicants file. This way, any person wanting to influence the NEA's decisionmaking process would know that their communications would be memorialized. This should effectively discourage "unofficial" outside influences tainting the grantmaking process.

Second, the NEA should issue regulations requiring that all official discussions during the grantmaking process be memorialized. Such regulations would amplify existing 1990 legislation which requires the NCA's meetings be open to the public with written records[228] as well as those requiring the peer panels to create written records of their meetings.[229] While the chairperson is authorized to issue such regulations and procedures regarding her own functions,[230] she has not exercised this option.[231] Such aug-

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227 For an example of such pressures and impropriety, see *supra* Part II.B.2.

228 20 U.S.C. § 955 (1990). "All policy meetings of the Council shall be open to the public. The Council shall create written records summarizing all meetings and discussions of the Council; and the recommendations made by the Council to the Chairperson, and make such records available to the public in a manner that protects the privacy of individual applicant, panel members and Council members."

229 20 U.S.C. § 959(b)(4) (1990). "[P]anels [are] to create written records summarizing all meetings and discussions of such panel; and the recommendations made by such panel to the council; and to make such records available to the public in a manner that protects the privacy of individual applicants and panel members. . . ." *But cf.* Lars Etzkorn, *Balancing Art and Politics: The Use of Peer Panels in United States Government Funding of the Arts*, 9 ST. LOUIS U. PUB. L. REV. 323 (1990) (arguing, unpersuasively, that open panel meetings will result in increased politics through lobbying by grant applicants).

230 "[T]he Chairperson . . . shall . . . have authority to prescribe such regulations as the chairperson deems necessary governing the manner in which the chairperson's functions shall be carried out . . . ." 20 U.S.C. § 959(a)(1) (1990). Although Congress, in 1990, added certain language—"The Chairperson shall issue regulations and establish procedures . . . to ensure, that, when feasible, the procedures used by panels to carry out their

mentation of the existing legislation should require that the chairperson's discussions regarding an applicant be memorialized. Additionally, the chairperson should issue regulations detailing the process of notification and explanation for those applications which are rejected. Currently, there are no formal regulations.[232]

While lower courts have found no constitutional obligation to provide written explanations when the NEA chooses not to fund a work,[233] such a requirement would deflect claims of political impropriety during its decisionmaking process.[234] A requirement that the reasons be articulated in a letter that the artist could make available to the public coupled with the availability of the discussions made on a particular application would provide a legitimate paper trail for the artist to understand why her application was rejected and would give the NEA grantmaking process the legitimacy that it currently does not have. Additionally, these "sunshine laws" would discourage outside pressures over content from clouding the decisionmakers' otherwise clear statutory standard of artistic excellence and merit to be applied to a proposed project.[235]

VII. CONCLUSION

If Congress were to adopt these structural reform measures, it would do much to return the NEA to its mission, unclouded by politics, of funding artistic excellence. It must be remembered, that during the NEA's twenty-seven years of existence, Congress has never altered its original statutory pledge to shield the NEA from government interference. That Congress has never altered

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responsibilities are standardized,. . . ." 20 U.S.C. § 959(c)—a statutory requirement embracing all three screens within the grantmaking process would be best.

231 There are no regulations on how the Peer Review Panels, the Council, or the chairperson are to conduct their meetings in the Code of Federal Regulations. The General Council of the NEA confirmed this and noted that any procedures are informal and found in internal documents. She did note, however, that general procedures can be found in the applications for grants which are available to artists and arts organizations. These procedures only outline the criteria that the various decisionmakers consider when deciding on grants, pursuant to 20 U.S.C. § 954(d)(2) (1990). Interview with Amy Sabrin, former General Counsel of the NEA (Nov. 11, 1991).

232 Usually, the Chairperson writes a letter of denial without specific reasons. *Id.* *See Frohnmayer Denies 'NEA 4' Grant Appeals*, L.A. TIMES, Aug. 25, 1990, at F1.

233 *See* Finley v. NEA, 795 F. Supp. 1457 (C.D.Cal. 1992); Advocates for the Arts v. Thompson, 532 F.2d 792, 797 (1st Cir. 1976).

234 The NEA once again faced such a charge when the new Chairperson denied funding to two applications that sought to support exhibits of "sexually explicit" art. *See* K. Masters, *NEA Chief Defends Vetos: Further Conflicts Likely*, WASH. POST, May 29, 1992, at D1.

235 The Environmental Protection Agency has issued "sunshine" regulations for exactly these reasons. The agency requires any representations about a pending application be memorialized. It issued these regulations to protect itself from political pressures from Congress. Telephone Interview with Professor Jerry L. Mashaw, Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School (Oct. 12, 1992).

this language, particularly during the last three years of turbulence, indicates a Congressional commitment to the NEA's original mission of funding art based on artistic merit, not based on government's conception of what constitutes good art. It is time for Congress to make good on that commitment, particularly in light of the recent *Rust* decision. Congress should use the 1993 reauthorization hearings as an opportunity to correct the structural flaws within the NEA's grantmaking structure—both from its original enabling legislation as well as from its recent amendments. Structural reform will shield the agency from any future attempts at government control, be it from the right or the left, over the content of subsidized art. Making the NEA grantmaking structure truly as independent as it was intended to be, making the grantmaking process open to public scrutiny, tightening up the prohibition on government interference, and returning the peer panels to their expert status will enable the NEA to return to its mission of funding artistically excellent art. As the Supreme Court itself said, "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."[236]

236 Hannegan v. Esquire, Inc., 327 U.S. 146, 157-58 (1946).