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1991 LEGISLATION, REPORTS AND DEBATES OVER FEDERALLY FUNDED ART: ARTS COMMUNITY LEFT WITH AN "INDECENT" COMPROMISE

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

Since June 1989, several federally funded artists in the United States have commanded national attention for their controversial creations of art.[2]

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1. Harris, *It Takes Practice and Serious Thought to Learn How to Dislike Art Properly*, THE CHRON. OF HIGHER EDUCATION, Sept. 19, 1990, at A56 (discussing ways in which one may dislike art and recommending government support of arts without content restrictions).

2. *See* Posner, *Art for Law's Sake*, THE AMERICAN SCHOLAR, at 513 (Autumn 1989) (discussing "persistent, perhaps intensify controversy over offensive art") The works of art most particularly in controversy include the exhibition "Robert Mapplethorpe: The Perfect Moment," and artist Andre Serrano's photographic work "Piss Christ." *Id.* Mapplethorpe's exhibition consists of several photographs of homoerotic and sadomasochistic images. *Id.*; *see also* Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1370 (1990) [hereinafter *Post-Modern Art*] (discussing adequacy of current legislation for judging contemporary art in light of recent controversial works). Two of the photographs considered most offensive include an image of a whip protruding from a man's anus, and an image of a man's testicles bound in leather. *Id.* Serrano's "Piss Christ" is a photographic collage depiction of a crucifix submerged in the artist's urine. Posner, *Art for Law's Sake*, at 513. *But see* Harris, *supra* note 1, at A56 (discussing work of Andre Serrano). Writing about the artistic value of "Piss Christ," Harris states that individuals will interpret "Piss Christ" according to their own personal beliefs, but that "no individual work of art can legitimately be disliked without being seen, heard or read." *Id.*

See also Art and Outrage in the Nation's Capital; No Sex Please, We're American, THE ECONOMIST, Oct. 7, 1989, at 111 (discussing political reactions to Robert Mapplethorpe's and Andre Serrano's controversial works). Following Congress' voiced displeasure over funding by the National Endowment for the Arts (NEA) of the Mapplethorpe exhibition, the Corcoran Gallery of Art in Washington, D.C. canceled plans to exhibit the Mapplethorpe photographs during the summer of 1989. *Id.* Following the cancellation of the exhibition by the Corcoran, artists boycotted exhibiting at the museum and artist Lowell Nesbitt wrote the Corcoran out of his will. *Id.* The Washington Project for the Arts showed the exhibition instead. *Id.*

See also Parachini, *NEA Gives Grants to Groups Targeted by Conservatives; Arts: Some Organizations That Played Key Roles in the Political Controversy Receive Funding. Museum Rallies to the Defense of Embattled Cincinnati Gallery*, L.A. Times, Apr. 24, 1990, at F1, col. 2 (discussing indictment for obscenity charges previous week of Cincinnati museum and director). When the exhibition subsequently travelled to the Cincinnati Arts Center in April 1990, a Cincinnati grand jury indicted the Arts Center and its director, David Barrie, of obscenity charges for the display of five of the seventy-five photographs in the exhibition. *Id.*; Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. Times,

People may label these creations as "disliked art" or "art with disliked subjects,"[3] and consequently, the government has given these works of art limited protection because of such a classification.[4] Some members of the

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Oct. 6, 1990, at A1, col. 1 (discussing acquittal of Cincinnati Arts Center and Director as vindication against anti-pornography groups in Cincinnati). A jury later acquitted the Arts Center and Barrie of the obscenity charges. *Id.*

See also Hubbard, Small, Micheli & Sellinger, *Bending to the Political Winds, The NEA Cuts Off Grants to Four Artists Amid Charges of Censorship*, PEOPLE, Aug. 6, 1990, at 93 (interviewing and discussing controversial performance art of Karen Finley, Tim Miller, John Fleck and Holly Hughes and denial of grants by NEA to these artists). Various performance artists also received media attention for what they perform on stage. *Id.* Karen Finley uses her body to re-create the emotional realities of sexual abuse. *Id.* Finley's controversial show, "We Keep Our Victims Ready," contains three segments. *Id.* In the second segment, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. *Id.* Holly Hughes' monologue "World Without End" is a somewhat graphic recollection of the artist's realization of her lesbianism and reminiscence of her mother's sexuality. *Id.* John Fleck, in his stage performance "Blessed Are All the Little Fishes," confronts alcoholism and Catholicism. *Id.* During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. *Id.* Tim Miller derives his performance "Some Golden States" from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. *Id.* Miller uses vegetables in his performances to represent sexual symbols. *Id.*; *infra* note 4 and accompanying text (discussing denial by NEA grants to above four artists).

3. *See* Harris, *supra* note 1, at A56 (discussing public's dislike of Andre Serrano's "Piss Christ"). Harris, writing specifically about "Piss Christ," states that individuals will dislike the work because it is a defamation of religious beliefs and because the artist used his own urine in its creation. *Id.*

4. *See* Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304 (1989) [hereinafter Appropriations Act of 1990] (providing that no federal funds appropriated to NEA may promote art which NEA judges obscene). Section 304(a) states:

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

Appropriations Act of 1990, § 304(a).

Subsequent to public debate over the use of government funds for exhibition of controversial works of art, Congress revoked funding for the exhibition of Mapplethorpe and Serrano works in question and passed legislation restricting funding by the NEA of "obscene art." *Id.*; *See also* Parachini, *NEA Nominee Hearing Opens on Cordial Note*, L.A. Times, Sept. 23, 1989, *available in* LEXIS, Nexis Library, LAT File (discussing opposition by President's nominee Director of NEA to Congressional proposals to restrict federally funded art); Scally, *Congressional Panel Compromises on Funding for "Obscene" Art*, Reuter Library Report, Sept. 29, 1989, *available in* LEXIS, Nexis Library, Reuter File (discussing Helms amendment as finally adopted into 1990 Appropriations Bill).

A separate amendment to the 1990 Appropriations Bill called for a five year ban of grants by the NEA to two regional arts organizations that organized exhibitions by Robert Mapplethorpe and Andre Serrano, the Institute for Contemporary Art at the University of Pennsylvania

public view this limited protection as government censorship of the arts,

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and the Southeastern Center for Contemporary Art in Winston Salem, North Carolina, respectively. *See* Parachini, *NEA Nominee Hearing Opens on Cordial Note* (discussing funding ban to museums). While Congress ultimately disapproved of the five year ban on federal funding to the above mentioned two arts organizations, Congress did cut $45,000 in funding to the NEA. *See* Scally, *Congressional Panel Compromises on Funding for "Obscene" Art* (discussing Congressional reaction to controversial art exhibitions). The $45,000 represents the combined amount of the two grants to the Institute for Contemporary Art and the Southeastern Center for Contemporary Art that supported the Mapplethorpe and Serrano exhibitions. *Id.*

See also Parachini & Goldman, L.A. Times, Nov. 17, 1989, at A4, col. 4 (discussing reconsideration and announcement by NEA to fund Artists Space). In November 1989 the Chairman of the NEA, John Frohnmayer, impounded funding to Artists Space. *Id.* Artists Space, a Manhattan gallery, scheduled a controversial exhibition about AIDS, titled "Witnesses: Against Our Vanishing." *Id.* Frohnmayer later rescinded the impoundment of the grant money to Artists Space. *Id.* Frohnmayer received criticism for allowing political views to influence his decision to withhold federal funding for controversial art. *Id.*

See also Parachini, *GAO Opens Investigation Into Funding of 'Obscene' Art*, L.A. Times, Mar. 24, 1990, at F13, col. 5 (discussing investigation by General Accounting Office in response to letter from Senator Helms asking for inquiry into possible violations of law by NEA). In March 1990, the U.S. General Accounting Office began an investigation of alleged improper funding of obscene works of art by the NEA. *Id.* Senator Helms, in a letter to the General Accounting Office, listed nine exhibitions that allegedly received funding in violation of the 1990 appropriations bill. *Id.* In particular, Senator Helms raised questions about the funding of "Witnesses: Against Our Vanishing," and also "Modern Primitives," at the Center on Contemporary Art in Seattle, Washington. *Id.*

See also Ament, *Seattle to Join Art Rallies*, Seattle Times, Mar. 19, 1990, *available in* LEXIS, Nexis Library, SEATT File (discussing protests across United States scheduled for March 20, 1990 against threat of government art censorship and controversy over "Modern Primitives" exhibition). The "Modern Primitives" show documented "contemporary body modification" that included tatoos and piercing of genitals. *Id.*

See also Bargreen, *The Embattled Arts Agency Finds Itself Surrounded on all Sides as Its Reauthorization Vote Draws Near—Targeting the NEA*, Seattle Times Company, July 22, 1990, *available in* LEXIS, Nexis Library, SEATT File [hereinafter *The Embattled Arts Agency*] (discussing controversy over NEA and views of members of Congress regarding reauthorization of NEA). In July 1990, following Frohnmayer's decision to overturn recommendations by panel members of the NEA to grant funds to four performance artists, Karen Finley, John Fleck, Tim Miller and Holly Hughes, angry artists demanded the resignation of Frohnmayer. *Id.* Three of the four artists are homosexual, and the work of these artists deals explicitly with their sexuality. *Id.*; Hubbard, Small, Micheli & Sellinger, *Bending to the Political Winds, the NEA Cuts Off Grants to Four Artists Amid Charges of Censorship*, *supra* note 2, at 93 (interviewing and discussing controversial performance art of Karen Finley, Tim Miller, John Fleck and Holly Hughes and denial of grants by NEA to these artists). The NEA awarded Holly Hughes a $15,000 playwriting grant in March 1990, after members of the NEA viewed her performance "World Without End." *Id.* However, the chairman of the NEA denied Hughes a second grant for $5,000 in July 1990 despite recommendations for the grant by the NEA review panel. *Id.* Similarly, the NEA previously awarded Tim Miller four grants, but denied Miller funding for "Some Golden States." *Id.* Karen Finley also received two prior grants totalling $10,000 from the NEA, but she did not receive funding for "We Keep Our Victims Ready." *Id.*; *supra* note 2 (describing these four artists' controversial performance art).

See also Stimpson, *The Arts-Endowment Crisis is the Latest Encounter in the Battle Between Freedom and Fear; Higher Education Must Join the Fray*, THE CHRON. OF HIGHER EDUCATION, Sept. 26, 1990, at B1 [hereinafter *Arts-Endowment Crisis*] (discussing controversy

criticizing members of Congress for responding bureaucratically to the members' personal tastes in art.[5]

In October 1989 Congress approved an amendment to the appropriations bill for the fiscal year 1990 that placed content restrictions against obscenity in art funded by federal grants.[6] Congress considered the amendment directly in response to Senate and House members' displeasure of funding of the Robert Mapplethorpe and Andre Serrano exhibitions by the National Endowment for the Arts (the NEA).[7] After Congress passed the 1990 appropriations bill, the NEA required grant recipients to sign an anti-obscenity pledge as a condition to receiving government funds.[8]

The arts community and members of the public reacted to both the restriction and pledge in an uproar.[9] Protest and political debate ensued throughout the fiscal year.[10] Artists criticized the government action as a

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over reauthorization of NEA and urging higher education to take action against content restrictions). Stimpson writes that the debate over the NEA is a "toxic-waste dump of rhetoric," stating that as a result of the debate, Karen Finley, as a serious performance artist, "has been denigrated as a chocolate-covered porn queen." *Id.*; Sherman, *NEA Grant Provisos Attacked in Courts*, NAT'L L.J., Nov. 5, 1990, at 12, col. 2 (discussing pending litigation against NEA and its Director, John Frohnmayer). These four performance artists who were denied funding, called the "NEA Four," subsequently filed suit against the NEA and Frohnmayer alleging the denial occurred on the basis of the artists' sexual politics. *Id.*

5. *See* Toner, *In North Carolina's Senate Race, A Divisive TV Fight Over Values*, N.Y. Times, Sept. 23, 1990, at A1, col. 1 (discussing countercharges between senatorial candidates Jesse Helms and Harvey Gantt). Gantt attempted to present Helms as a candidate who prioritized his personal "crusades" over the needs of North Carolina. *Id.* at A32, col. 2. These crusades included those against the NEA for funding Helms's own perception of obscene art. *Id.*; *see also* Boyer, *Mean for Jesus*, VANITY FAIR, Sept. 1990, at 224 (examining Helms's crusade against NEA in wake of senatorial race against Gantt).

6. *See* Appropriations Act of 1990, *supra* note 4, § 304(a); *see also* 135 Cong. Rec. S8862 (daily ed. July 26, 1989) (Helms Amendment No. 420). Senator Helms proposed an amendment to the Department of the Interior and Related Agencies Appropriations Act of 1990. Helms Amendment No. 420. Senator Helms's original amendment sought to prohibit funding of "obscene" and "indecent" works of art, and "material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion" and "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." *Id.*; *infra* notes 25-33 and accompanying text (discussing language of 1990 Appropriations Act). The approved Appropriations Act of 1990 rejected Senator Helms's extensively restrictive language, but did maintain a prohibition against art deemed "obscene" by the NEA. Appropriations Act of 1990, § 304(a).

7. *See* Horn & Plattner, *Should Congress Censor Art ?*, U.S. NEWS & WORLD REPORT, Sept. 25, 1989, at 22 (reporting House vote in favor of Senator Helms's amendment into Congressional appropriations bill and discussing amendment in response to Congressional displeasure with federal funding spent on exhibition of works by Robert Mapplethorpe and Andre Serrano).

8. *See infra* notes 27-29 and accompanying text (describing language of pledge requirement).

9. *See generally* Horn & Plattner, *Should Congress Censor Art?*, *supra* note 7, at 22 (reporting public response to Helms amendment). The MARS Artspace in Phoenix, Arizona displayed "Piss Helms," a work that portrayed a photograph of Senator Helms submerged in a urine-like substance. *Id.*

10. *See* Ament, *Seattle to Join Art Rallies*, *supra* note 4 (discussing protests scheduled

denial of an individual's right to freedom of expression, and several arts organizations protested by refusing grants from the NEA.[11] Members of

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across United States in response to perceived government censorship of arts). Demonstrations and rallies planned by organizations such as the Arts Coalition for Cultural Freedom expressed concern over governmental action restricting federal funding of the arts. *Id.*

Compare Helms, *Art, the First Amendment, and the NEA Controversy—Tax-Paid Obscenity*, 14 NOVA L.J. 317 (1990) [hereinafter *Tax-Paid Obscenity*] (concluding that government should not support art that is offensive to public) *with About Washington*, Chi. Trib., Apr. 22, 1990, *available in* LEXIS, Nexis Library, CHTRIB File (discussing poll sponsored by lobbying group fighting Helms's effort to place restrictions on NEA) and Mathews, *Fine Art or Foul? In Galleries, Theaters, Congress and the Courts, a Battle Over Freedom of Expression is Raging*, NEWSWEEK, July 2, 1990, at 46 [hereinafter *Fine Art or Foul?*] (discussing poll conducted by Gallup Organization following recent controversial grants by NEA and obscenity charges against rap group 2 Live Crew for group's allegedly obscene lyrics). Helms states that "[t]he enormous response I have received from throughout the country indicates that the vast majority of Americans support my amendment because they were aghast to learn that their tax money has been used to reward artists who had elected to depict sadomasochism, perverted homoerotic acts, and sexual exploitation of children." Helms, *Tax-Paid Obscenity*, at 319.

In contrast, the results of the poll conducted by Research and Forecasts, Inc. of 1,200 people showed that ninety-three percent believe that "freedom of expression is essential to artists and the arts" and that eighty-one percent oppose Congressional action to "interfere with our rights to free expression." *See About Washington* (stating results of poll). Additionally, the Gallup Poll, taken June 20-21, 1990, asked, "With federal funding of arts projects, should federal officials exercise more control to ensure that the works of art don't offend the public? Or should these judgments be left to independent panels of established arts experts in each field?" Mathews, *Fine Art or Foul?*, at 50. Sixty-three percent of the 605 adults surveyed responded "Let Experts Judge," compared to thirty percent who thought that "More Official Control" was necessary. *Id.* Seventy-five percent also felt that it was more important that individuals have the right to determine what they may see or hear, rather than allowing "society to impose laws prohibiting material offensive to some segments of the community." *Id.*

In June 1990 protests again coincided with Congressional hearings in Washington, D.C. about the reauthorization of the NEA. *See* Grant, *Art Works Covered to Show Support for the NEA*, Proprietary to the United Press International, June 7, 1990, *available in* LEXIS, Nexis Library, UPI File (reporting Arts Day USA demonstrations taking place in Ohio and around United States in response to proposed Congressional legislation to curtail operation of NEA). Museums in Ohio covered sculptures and paintings with black cloth to demonstrate the effects of Congressional efforts to disband the NEA; Grant, *Art Works Off-Limits to Show Support for NEA*, Proprietary to the United Press International, June 8, 1990, *available in* LEXIS, Nexis Library, UPI File (reporting about Arts Day USA demonstrations taking place in Virginia in response to proposed Congressional legislation to curtail operation of NEA). In Virginia, museums hung yellow tape across gallery entrances and dimmed the lights of several galleries. *Id.*

11. *See* Grant, *Papp Nixes Federal Grants Until Obscenity Restrictions are Lifted*, Proprietary to United Press International, Apr. 27, 1990 *available in* LEXIS, Nexis Library, UPI File (discussing rejection of $50,000 grant received from NEA by director Joseph Papp of Public Theater in New York); *Personalities*, Wash. Post, Nov. 2, 1990, at C3, col. 3 (discussing Papp's refusal of grants and 1991 budget legislation for NEA). Papp later turned down another grant, a refusal totalling $323,000, after Congress failed to delete any restrictions to the NEA in the fiscal budget for 1991. *Id.* Papp's decision was the largest rejection of a federal grant since the controversy over the NEA began last year. *Id.*; Mathews, *Fine Art or Foul?*, *supra* note 10, at 51-52 (discussing recipient's refusal of NEA grants). In addition to the rejection by Papp, *The Paris Review* and the *University of Iowa Press* also turned down

Congress drafted new legislation in anticipation of the September 1990 reauthorization of the NEA.[12] A Congressionally appointed task force, the Independent Commission, submitted a report to Congress in September 1990 recommending that Congress reauthorize the NEA without any funding restrictions.[13] In response to several actions brought against the NEA by arts organizations, the United States District Court for the Central District of California later invalidated the NEA pledge requirement.[14]

The Senate and House of Representatives subsequently approved legislation, which the members of Congress heralded as a compromise between current and proposed legislation, to reauthorize the NEA and to delete explicit restrictions on the kinds of art that the NEA may fund.[15] The adopted bill, however, contains a "decency provision," which requires the chairman of the NEA to ensure that grants are made ". . . taking into consideration general standards of decency and respect for the diverse beliefs

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NEA grants in protest of the pledge requirement, and the University of California, Los Angeles, planned to convince the other schools in the California system to do the same. *Id.* at 52; *Art Not for Politicians' Sake*, L.A. Times, Jan. 30, 1990, at B6, col. 1 (discussing criteria as artistic excellence versus political standards in NEA funding process, and Leonard Bernstein's reaction to NEA grant restrictions). Conductor Leonard Bernstein refused acceptance of the National Medal of Arts, which President Bush planned to present at a ceremony at the White House. *Id.* Bernstein acted in protest to Chairman of the NEA John Frohnmayer's decision to initially withhold funding to Artists Space for the show "Witnesses: Against Our Vanishing." *Id.*

See also Stimpson, *Arts-Endowment. Crisis*, *supra* note 4, at B2 (discussing controversy over reauthorization of NEA and urging higher education to take action against content restrictions). The author states that higher education has taken a "modest" involvement in the reauthorization debate, and suggests that colleges and universities should follow the steps that other individuals and institutions had taken during the year such as lobbying Congress, rejecting grants and going to court. *Id.*

12. *See infra* notes 114-123 and accompanying text (discussing proposed legislation to reauthorize NEA).

13. *See* The Independent Commission, *A Report to Congress on the National Endowment for the Arts* (September 1990) [hereinafter Independent Commission Report] (discussing NEA funding and recommending considerations for NEA reauthorization that included deletion of content restrictions); *see also infra* notes 59-87, 112-13 and accompanying text (discussing creation of Independent Commission through 1990 Appropriations Act and Independent Commission's specific recommendations to Congress).

14. *See* Bella Lewitsky Dance Found. v. Frohnmayer, 754 F.Supp. 774 (C.D. Cal. 1991) (holding NEA pledge requirement unconstitutional because pledge had chilling effect upon artists' expression and was vague); *see also infra* notes 35-57 and accompanying text (discussing facts of case and court's rationale in holding pledge requirement unconstitutional); Pinsky, *U.S. Will Not Appeal Ruling on NEA Grants*, L.A. Times, June 21, 1991, at F22, col. 1 (stating that Justice Department announced decision not to appeal decision holding NEA anti-obscenity pledge unconstitutional).

15. *See* Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512 [H.R. 5769], Title I - Amendments to the National Foundation on the Arts and Humanities Act of 1965 (November 5, 1990) [hereinafter Appropriations Act of 1991] (reauthorizing NEA); *See also* Masters, *Congress Approves Funding Compromise*, Wash. Post, Oct. 28, 1990, at A17, col. 2 (discussing NEA funding in approved Appropriations Act of 1991); *see also infra* notes 16-19, 124-28 and accompanying text (discussing additional provisions of 1991 funding bill of NEA).

and values of the American people."[16] The language of the bill may sound like a compromise to members of Congress, particularly in comparison to some of the more restrictive legislation proposed.[17] The NEA no longer requires a federally funded artist, before the creation of a work of art, to sign a pledge which states that the artist will not use the funds from the NEA to create something that may later be deemed obscene.[18] Instead, the NEA now will screen potential grant recipients and weed out possible indecency in the art that the agency decides to fund.[19] Such censoring permitted by the new legislation is not a compromise at all.[20]

A comparison of the constitutionality of the language of the Appropriations Acts of 1990 and 1991 reveals that, with the strings attached to the 1991 reauthorization of the NEA, the 1991 Appropriations Act actually is not a compromise.[21] Although the Appropriations Act of 1990, the so-called Helms Amendment, and the consequential pledge requirement that followed contained questionable violations of the First Amendment,[22] the

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16. *See* Appropriations Act of 1991, *supra*, § 103, National Endowment for the Arts (granting authority to NEA to provide financial assistance under certain conditions). Section 103 states:

> (b) Artistic Excellence and Obscene Matter.—Section 5(d) of the National Foundation on the Arts and the Humanities Act of 1965 (20 U.S.C. 954(d) is amended to read as follows:
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> "(d) No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
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> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . ."

Id. § 103(b).

See also Masters, *Congress Approves Funding Compromise*, *supra*, at A17, col. 2 (discussing additional provisions of Appropriations Act of 1991 about NEA funding). As an effect of the 1991 Appropriations bill, a grant recipient will no longer be required to sign a pledge stating that the funds will not be used in support of obscene material. *Id.* The bill, however, does allow the NEA to recoup money from a grant recipient whose creation of art is subsequently judged to be obscene by a court's determination. *Id.*; *see also infra* notes 124-28 and accompanying text (discussing additional provisions of approved fiscal 1991 funding bill of NEA).

17. *See infra* notes 117-18 and accompanying text (discussing restrictive legislative language proposed by members of Senate and House of Representatives).

18. *See* the Appropriations Act of 1990, *supra* note 4, § 304(a) (setting forth *Miller* language from which NEA derived its pledge requirement); *see also infra* notes 27-29 and accompanying text (discussing NEA pledge requirement).

19. *See* Appropriations Act of 1991, *supra* note 15, § 103; *See also* Masters, *Congress Approves Funding Compromise*, *supra* note 15, col. 2, at A17 (discussing approved fiscal year 1991 funding bill of NEA).

20. *See infra* notes 128-31 and accompanying text (discussing language of 1991 Appropriations Act as restrictive in creation of art and not compromise from 1990 legislation).

21. *See infra* notes 129-77 and accompanying text (discussing problems inherent in indecency provision).

22. *See infra* notes 44-63, 77-111 and accompanying text (discussing constitutional problems that 1990 Appropriations bill presented).

adopted bill for 1991 offers little relief to an artist. Instead, the language in the 1991 Appropriations Act leaves the arts community with vague expectations and may increase the chilling effect on the creation of art in the United States than previously feared.[23]

The public first feared a chilling effect on the arts community in October 1989 when, for the first time since the creation of the NEA,[24] Congress adopted legislation which included restrictions specifically prohibiting the NEA from funding obscene works of art in the Appropriations Act of 1990.[25] The language of the bill read:

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23. *See infra* notes 136, 162-78 and accompanying text (discussing problems of vagueness in definition of decency).

24. *See* Independent Commission Report, *supra* note 13, at Part I (discussing history of NEA). Congress created the NEA and the National Endowment for the Humanities through Public Law 89-209 in September 1965. *Id.* at 11 (citing 20 U.S.C. 951, § 2 (1965)) (stating Congress's purpose in creating NEA, as National Foundation on the Arts and the Humanities Act of 1965 Act). The Congressional Declaration of Purpose reads:

> Sec. 2. The Congress hereby finds and declares—
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> (1) that the encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, is also an appropriate matter of concern to the Federal Government;
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> (2) that a high civilization must not limit its efforts to science and technology alone but must give full value and support to the other great branches of man's scholarly and cultural activity;
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> (3) that democracy demands wisdom and vision in its citizens and that it must therefore foster and support a form of education designed to make men masters of their technology and not its unthinking servant;
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> (4) that it is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations;
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> (5) that the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent;
>
> (6) that the world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit; and
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> (7) that, in order to implement these findings, it is desirable to establish a National Foundation on the Arts and Humanities and to strengthen the responsibilities of the Office of Education with respect to education in the arts and the humanities.

Id.

See also Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969 (1990) [hereinafter *Standards for Federal Funding of the Arts*] (discussing current standards for funding by NEA and suggesting those standards are inappropriate; in Part I examining origins of NEA); *see generally* Note, *The National Endowment for the Arts: A Search for an Equitable Grantmaking Procedure*, 74 GEO. L.J. 1521 (1986) [hereinafter *A Search for An Equitable Grantmaking Procedure*] (examining history of government patronage of art in United States and discussing founding and grantmaking procedures of NEA).

25. *See* Appropriations Act of 1990, *supra* note 4, § 304(a) (stating content restrictions for NEA funding).

> None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.[26]

After Congress passed the Appropriation Act of 1990, the NEA required grant recipients to sign an anti-obscenity pledge as a condition of acceptance of government funds.[27] By signing the pledge, the recipient certified compliance with the terms and conditions of the grant.[28] Those terms included the above-quoted language of the amendment to the 1990 Appropriations Act.[29]

Congress adopted the obscenity language of the 1990 appropriations law from a landmark U.S. Supreme Court decision, *Miller v. California*,[30] which set forth the standard for determining obscenity that the Court

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26. *Id.*

27. *See* National Endowment for the Arts, Statement of Policy and Guidance for the Implementation of Section 304 of the Department of Interior and Related Agencies Appropriations Act of 1990, § 3(a) (July 5, 1990) [hereinafter Statement of Policy] (describing policy guidelines of NEA about grant conditions). The NEA states in "Summary" portion of policy text: "This statement of policy and accompanying guidance define what the Endowment considers to be 'obscene' for purposes of carrying out the Endowment's responsibilities under section 304 of the Department of Interior and Related Agencies Appropriations Act of 1990." *Id.*

28. *Id.* Section 3(a) of the Appropriations Act of 1990 states: "Accordingly, grant recipients, in order to receive funds, must agree that they will not use those grant funds to promote, disseminate, or produce materials that are 'obscene' under the well-settled legal definition employed by the Supreme Court in *Miller v. California*." *Id.*; *see also* Bargreen, *The Embattled Arts Agency*, *supra* note 4 (discussing controversy over reauthorization of NEA and NEA certification requirement of its recipients). The article states:

> Grant recipients must sign a form that concludes with the following paragraph: "I certify that I will comply with the terms and conditions of my grant as set forth in the enclosed 'General Information and Guidance for Fellowship & Individual Project Grant Recipients.'"

Id.; *supra* notes 30-33 and accompanying text (discussing development of *Miller* test for determining obscenity and interpretation of standard by Supreme Court since *Miller*).

29. *See* National Endowment for the Arts, Statement of Policy, *supra* note 27, § 3(a) (describing policy guidelines of NEA regarding grant conditions). Section 3(a) states: "Paragraph 2 of the general terms and conditions for organizations and individuals receiving grants from the Endowment sets forth the restriction exactly as it appears in section 304 [of the 1990 appropriations law]." *Id.*

30. 413 U.S. 15 (1973); *see also* Independent Commission Report, *supra* note 13, at 53 (discussing NEA implementation of *Miller* test for obscenity standard). The language written into the 1990 Appropriations Act intentionally borrowed the language of Miller v. California. *Id.*; *supra* notes 25-26 and accompanying text (stating that NEA grant recipients may not use funds to "promote, disseminate, or produce" a work of art that is obscene under *Miller* standard).

continually has observed.[31] According to the Supreme Court, to determine if a work is obscene, a court must decide:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[32]

Congressional authorization of the application of this standard to determine the obscenity of a work of art, therefore, is consistent with judicial precedent in judging a work to be obscene.[33]

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31. Miller v. California, 413 U.S. at 15. In *Miller* the defendant, Miller, sent unsolicited sexually explicit books through the United States mail in violation of a California statute prohibiting the knowing distribution of obscene material. *Id.* at 16. The United States Supreme Court affirmed the trial court's conviction of Miller based on the obscenity test formulated in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966). *Miller* at 15. The Court adopted the obscenity test applied in *Memoirs* with the following guidelines:

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

Id. The Court replaced the *Memoirs* test, which required that a work be "*utterly* without redeeming social value," with the new standard "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24-25. The majority of the Court rejected the "*utterly* without redeeming social value" standard for several reasons. *Id.* First, the Court noted that no more than three justices ever have adhered to that standard. *Id.* at 25. Second, the Court questioned the meaning of such a standard, because it imposed "a burden virtually impossible to discharge." *Id.* at 22. Various courts since the United States Supreme Court's decision in *Miller* have sought to clarify the meaning of the three part obscenity test for determining the "value" of a particular work.

The United States Supreme Court in *Pope v. Illinois*, 481 U.S. 497 (1987), further grappled with the meaning of obscenity under the *Miller* standard. *Id.* at 498-99. In *Pope*, petitioners were convicted of selling allegedly obscene magazines in an adult bookstore in Illinois. *Id.* at 499. The trial courts for each of petitioners' cases instructed the respective juries to consider the 'value' of the magazines by applying contemporary community standards, while the Illinois Appellate Court held that the standard is an objective one. *Id.* at 499-500. The Supreme Court in *Pope* considered the appropriate standard for determining "value." *Id.* at 500-01. The Court concluded that, while a community standard should be applied to the first and second prongs of the *Miller* test, for determining prurient interests and patent offensiveness, the third requirement for the value of the material must be viewed from the perspective of a reasonable person. *Id.* at 501. The Court based its conclusion on the rationale in *Miller* that "'[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.'" *Id.* at 500.

32. *Miller*, 413 U.S. at 15.

33. This Note will not evaluate the appropriateness of the *Miller* standard in judging

Although courts traditionally have applied the three-part standard, the application of this standard in the form of a pledge requirement immediately raised issues of unconstitutionality.[34] In *Bella Lewitsky Dance Found. v. Frohnmayer*[35] two arts organizations, the Bella Lewitsky Dance Foundation (Foundation) and the Newport Harbor Art Museum (Museum), viewed the pledge as a violation of freedom of expression and refused to sign the pledge during the 1990-91 NEA application process.[36] Following the NEA's consequent refusal to award either the Foundation or the Museum any funds because the organizations failed to sign the pledge requirement,[37] the Foundation and the Museum separately filed suits against the NEA and its director, John Frohnmayer, and the court consolidated these actions.[38]

In *Bella Lewitsky*, the United States District Court for the Central District of California decided that both plaintiffs, the Foundation and the Museum, suffered actual injury as a result of the withholding of the grants

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obscenity in federally funded art works. However, commentators have evaluated the *Miller* standard. *See Post-Modern Art, supra* note 2, at 1359 (exploring *Miller* test and concluding inadequacy of *Miller* test for protecting contemporary art). The author writes:

> . . . *Miller* was drafted at a radical turning point in the history of art, and the new art that has arisen since *Miller* has rendered standards such as 'serious artistic value' obsolete. This new art—Post-Modern art—rebels against the demand that a work of art be serious, or that it have any traditional 'value' at all. *Miller*, then, evaluates contemporary art by the very standard which that art seeks to defy.

Id.; *see also* Note, *Standards For Federal Funding of the Arts, supra* note 24 (discussing current standards for funding by NEA and suggesting that those standards are inappropriate).

34. *See infra* notes 43-111 and accompanying text (discussing pledge requirement as being vague, unconstitutional condition and prior restraint).

35. 754 F. Supp. 774 (C.D. Cal. 1991).

36. Bella Lewitsky Dance Company v. Frohnmayer, 754 F. Supp. 774, 777 (C.D. Cal. 1991). The NEA awarded the Bella Lewitsky Dance Foundation a $72,000 grant. *Id.* at 776. The NEA required the Foundation to return a certification of compliance with all NEA terms and conditions, that included signing the pledge not to produce obscene materials. *Id.* at 776-77. The Foundation returned the NEA certification but crossed out the obscenity pledge, refusing to be bound by that condition. *Id.* at 777. The Board of Trustees of the Newport Harbor Art Museum similarly refused to comply with the obscenity condition after the NEA granted the Museum $100,000. *Id.*

37. *Id.* at 777. The NEA informed the Foundation that the terms and conditions of the grant to the Foundation were not optional, and that compliance with the obscenity condition was a prerequisite to receiving the grant. *Id.* The Foundation received only $15,000 of its $72,000 grant, and the Museum did not receive any of its allocated $100,000 NEA funds. *Id.*

38. *Id.* at 775. *See also* Sherman, *NEA Grant Provisos Attacked in Court*, Nat. L. J., Nov. 5, 1990 at 12, col. 2 (discussing then pending litigation against NEA in response to NEA's pledge requirement); Honan, *U.S. Documents Said to Show Endowment Bowed to Pressure*, N.Y. Times, Sept. 18, 1991, at C13, col. 4 (reporting on case filed by four performance artists against NEA). Karen Finley, John Fleck, Holly Hughes and Tim Miller haved filed an action in Federal District Court in Los Angeles, California against the NEA and Frohnmayer, arguing that the NEA based its denial of grants to the artists on political, rather than artistic grounds. *Id.* The artists now allege that government documents in the possession of their attorneys support their allegations that the decision by Frohnmayer to deny the grants demonstrates that Frohnmayer "yielded to political pressure." *Id.*

by the NEA.[39] The *Bella Lewitsky* court noted that the NEA awarded grants to both plaintiffs initially on the basis of artistic merit.[40] The court found that the NEA withheld the grants to the Foundation and to the Museum solely because each refused to sign the anti-obscenity certification.[41] Accordingly, the *Bella Lewitsky* court recognized that the Foundation and the Museum suffered a loss of benefits because of the NEA's action.[42]

In addition to concluding that plaintiffs suffered a loss of monetary benefits because of the pledge requirement, the *Bella Lewitsky* court examined the constitutional effects that the NEA pledge requirement had on the Foundation and on the Museum.[43] The *Bella Lewitsky* court initially addressed plaintiffs' contention that the pledge requirement was unconstitutionally vague because the Foundation and the Museum had to speculate about how the NEA would judge obscenity.[44] The court rejected, for two reasons, the NEA's argument that the NEA's reliance on the *Miller* standard for obscenity solved the vagueness issue.[45] First, the *Bella Lewitsky* court found that the NEA policies which dictate reliance on the *Miller* standard for defining obscenity were not binding on the NEA.[46] Second, the *Bella Lewitsky* court stated that the NEA is unable to provide to its grant recipients the proper procedural safeguards.[47] The *Bella Lewitsky* court held that the NEA pledge requirement was unconstitutionally vague because it

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39. *Bella Lewitsky*, 754 F. Supp. at 778-79. The *Bella Lewitsky* court concluded that because plaintiffs had suffered actual injury, plaintiffs had standing to sue. *Id.* at 780.

40. *Id.* at 778.

41. *Id.* at 779.

42. *Id.* at 778-80. The *Bella Lewitsky* court stated that defendants' withholding of the grant money from plaintiffs is a direct result of plaintiff's refusal to sign the anti-obscenity certification. *Id.* at 779.

43. *See infra* notes 44-57 and accompanying text (discussing *Bella Lewitsky* court's analysis of First and Fifth Amendment issues raised by NEA pledge requirement).

44. *Bella Lewitsky*, 754 F. Supp. at 781. The *Bella Lowitsky* Court cited Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Ninth Circuit defined the vagueness doctrine as "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." 754 F. Supp. at 781. The *Bella Lewitsky* court adopted the Ninth Circuit's reasoning in *Grayned*, that an individual must be able to know exactly what is being prohibited; otherwise, an individual will avoid the "unlawful zone" and the vagueness consequentially will inhibit the exercise of constitutional freedoms. *Id.*

45. *Id.* at 781-82. The NEA responded that the *Miller* standard was not vague as a matter of law. *Id.* at 781; *see also supra* notes 27-33 and accompanying text (discussing *Miller* standard and NEA implementation of standard in pledge requirement).

46. *Bella Lewitsky*, 754 F. Supp. at 782. (citing Telecommunications Research and Action Center v. FCC, 800 F.2d 1181, 1186 (D.C. Cir. 1988), which held that general statement of policy is just agency informing public of policy that agency intends to implement in future rulemaking or adjudications).

47. *Bella Lewitsky*, 754 F. Supp. at 782. The *Bella Lewitsky* court specifically refers to the procedural safeguards discussed in *Miller*. *Id.* The Supreme Court in *Miller* outlined the safeguards as including first, a statute clearly defining the prohibited conduct; second, a full adversarial trial; and third, a citizen jury to apply local community standards, the third prong of the *Miller* test for obscenity. *Id.* (citing Miller v. California, 413 U.S. 15, 24-35 (1973)).

violated the Fifth Amendment in allowing the NEA, and not the court, to make the obscenity determination.[48]

The *Bella Lewitsky* court further held that the vague language of the NEA pledge requirement violated not only plaintiffs' right to due process, but also plaintiffs' First Amendment protection of freedom of speech.[49] The court recognized that the vagueness in the obscenity certification created a chilling effect on a grant recipient's artistic expression.[50] A chilling effect occurs when a vague oath or certification causes individuals to restrict their actions to safe conduct to avoid a threatened sanction.[51] The *Bella Lewitsky* plaintiffs contended that the pledge requirement chills creativity in the art process because NEA applicants would avoid creating certain legitimate works of art in fear of violating the obscenity pledge, or in fear of litigation with the NEA as the result of a possible obscenity violation.[52] The court concluded that, in this instance, the creative expression of the Foundation suffered as a result of the pledge requirement.[53] The court also asserted that the Museum would impose self-censorship in making exhibition selections to avoid showing obscene works of art.[54] The *Bella Lewitsky* court noted that the chilling effect becomes "exacerbated by the practical realities of funding in the artistic community."[55] Because the NEA plays a significant role in the funding of the arts in the United States, NEA grantmaking decisions influence non-federal funding sources.[56] Any chilling effect caused by the NEA could therefore have a multiple effect on financial sources that are available to artists and arts organizations outside the NEA.[57]

The plaintiffs in *Bella Lewitsky* challenged the inherent vagueness in the NEA's implementation of the government's anti-obscenity subsidy restriction in the form of the pledge requirement, but did not challenge the right of the government to restrict NEA funds.[58] However, the Independent Commission, which Congress created in response to controversy over the NEA's funding standards,[59] addressed the issue of the government's right

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48. *Id.* at 782. *See also infra* notes 93-111 and accompanying text (analyzing argument that pledge requirement in absence of judicial determination of obscenity is unconstitutional prior restraint of artist's right to expression).

49. *Bella Lewitsky*, 754 F. Supp. at 783.

50. *Id.* at 782-83.

51. *Id.* (citing Speiser v. Randall, 357 U.S. 513, 526 (1958); Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

52. *Id.* at 782 (citing Amicus Brief of Rockefeller Foundation amicus brief at 12, 54); *See also* Testimony of the Legal Task Force, Statement of Kathleen Sullivan, *A Report to Congress on the National Endowment for the Arts*, at 7-8 (July 1990) [hereinafter Testimony of the Legal Task Force] (stating chilling effect will result because artists will avoid creating innovative art for fear that art may come close to obscenity).

53. *Bella Lewitsky*, 754 F.Supp. at 783.

54. *Id.*

55. *Id.*

56. *Id.* (citing Amicus Brief of Theatre Communications Group (no page cite)).

57. *Id.*

58. *Id.* at 784.

59. *See* Appropriations Act of 1990, *supra* note 4, § 304(c). Congress temporarily

to impose conditions on benefits it offers for the exercise of a constitutional right.[60] The Independent Commission unanimously adopted a consensus statement of the legal issues[61] identified by a legal task force of six lawyers.[62]

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established the Independent Commission for the purposes of:

(A) Reviewing the National Endowment for the Arts grant making procedures, including those of its panel system; and

(B) considering whether the standard for publicly funded art should be different than the standard for privately funded art.

Id. § 304(c)(1).

The Independent Commission is a twelve member group comprised of four members appointed by the President of the United States, four members appointed by the President upon recommendation of the Speaker of the House of Representatives, and four members appointed by the President upon the recommendation of the President pro tempore of the Senate. *Id.* § 304 (c)(2).

60. *See* Independent Commission Report, *supra* note 13, at 85 (exploring whether standard for publicly funded art should be different than standard for privately funded art and endorsing statement of legal task force that addressed conditions of government funding); *See also infra* notes 77-92 and accompanying text (discussing analysis of NEA obscenity restrictions as unconstitutional governmental condition on funding of artists).

61. Independent Commission Report, *supra* note 13, at 85. The Consensus Statement states:

1. There is no constitutional obligation on the part of the federal government to fund the arts. That is a policy decision to be determined by Congress based upon its views as to whether it is useful and wise for the federal government to play a role in the arts funding process. The Constitution offers no guidance as to whether the arts should be funded by the federal government.

2. If federal funds are used to subsidize the arts, however, constitutional limitations on how the arts are funded may come into play. The most important of these is that while Congress has broad powers as to how to spend public funds, it may not do so in a way that the Supreme Court has said is "aimed at the suppression of dangerous ideas." Congress plainly may, for example, determine to spend all federal funds designated for the arts on music and none on the visual arts. Or vice versa. It may expend funds to celebrate American history or American diversity, even though spending for one purpose naturally means less money is expended on others. And, of course, it may insist on artistic excellence as a prerequisite for any funding. What it may not do, however, is to choose those to be funded—and, often more important, those *not* to be funded—in a manner which punishes what Congress views as "dangerous content." When funding denials are the product of invidious discrimination with the aim of suppressing a particular message and for no other reason, a particularly powerful case might be made that the decision was unconstitutional.

3. Obscenity is not protected speech under the First Amendment and Congress is under no obligation to fund obscene speech. In fact, under both state and federal laws, obscenity is a crime. The definition of what is and is not obscene was set forth by the Supreme Court in the 1973 case of *Miller v. California* . . .

4. Unless a work fits within each of the prongs of the definition [in *Miller*], it is not obscene under the *Miller* standard. For example, any work which, "taken as a whole," *has* "serious . . . artistic . . . value" cannot be obscene under *Miller*, whatever its sexual content.

5. The NEA currently requires all grant recipients to certify, under oath, that they will adhere to and enforce a ban on any use of NEA funds for purposes which the NEA "may consider" to be obscene. Some of the legal advisors to the Independent Commission believe this requirement is unconstitutional; all believe the insistence on

Specifically, the Independent Commission recognized that, while the Constitution does not require the government to fund the arts in the United States, if the government chooses to fund the arts, constitutional limitations apply to that funding.[63]

Before commenting on the constitutional limitations on funding, the Independent Commission recognized the rights of an artist to create obscene subject matter.[64] While the First Amendment guarantee of free speech applies to artistic expression,[65] the government does not confer a right of subsidy to any artist in the United States.[66] Additionally, an artist does not have a constitutional right to produce an obscene work of art.[67] In *Roth v. United States*[68] the United States Supreme Court recognized that the First Amendment does not protect the creation of obscene material.[69] In *Roth*, the defendant mailed obscene circulars and advertising in violation of a federal obscenity statute that prohibited the mailing of obscene material.[70] The Court considered whether the federal obscenity statute violated the First Amendment guarantees of freedom of speech and freedom of the press.[71] The Court examined the history of the First Amendment and its guarantee of freedom of expression and concluded that obscenity was outside the protection intended for speech and for the press.[72] The Court regarded the

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such a requirement is unwise and all recommend against it.
Id. at 85-87.

62. *Id.* (discussing formation of Independent Commission Legal Task Force). The lawyers that comprised the legal task force included: Floyd Abrams of Cahill, Gordon and Reindel; Michael McConnell, professor of law at the University of Chicago; Henry Monaghan, professor of law at Columbia University; Theodore Olson of Gibson, Dunn, and Crutcher; Geoffrey R. Stone, Dean of the University of Chicago Law School; and Kathleen Sullivan, professor of law at Harvard University. *Id.*

63. *See id.* (setting out Legal Task Force Consensus Statement and discussing constitutional issues raised by 1990 Appropriations Act).

64. *See id.* at 83-85 (recognizing that obscenity is not protected speech); *See infra* notes 65-73 and accompanying text (discussing constitutionality of obscenity and creation of obscene art).

65. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Theodore Olson, at 4 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975), which held that live drama as medium of expression is protected speech under First Amendment and Miller v. California, 413 U.S. 15, 34-35 (1973)). The United States Supreme Court in *Miller* extended First Amendment protection to works that, "taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Miller*, 413 U.S. at 34.

66. Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating that individuals do not have constitutional right to government benefits); *See also infra* note 77 and accompanying text (discussing facts of *Perry* and principle that government may not deny benefit to person on basis that violates constitutional interests such as freedom of expression).

67. *See infra* notes 69-73 and accompanying text (discussing obscene expression as not constitutionally protected).

68. 354 U.S. 476 (1957).

69. Roth v. United States, 354 U.S. 476, 481 (1957).

70. *Id.* at 480.

71. *Id.* at 479.

72. *Id.* at 483. The Supreme Court examined the legislative history of the First Amend-

First Amendment as protecting ideas of redeeming social importance, and recognized obscenity, implicitly in the history of the First Amendment, as "utterly without redeeming social importance."[73]

Although *Roth* held that an artist does not have a constitutional right to create obscene art, an artist does retain certain rights of expression which the government may not violate by withholding funding.[74] Advocates of the pledge requirement assert that, because an artist does not have a constitutional right to receive federal funding for creation of an artist's work, the government may place restrictions on the type of art that the government desires to fund.[75] This view is consistent with the Appropriations Act of

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ment, stating:

> "the First Amendment was not intended to protect every utterance . . . at the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

Id. (citing Act Concerning Crimes and Punishments, Section 69 (1821), Stat. Laws of Conn. 109 (1824); Knowles v. State, 3 Day (Conn.) 103 (1808); Rev. Stat. of 1835, c. 130, Section 10, Rev. Stat. of Mass. 740 (1836); Commonwealth v. Holmes, 17 Mass. 335 (1821); Rev. Stat. of 1842, c. 113, Section 2; Rev. Stat. of N.H. 221 (1843); Act for Suppressing Vice and Immorality, Section XII (1798), N.J. Rev. Laws 329, 331 (1800); Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91 (1815); *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (holding that exhibition of obscene material in public places is not constitutionally protected).

In *Paris Adult Theatre I*, the United States Supreme Court reaffirmed the holding in *Roth*. *Id.* at 54. Respondents brought suit against the theater to enjoin the exhibition of two films that the respondents considered obscene. *Id.* The Court remanded the case for a consideration of Georgia obscenity laws in light of the First Amendment obscenity standards then recently formulated by the Court in *Miller*. *Id.* at 50. The Court in *Paris Adult Theatre I* affirmed that obscene material is not protected under the First Amendment as free speech. *Id.* at 54, citing *Miller*, 413 U.S. at 23-25 (1973) and *Roth*, 354 U.S. at 485 (1957). *But see Paris Adult Theatre I*, 413 U.S. at 70 (Douglas, J. dissenting):

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

Id.

73. *Roth*, 354 U.S. at 484. The United States Supreme Court in *Roth* subsequently noted that the Court similarly had expressed the principle that obscenity is regarded as without value in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), in which the Court acknowledged that obscene utterances:

> . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Roth, 354 U.S. at 485.

74. *See infra* notes 77-92 and accompanying text (analyzing constitutional limitations on awarding and withholding government benefits in context of arts funding).

75. *See* Bernstein, *Subsidies for Artists: Is Denying a Grant Really Censorship?*, N.Y. Times, July 18, 1990, at C11, col. 6 (discussing whether NEA's pledge requirement is censorship or whether artists have grown accustomed to grants as entitlement). With regard to assertions by opponents of the NEA anti-obscenity pledge that the pledge requirement is censorship, Bernstein comments that some members of the public adhere to the view that nothing is

1990, in which Congress restricted funding of obscene art, including images that are sadomasochistic, homo-erotic and sexually exploitative of children.[76] The advocates of the pledge requirement, however, fail to recognize that although an individual has no right to a government benefit or subsidy, once the government grants the benefit, the government cannot deny the benefit on any basis that adversely impacts the individual's freedom of speech.[77]

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preventing artists from performing whatever they want to perform, so long as the performance is not paid for by the taxpayers. *Id.*; Helms, *Tax-Paid Obscenity*, *supra* note 10 (arguing Congress has power to decide whether to fund art that is offensive to public); Fein, *Regarding Reauthorizing the National Endowment for the Arts: Statement Before the Senate Subcommittee on Education, Arts, and Humanities*, 14 NOVA L.J. 333 (1990) (stating that government has right to enforce denial of subsidies by NEA, particularly from funding indecent art).

76. *See* Appropriations Act of 1990, *supra* note 4, § 304(a) (setting forth specific content restrictions for NEA funded art).

77. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972). In *Perry*, appellant was a college professor who brought an action against the college of his employment, alleging that the college's decision not to rehire him was based on his public criticism of the school administration and thus was a violation of his right to free speech. *Id.* at 593. The United States Supreme Court reasoned that a teacher's exercise of free speech cannot be the basis for a denial of a renewal of a public school teacher's contract. *Id.* at 598. The Court determined that while an individual has no right to a government benefit, once the government offers the benefit, the government cannot deny the benefit on any basis that infringes upon a constitutionally protected interest, particularly speech, because "such interference with constitutional rights is impermissible." *Id.* at 597. Other cases have applied this principle with respect to government benefits such as denials of tax exemptions, unemployment benefits, welfare payments and public employment. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (holding that filing of loyalty oath as prerequisite of obtaining veterans' tax exemption violated free speech); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that disqualification of individual for unemployment compensation benefits because of individual's refusal to accept employment on day contrary to religious belief imposes unconstitutional burden on individual's free exercise of religion); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (holding that statute that prohibits benefits to resident aliens of less than one year violates Equal Protection Clause); *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (same); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (holding that condition requiring state employee to take loyalty oath as prerequisite to employment is unconstitutional); *Shelton v. Tucker*, 364 U.S. 479, 489 (1960) (holding that condition compelling teacher to disclose association ties as prerequisite to public employment is unconstitutional); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding that oath in belief of God as prerequisite for qualification for public office is unconstitutional); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288 (1961) (holding that loyalty oath requirement of Florida public school teaching position is unconstitutional); *Elfbrandt v. Russell*, 384 U.S. 11, 18-19 (1966) (holding that loyalty oath of Maryland public school teaching position is unconstitutional); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967) (holding that loyalty oath requirement of Arizona public school teaching position is unconstitutional); *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) (holding that teachers' right to make public comment may not be basis of dismissal from public employment).

In Bella Lewitsky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991), the United States District Court for the Central District of California characterized the government's imposition of obscenity restrictions on NEA grant recipients as an unconstitutional condition on freedom of speech. *Bella Lowitsky*, 754 F. Supp. at 784-85. The court stated that obscenity restrictions impinge on freedom of speech as prohibited in *Perry*, because the restrictions' vagueness violates the First and Fifth Amendments. *Id.*; *see supra* notes 44-58 (discussing *Bella*

The pledge requirement, by broadly prohibiting art protected under *Miller*,[78] is a denial of a benefit that adversely affects an artist's constitutional rights. When Congress drafted the Appropriations Act of 1990, Congress added to the *Miller* test a list of "forbidden topics,"[79] including depictions of sadomasochism, homo-eroticism, or individuals engaged in sex acts.[80] The government, unlike a private art patron, is not at liberty to exercise its "unfettered taste or whim" merely because the government spends public funds on the art.[81] The government, by making federal funds available to artists through the NEA, may not deny that funding to any artist in a manner that infringes on an artist's or recipient's right to freedom of expression or due process.[82]

One First Amendment limitation on Congressional denial of funding is that Congress cannot act in a manner that aims to suppress dangerous ideas.[83] Congress may not make an unjustified viewpoint discrimination in

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Lewitsky court's rationale that pledge requirement is vague in violation of Fifth Amendment and that vagueness causes chilling effect in violation of First Amendment).

78. *See supra* notes 31-32 (discussing *Miller* test for determining obscenity).

79. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Floyd Abrams, at 2-3 (analyzing constitutional issues raised by NEA pledge requirement). Mr. Abrams stated that:

> "What Congress may not constitutionally do, however, is to create a list of presumptively forbidden topics, speech that *is* constitutionally protected but which Congress disapproves of and, on this ground having nothing to do with artistic excellence, to decline to fund them. . . .' to say that the arts will be funded but that *no* art which is 'homoerotic' (Michelangelo's 'David,' perhaps?) will be funded is constitutionally unacceptable."

Id.

80. *See* Appropriations Act of 1990, *supra* note 4, § 304(a) (setting out specific content restrictions for NEA art funding).

81. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Kathleen M. Sullivan, at 2 (discussing restrictions government may place on benefits it makes available). Sullivan states that "Free speech principles will limit the kinds of discrimination the federal government may make about art that is publicly funded. A public art endowment is constrained by the Constitution in ways that a private artist or art collector is not." *Id.*

82. *See supra* notes 77-81 and accompanying text (discussing constitutional limitations to government benefits in context of arts funding).

83. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983) (holding that Congress did not violate defendant's First Amendment rights in deciding not to subsidize defendant's activity, because Congress' decision was not intended to discriminate invidiously or to suppress dangerous ideas). In *Regan*, Taxation Without Representation of Washington ("TWR"), a lobbying organization, brought an action against the Commissioner of Internal Revenue, the Secretary of the Treasury and the United States alleging that the Internal Revenue Service's denial of TWR's application for tax exempt status was a violation of TWR's First Amendment rights. *Id.* The United States Supreme Court considered whether Congress violated TWR's rights by Congress' decision to deny subsidy of TWR's lobbying activities. *Id.* In holding that Congress did not violate TWR's First Amendment rights, the Court stated that "the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Id.* at 548. *See also* Speiser v. Randall, 357 U.S. 513, 519 (1958) (holding unconstitutional swearing of

its decision whether to extend funding to an individual or to an organization in any benefit that the government offers.[84] Because the government offers public funds to artists, the government cannot refuse to fund an artist because of the viewpoint expressed in the work of art or because the work is offensive to the public.[85] Additionally, the government may not impose any condition on the artist prior to funding.[86] The government, therefore,

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oath as precondition of obtaining tax exemption).

In *Speiser*, the state of California denied appellant veterans' tax exemptions provided for by the state constitution. *Id.* at 515. Appellants failed to swear, as a prerequisite to obtaining the benefit, "that they [did] not advocate the overthrow of the Federal or State Government by force, violence or other unlawful means, or advocate the support of a foreign government against the United States in event of hostilities." *Id.* at 513. The United States Supreme Court held that the statutory procedure violated due process requirements because the state did not provide procedural safeguards in placing the burden of proof on the taxpayer. *Id.* at 513-14. The Court stated that the state must prove that the appellants engaged in criminal speech. *Id.* Appellants in *Speiser* argued that the Constitution prohibited the swearing of an oath as a condition of obtaining a tax exemption. *Id.* The Court agreed that the denial of the benefit would cause appellants to refrain from the speech. *Id.* at 519. The Court stated that such a denial is "frankly aimed at the suppression of dangerous ideas." *Id.*

84. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Henry P. Monaghan, at 3 (discussing whether constitutional standard for publicly funded art should be different than standard for privately funded art). Henry P. Monaghan, Harlan Fiske Stone Professor at Columbia Law School, comments that while Congress has a wide discretion in excluding some viewpoints in its attempt to seek public support, Congressional efforts to suppress unpopular ideas and offensive speech have failed. *Id.* at 4. As support, Monaghan cited the decision in United States v. Eichman, 110 S.Ct. 2404, 2404 (1990), in which the United States Supreme Court upheld the constitutionality of flag burning. *Id.* Monaghan also suggests that the principle in *Regan*, 461 U.S. 540, 548, forbidding unjustified viewpoint discrimination, is applicable to all benefits offered by the government. Testimony of the Legal Task Force, *supra* note 52, Statement of Henry P. Monaghan, at 3.

85. *See infra* note 86 and accompanying text (discussing constitutional protection of offensive speech).

86. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Theodore Olson, at 16 (discussing implications of conditions on government funding). Olson, an attorney at Gibson, Dunn and Crutcher, characterized the government's imposition of a condition on an artist prior to funding as a broad application of the "unconstitutional conditions doctrine." *Id.* Under the unconstitutional conditions doctrine, a state cannot grant a privilege subject to conditions that cause the waiver of constitutional rights. *Id.* Olson quoted from the statement of Professor Kathleen M. Sullivan before the Senate Subcommittee on Education, Arts and Humanities, given on April 27, 1990. *Id.* Professor Sullivan asserted that "[F]unding may not be withheld because of the unorthodoxy or unpopularity of the artist's message." *Id.*

The United States Supreme Court has affirmed protections of offensive and outrageous speech. In Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the Supreme Court gave "outrageous" expression First Amendment protection. *Id.* at 55. In *Hustler Magazine*, respondent brought an action against *Hustler* for a parody advertisement that portrayed respondent as "having engaged in a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 46. The Court upheld the constitutional protection of outrageous ideas, stating:

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace

should not be able to prohibit "forbidden topics" in the language of the Appropriations Act simply because Congress may disagree with the views and speech expressed in art that contains such topics.[87]

The legislative language of the 1990 bill, however, appears to be a list of forbidden topics.[88] In previous NEA grantmaking procedures, Congress vested in the arts professionals at the NEA the discretion to apply aesthetic judgment in deciding whether to fund a work on the basis of the artistic value of that work.[89] The NEA may allocate grants for a particular subject matter, such as performance art, without infringing the First Amendment rights of any recipient.[90] However, the government may not apply its particular views on race, politics, religion or sex in the suppression of art in its funding programs.[91] The NEA restriction requiring an artist to sign

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of ideas.

Id. at 55 (citing FCC v. Pacifica Foundation, 438 U.S. 726, 745-746 (1978)). *See also* Cohen v. California, 403 U.S. 15 (1971) (holding that offensive speech expressed by words on jacket in public place is constitutionally protected speech).

In *Cohen*, appellant Cohen wore a jacket bearing the words "Fuck the Draft." *Id.* at 16. Police arrested under a California law that prohibited "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace." *Id.* The Court found that the state had provided no evidence that such violent conduct would result. *Id.* at 18. Instead, the Court upheld the expression as having value necessary in the public debate, which the First Amendment protects. *Id.* at 24. The Court sought to avoid suppression of offensive speech as a guise for banning the expression of unpopular views. *Id.* at 26.

87. *See supra* notes 84-86 and accompanying text (discussing language of 1990 Appropriations Act as viewpoint discrimination against artists).

88. *See infra* notes 89-92 and accompanying text (discussing unconstitutionality of language of 1990 Appropriations Act by listing forbidden topics).

89. 20 U.S.C. § 954(5)(c)(1) (1982). The standards that guide the NEA in its grantmaking procedures state that the Chairman of the NEA is authorized to support:

> (1) productions which have substantial and cultural significance, giving emphasis to American creativity and the maintenance and encouragement of professional excellence;
>
> (2) productions, meeting professional standards of authenticity, irrespective of origin which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens in many areas of the country;
>
> (3) projects that will encourage and assist artists and enable them to achieve standards of professional excellence;
>
> (4) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (5) other relevant projects, including surveys, research and planning in the arts.

Id. See also Note, *A Search for an Equitable Grant Making Process*, *supra* note 24 (examining history of government patronage of art in United States and discussing founding and grantmaking procedures of NEA).

90. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Michael W. McConnell, at 5 (discussing distinction between content discrimination, subject matter discrimination and viewpoint discrimination in federal funding of benefits); Testimony of the Legal Task Force, *supra* note 52, Statement of Kathleen M. Sullivan, at 7 (same). McConnell and Sullivan assert that the NEA's employment of subject matter discrimination in certain decisions, such as a decision to fund tragic theater but not comedy, does not raise constitutional problems. Statement of McConnell at 5; Statement of Sullivan at 7.

91. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Kathleen M.

an anti-obscenity pledge that the artist will not create art which is sado-masochistic, homo-erotic, or which involves individuals engaged in sexual acts, before creating the art, is an example of the government's impermissible application of its particular views against art that the government believes is morally offensive.[92]

An additional problem of the 1990 Appropriations Act is the requirement that a grant recipient, before receiving federal funding from the NEA, must sign a legal document of a contractual nature.[93] In this document the recipient or artist promises not to create a work of art that would be determined "obscene" according to the NEA's interpretation of the Supreme Court's *Miller* test.[94] Consequently, this pledge could create a prior restraint on an artist's right to expression by suppressing, or restraining, an artist's work prior to the artist actually creating the work.

Sullivan, at 5 (commenting on government discrimination in offering benefits); Testimony of the Legal Task Force, *supra* note 52, Statement of Michael W. McConnell, at 9-10 (same). Sullivan calls government discrimination in government subsidies a "cardinal sin," and comments that the government cannot withhold funding for viewpoint discrimination any more than the government may criminalize unorthodox or unpopular views. Statement of Sullivan at 5. Sullivan also states that the United States Supreme Court has refused to uphold criminal laws that suppress sexually explicit expression on the basis of the government's viewpoint. *Id.* (citing Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959) and Hudnut v. American Booksellers Ass'n, Inc., 475 U.S. 1001 (1986)).

In *Kingsley*, appellant submitted the film "Lady Chatterly's Lover" to the Motion Pictures Division of the New York Education Department in order to obtain a license. 360 U.S. at 685. The Division denied Kingsley a license, finding that the depiction of adultery in the film was immoral and in violation of the licensing statute which explicitly prohibited obscenity, indecency and immorality. *Id.* The United States Supreme Court held that the statute violated appellant's freedom to advocate ideas, which was guaranteed by the First Amendment. *Id.* at 688. The Court rejected the argument that the portrayal of adultery was contrary to the moral standards of the citizens, writing "[The Constitution]'s guarantee is not confined to the expression of ideas that are conventional or shared by a majority." *Id.* at 689. In *Hudnut*, the United States Supreme Court considered an Indianapolis ordinance that defined pornography in terms of material that presented women as sexual objects or in positions of sexual subordination. 475 U.S. at 1101. The Court found the statute to be unconstitutional because the statute restricted speech based on content alone. *Id.*

See also Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (exploring complexities of government funding and conditions on funding); Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327 (1989) (discussing three theories of unconstitutional conditions doctrine and application of theories to abortion cases).

92. *See* Testimony of the Legal Task Force, *supra* note 65, Statement of Henry P. Monaghan, at 8 (commenting that government exclusion of funds for art that is indecent or contains offensive sexual features is not valid). Monaghan states that government exclusions of funding for art based on the art's sexual features is not viewpoint neutral, particularly in comparison with a government restriction that requires an artist to employ a specific method or medium to express the artist's message. *Id.* Monaghan concludes that "Any such claim would wholly misapprehend the relationship between form and art and would also invite considerable viewpoint restriction." *Id.*

93. *See supra* notes 27-28 and accompanying text (discussing NEA pledge requirement and procedures recipient must follow).

94. *See supra* notes 27-32 (discussing adoption by NEA of *Miller* test as standard for judging obscenity in work of art created by recipient).

The United States Supreme Court regards prior restraints on freedom of expression as presumptively unconstitutional.[95] However, courts have allowed prior restraints as a means of screening obscene material after the production of the material and prior to actual public sale or exhibition.[96] Prior restraint in the absence of a judicial procedure results in censorship.[97] The United States Supreme Court faced the issue of censorship in *Southeastern Promotions, Ltd. v. Conrad.*[98] In *Southeastern Promotions* a city's municipal board denied the presentation of "Hair" at the town theater because the board determined that the production of the musical, due to its content, would not be in the best interest of the community.[99] The Court considered the constitutionality of the procedure which the board followed in denying the presentation of the performance.[100] The Court recognized that a heavy presumption exists against prior restraints,[101] and concluded that the board's decision was an unconstitutional prior restraint because the board failed to implement the proper procedural safeguards, which required a judicial determination in an adversarial proceeding.[102] The Court recognized that the proper procedural safeguards place the burden on the censor to prove that the Constitution does not protect the material.[103]

Similarly, in *Cinevision Corp. v. City of Burbank*[104] the United States Court of Appeals for the Ninth Circuit upheld the necessity of procedural

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95. *See* Near v. Minnesota, 283 U.S. 697, 719 (1931) (holding that prior restraints on publication are inconsistent with freedom of expression). In *Near*, a local prosecutor sought to prohibit, consistent with Minnesota state law, publication of a newspaper, alleging that the newspaper was a nuisance after it made accusations against public officials. *Id.* at 703. The United States Supreme Court considered the constitutionality of the Minnesota statute in question and held that in order to be consistent with the constitutional guarantee of freedom of the press, the Court would not permit prior restraints against publication except in exceptional circumstances, such as when the nation is at war. *Id.* at 716. *See also* New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (holding that First Amendment protects press from judicial restraints prior to publication).

96. *See New York Times*, 403 U.S. at 726 (Brennan, J. concurring that prior restraints are not tolerated except in time of war because of national interest, noting obscenity cases not on point). In his concurring opinion, Justice Brennan characterized obscene material as being constitutionally protected from prior restraints, because of the Supreme Court's holding in *Roth v. United States* that First Amendment freedom of speech protections do not extend to obscenity. *Id.*; *See also* Times Film Corp. v. Chicago, 365 U.S. 43, 50 (1961) (upholding constitutionality of state legislation that required judicial prescreening clearance procedure before film industry distributed motion picture); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957) (upholding decision of judge in equity to order ex parte injunction and trial before sale and distribution of literary work that might be considered obscene).

97. *See Near*, 283 U.S. at 712-14 (holding that statute suppressing "malicious, scandalous and defamatory" newspapers or periodicals both enjoins publication as prior restraint and causes publisher to act as censor).

98. 420 U.S. 546, 559 (1975).

99. Southeastern Promotions v. Conrad, 420 U.S. 546, 549 (1975).

100. *Id.* at 552-53.

101. *Id.* at 566.

102. *Id.* at 559.

103. *Id.* at 560.

104. 745 F.2d 560 (1984).

safeguards when the Ninth Circuit rejected the Burbank City Council's denial of certain musical entertainers' access to perform.[105] The Ninth Circuit in *Cinevision* considered the constitutionality of the procedure that the council employed.[106] The council members objected to the performances on the assumption that the music would attract a "drug crowd" to the city.[107] The Ninth Circuit found that such assumptions were arbitrary and unlawful and deprived the performers of a judicial determination of whether the performance material was constitutionally protected.[108]

The prior restraints in *Southeastern Promotions* and *Cinevision* are distinguishable from the restrictions contained in the NEA pledge requirement because the pledge requirement restrains the artist prior to the creation of the work.[109] Because of the pledge requirement, an artist does not have the complete freedom to create a work of art that expresses the content of the artist's choice. The created work is not subjected, then, to the procedural safeguards articulated in *Southeastern Promotions* and *Cinevision*.[110] A prior restraint on an exhibition or sale of a work of art is permissible only after a judicial determination that the work of art in question is obscene.[111]

Recognizing the questions of constitutionality surrounding the NEA restrictions and the possibility that the restrictions may have a dangerous chilling effect, the Independent Commission responded unfavorably both to the imposition of specific restrictions on the content of NEA-funded art and to the NEA-imposed certification that requires recipients to pledge that they will not create obscene art.[112] The Independent Commission recommended that Congress remove any content restrictions on federally funded art and rescind the pledge because of the constitutional issues raised by the provisions of the pledge.[113] Beginning in June 1990, members of Congress

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105. Cinevision Corp. v. City of Burbank, 745 F.2d 560, 573 (1984).

106. *Id.* at 566.

107. *Id.*

108. *Id.* at 576.

109. *See infra* notes 110-11 and accompanying text (concluding that pledge requirement is impermissible prior restraint on artists).

110. *See supra* notes 66-76 (referring to procedural safeguards of *Southeastern Promotions*, 420 U.S. 546, and *Cinevision Corp.*, 745 F.2d 560).

111. *See supra* notes 97-108 and accompanying text (discussing judicial safeguards necessary for imposition of prior restraints).

112. *See* Independent Commission Report, *supra* note 13, at 55-81 (discussing recommendations on "whether the Standard for Publicly Funded Art Should be Different Than the Standard for Privately Funded Art" and on issue of "Obscenity and Other Content Restrictions," recommending that standard must go beyond that for privately funded art and that restrictions on content of funded art should be abandoned in favor of standard of artistic excellence).

113. *Id.* at 83-91. For additional exploration of the constitutional issues raised by the Appropriations Act of 1990, *see* Note, *Standards for Federal Funding of the Arts*, *supra* note 24 (discussing current standards for NEA funding and suggesting that those standards are inappropriate); Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HAST. COMM. & ENT. L.J. 353 (1990) (examining constitutionality of Helms Amendment and resulting threat to NEA's existence); Fox, *Art Funding: The Fight over Sex,*

proposed various bills regarding the reauthorization of the NEA.[114] These bills included various proposals for reauthorization in response to outrage in the arts and public communities, as well as in the federal government, over the 1990 Appropriations Act.[115] In October 1990 the House of Representatives defeated two Congressional proposals.[116] One proposal sought to place specific content restrictions on the NEA,[117] and the other proposal attempted to prohibit the reauthorization of the NEA altogether.[118]

The House of Representatives approved, however, a compromise bill to reauthorize the NEA for three years.[119] The House-approved bill eliminated

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Money and Power, 14 NOVA L.J. 369 (1990) (arguing that NEA was created to fund art without Congressional interference); Jacobs, *"One if by Land, Two if by Sea"*, 14 NOVA L.J. 343 (1990) (concluding that current legislative restrictions pose threat to creativity of arts in United States).

114. *See* Parachini, *White House Plea on NEA Resisted; Showdown Next?*, L.A. Times, June 7, 1990, at F1, col. 5 (discussing questioned future and reauthorization of NEA); Masters, *Frohnmayer Welcomes Senate NEA Bill*, Wash. Post, Sept. 19, 1990, *available in* LEXIS, Nexis Library, WPOST File (discussing Senate bill regarding reauthorization of NEA); *infra* notes 115-24 and accompanying text (discussing proposed bills regarding reauthorization of NEA).

115. *See* Berke, *House Approves Compromise Bill to Continue the Arts Endowment*, N.Y. Times, Oct. 12, 1990, at A1, col. 3 (discussing proposals for reauthorization of NEA and final House of Representatives' version of bill that would reauthorize NEA and require judicial determination of obscenity).

116. *Id.* at C3, col. 1; *infra* notes 117-18 and accompanying text (describing other Congressional proposals defeated by House of Representatives).

117. *See* Berke, *House Approves Compromise Bill to Continue Arts Endowment*, *supra* note 115, at C3, col. 2. California Representative Dana Rohrabacher introduced the alternative bill to restrict federal funding of art projects involving subjects such as child pornography and the desecration of the flag. *Id.*; Zuckman, *Obscenity Debate—House Approves Compromise on Arts Endowment Bill*, CONGRESSIONAL QUARTERLY, Oct. 13, 1990 at 3423. The Rohrabacher amendment also prohibited funding of projects that are "obscene; that denigrate the beliefs, tenets or objects of a particular religion; or that denigrate a person or group on the basis of race, sex, handicap or national origin." *Id.*; Zuckman, *Obscenity Debate—Compromise Eludes Members on Standards for Arts*, CONGRESSIONAL QUARTERLY, July 28, 1990, at 2422 (discussing HR 4825 bill to reauthorize NEA for five years and discussing language of proposed legislation). Jamie L. Witten, Mississippi Representative, submitted to Representative Yates an amendment to the Education and Labor Committee's restriction-free bill that requested a prohibition on funding "filthy pictures." *Id.* Paul B. Henry, Michigan Representative, sought to prohibit funding of works of art that "'deliberately denigrate' the cultural heritage of the United States, its religious traditions, or racial or ethnic groups," and material that is obscene by Supreme Court standards or indecent under the Federal Communications Commission's (FCC) definition of that term. *Id.*

118. *See* Berke, *House Approves Compromise Bill to Continue Arts Endowment*, *supra* note 115, at C3, col. 3. Representative Philip M. Crane proposed the bill to abolish the NEA. *Id.*; Andrews, *House Says No to Anti-Obscenity Limits on NEA Funding*, Duke Chron., Oct. 12, 1990, at 7, col.1 (discussing decision by House to eliminate existing anti-obscenity restrictions and to allow courts to determine obscenity). Representative Crane wanted to abolish the NEA because of the NEA's prior support for art that he deemed "'obnoxious, perverted and sick.'" *Id.* at 7, col. 4.

119. *See* Andrews, *House Says No to Anti-Obscenity Limits on NEA Funding*, *supra* note 118, at 7, col. 1 (discussing provisions of House bill regarding NEA funding restrictions). The

the content restrictions that the 1990 Appropriations Act placed on the NEA.[120] In place of the content restrictions, the House bill delegated to the courts the responsibility for determining obscenity.[121] Furthermore, the compromise bill required a grant recipient to return federal funds upon a judicial determination that the recipient violated obscenity standards in the recipient's use of the funds.[122] The Senate also considered a bill almost identical to the House-adopted bill that would have reauthorized the NEA without content restrictions and would have allowed the courts to make judgments of obscenity.[123]

On October 28, 1990 the Senate and House of Representatives finally came to an agreement, approving legislation that reauthorized the NEA for three years.[124] Congress parades the law as a compromise because of its terms.[125] The law contains no explicit restrictions on the content of NEA-

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adopted bill is a bipartisan "compromise" proposed by Pat Williams, Democratic representative from Montana, and Thomas Coleman, Republican representative from Missouri. *Id.*; Zuckman, *Obscenity Debate—House Approves Compromise on Arts Endowment Bill*, *supra* note 117, at 3423 (discussing provisions of House-approved bill as William-Cole compromise).

120. *See* Andrews, *House Says No to Anti-Obscenity Limits on NEA Funding*, *supra* note 118, at 7, col. 1. (discussing decision by House to eliminate existing anti-obscenity restrictions and to allow courts to determine obscenity); Zuckman, *Obscenity Debate—House Approves Compromise in Arts Endowment Bill*, *supra* note 117, at 3423 (discussing passage of Williams-Cole compromise bill and its provisions). The House also approved two amendments to the Williams-Cole bill submitted by Paul N. Henry of Michigan and Fred Grandy of Iowa. *Id.* The Henry language requires the Chairman of the NEA to consider during the grant-making procedures "general standards of decency and respect for the diverse beliefs and values of the American public," in addition to the standards of artistic excellence. *Id.* The Grandy amendment "softened" the provision that barred an artist found guilty of violating obscenity standards from receiving NEA funding for three years. *Id.* Instead, the amendment provided that the artist may receive a new grant upon repaying the artist's original grant. *Id.*

121. *See* Andrews, *House Says No to Anti-Obscenity Limits on NEA Funding*, *supra* note 118, at 7, col 1 (discussing decision by House to eliminate anti-obscenity restrictions and to allow courts to determine obscenity).

122. *Id.*

123. *See* Masters, *Frohnmayer Welcomes Senate NEA Bill*, *supra* note 114 (discussing provisions of Senate bill to reauthorize NEA without content restrictions). The Senate Labor and Human Resources Committee earlier approved the Senate bill. *Id.*; Berke, *House Approves Compromise Bill to Continue Arts Endowment*, *supra* note 115, at A1, col. 2 (stating that reauthorization of bill being considered by Senate is "awaiting action on the Senate floor"); Zuckman, *Obscenity Debate—Committee Offers Compromise On Long-Delayed NEA Bill*, CONGRESSIONAL QUARTERLY, Sept. 15, 1990, at 2920 (discussing Senate Labor and Human Resources Committee approved plan to reauthorize NEA without content restrictions on funding and to allow judicial determination of obscenity). The Senate Labor and Human Resources Committee defeated an amendment proposed by Senator Daniel R. Coats of Indiana, which "would bar grants for obscene projects, for the sexual exploitation of minors and for attacking historically religious tenets, traditions, symbols or figures." *Id.*

124. *See* Appropriations Act of 1991, *supra* note 15 (reauthorizing NEA and amending National Foundation on the Arts and Humanities Act of 1965); *See also* Masters, *Congress Approves Arts Funding Compromise*, *supra* note 15, at A17, col. 2 (discussing provisions of Interior Appropriations bill reauthorizing NEA).

125. *See* Masters, *Congress Approves Arts Funding Compromise*, *supra* note 15, at A17, col. 3 (discussing provisions of 1991 Appropriations Act as compromise legislation).

funded art.[126] However, the law requires the chairman of the NEA to consider general standards of decency and respect for the diverse beliefs and values of the American public throughout grantmaking procedures.[127] The law no longer requires artists to sign an anti-obscenity pledge, but instead provides for a judicial determination of obscenity and empowers the NEA to recoup funds from recipients who use their grants to create obscene art.[128]

Although the new law removes explicit content restrictions on the type of art that the NEA may fund, and, therefore, seems to address the concerns of the Independent Commission, artists still may not be able to enjoy their right to freedom of expression without restrictions on creativity that an anti-obscenity oath poses.[129] Significant problems inherent in the decency clause include close scrutiny of experimental and challenging works of art, and vague language in the clause.[130] The requirement that the NEA chairman

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126. Appropriations Act of 1991, *supra* note 15, § 103; *See also* Masters, *Congress Approves Arts Funding Compromise*, *supra* note 15, at A17, col. 2 (discussing provisions of 1991 Appropriations Act regarding funding of art by NEA).

127. *See* Appropriations Act of 1991, *supra* note 15, § 103(b) (amending standard by which NEA may fund art); *See also* Masters, *supra* note 15, *Congress Approves Arts Funding Compromise*, at A17, col. 3. (discussing provisions of 1991 Appropriations Act regarding NEA funding of art).

128. *See* Appropriations Act of 1991, *supra* note 15, § 102 (providing for judicial determination of obscenity). Section 102 states:

> . . . Section 3 of the National Foundation on the Arts and the Humanities Act of 1965 (20 U.S.C. 952), as amended by subsection (a), is amended by adding at the end the following:
>
> "(j) The term 'determined to be obscene' means determined, in a final judgment of a court of record and of competent jurisdiction in the United States, to be obscene . . ."

Id., § 102(c).

See also Masters, *Congress Approves Arts Funding Compromise*, *supra* note 15, at A17, col. 1, 5 (stating Appropriations Act of 1991 provides for judicial determination of obscenity); *supra* notes 93-111 (discussing pledge requirement as prior restraint on artists' expression).

The provision of the 1991 Appropriations Bill allowing for a judicial determination of indecency resolves some of the problems inherent in the prior restraint cases. *See supra* notes 102-11 and accompanying text (discussing requirement of judicial hearing prior to restraint of material). For example, under the new 1991 legislation, a work of art may be created before it is subject to censorship. This Note does not explore, however, the remedial problem involving recoupment of money from the artist subsequent to a judicial determination of obscenity.

129. *See supra* notes 49-57 and accompanying text (discussing chilling effect that vagueness of NEA pledge requirement creates); *supra* notes 93-111 and accompanying text (discussing pledge requirement as prior restraint on artist's expression).

130. *See* Masters, *Congress Approves Arts Funding Compromise*, *supra* note 15, at A17, col. 4 (discussing provisions of Interior Appropriations Bill that reauthorized NEA). Representative Sidney R. Yates, Chairman of the Interior Appropriations Subcommittee, commented that he disliked the decency provision. *Id.* Representative Yates stated that because of the decency language, "experimental and 'challenging' works will be subject to very close scrutiny under that clause." *Id.*; *see also infra* notes 162-78 and accompanying text (discussing definition of indecency in 1991 legislative language as vague under broadcasting standards and in view of NEA).

ensure that grantmaking procedures consider general standards of decency and respect for the diverse beliefs and values of the American public, therefore, still may cause the adverse effects to the creativity of the arts in this country that the Independent Commission sought to avoid.[131]

Because members of Congress previously rejected the decency language in prior legislation,[132] perhaps anticipating the same effects that the Independent Commission feared, it is surprising that Congress adopted the "decency" language into the 1991 Appropriations bill.[133] When Congress voted on the Helms Amendment to the 1990 Appropriations Act, Congress deleted language that prohibited funding of "indecent" works of art, in addition to "material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion," and "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."[134] One of the reasons for the rejection of such prohibitive language was that Congress believed the ban extended too far, restricting citizens' First Amendment rights to free speech.[135] One senator opposed the prohibition against indecency because, unlike the United States Supreme Court's test for obscenity, no legal definition for indecency existed and indecency, therefore, would be almost impossible to define.[136]

The legislative history of the proposed amendment language to the Appropriations Act of 1991 suggests that Congress intended to interpret indecency under the Federal Communication Commission's (FCC) definition of "indecent."[137] An analysis of indecency in the broadcast context indicates

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131. *See supra* notes 44-63, 75-111 and accompanying text (discussing adverse effects of NEA pledge requirement); *infra* notes 174-79 and accompanying text (discussing chilling effect that will result from imposition of indecency provision).

132. *See infra* notes 134-36 and accompanying text (discussing deletion of "decency" language from Helms Amendment).

133. *See infra* notes 134-36 and accompanying text (discussing rejection of decency language in Helms Amendment, and adoption of decency language into 1991 Appropriations bills).

134. 135 CONG. REC. S8862 (daily ed. July 26, 1989) (Helms Amendment No. 420); *see* Houston & Davis, *Conferees Agree to Ban Funding for 'Obscene Art'*, L.A. Times, Sept. 30, 1990, at A1, col.3 (discussing Senate vote to scale down Helms Amendment). The Senate voted 65 to 31 to accept amendment language proposed by Senators Wyche Fowler and Warren B. Rudman, prohibiting funding only of "obscene" art. *Id.*

135. *Id.*

136. *See Helms's Victory*, Proprietary to the United Press International, Oct. 16, 1989, *available in* LEXIS, Nexis Library, UPI File (discussing Senator Simpson's opposition to proposed Helms amendment).

137. Zuckman, *Obscenity Debate—Compromise on Arts Funding is Ready for House Vote*, CONGRESSIONAL QUARTERLY, Oct. 6, 1990, at 3236. Representative Paul B. Henry proposed language to prohibit funding of works that "deliberately denigrate" the cultural heritage of the United States, its religious traditions, or racial or ethnic groups, are "obscene" under Supreme Court standards, or are "indecent" under the definition of the FCC. *Id.* The article reports that as a "nod" to Rep. Henry, the adopted compromise language included the decency clause. *Id.*; *see also infra* notes 139-46, 169-74 and accompanying text (discussing how FCC interprets indecency).

that such a standard is wholly inapplicable to judging the merit of a work of art because the government justifies its regulation of the content of broadcasting almost entirely on the basis of the protection of young children as listeners and viewers.[138] In *FCC v. Pacifica Foundation*[139] defendant broadcasted an afternoon monologue, entitled "Filthy Words," which discussed the uses of "words you couldn't say on the public . . . airwaves . . ."[140] The FCC sought to regulate the speech as a statutory violation against the use of "obscene, indecent, or profane language by means of radio communications."[141] The FCC defined the concept of indecency as "connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children might be in the audience."[142] The United States Supreme Court, however, rejected the FCC's definition of indecency, concluding that the normal definition of indecency was nonconformance with accepted standards of morality.[143] Applying this definition of indecency to the FCC's action against Pacifica, the Court held that even if speech is offensive to contemporary moral standards,[144] the FCC does not have a sufficient reason to suppress speech.[145] The Court viewed the words of the monologue in the context of the broadcast, however, and held that the monologue was indecent because of the repetitive use of the seven offensive words during the afternoon.[146]

The holding in *Pacifica* raises the issue of offensive expression in the broadcasting medium.[147] The United States Supreme Court, in *Pacifica*, recognized that freedom of expression receives the most limited protection in the broadcast medium of communication.[148] The Court presented two reasons for distinguishing broadcast from other mediums of expression: first, offensive material broadcast on the airwaves confronts a listener in the privacy of the home as well as in public, and, therefore, the individual's right to privacy outweighs the First Amendment rights of a communicator;

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138. *See infra* notes 139-61 and accompanying text (analyzing inapplicability of indecency in broadcasting context for judging merit of work of art).

139. 438 U.S. 726 (1978).

140. FCC v. Pacifica Foundation, 438 U.S. 726, 729 (1978).

141. *Id.* at 731 (citing 18 U.S.C. § 1464 (1976 ed.)).

142. *Id.* at 731-32 (citing FCC declaratory order, 56 F.C.C.2d 94, 98 (Feb. 21, 1975)).

143. *Id.* at 740. The Court looked to the dictionary for definition of indecency: "'a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate; hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . .'" *Id.* (citing Webster's Third New International Dictionary (1966)).

144. *Id.*, 438 U.S. at 745.

145. *Id.*

146. *Id.* at 747-50.

147. *See infra* notes 148-61 and accompanying text (discussing differences between broadcasting and non-broadcasting First Amendment expression such as creation of art and why different standards are necessary for each).

148. *Pacifica*, 438 U.S. at 748.

second, broadcasting is accessible to children, and the government's interest in protecting children similarly outweighs freedom of expression.[149] The Court limited its holding in *Pacifica* to allow the FCC to regulate and prohibit indecent broadcasting after a consideration of both the time of day of the broadcast and the content of the program.[150]

Allowing the FCC to regulate broadcasts of indecency is distinguishable from the NEA's regulation of funding of a work of art.[151] A work of art that is indecent is not expressed through a medium that directly confronts a viewer in the privacy of one's home. Moreover, a work of art, unlike a radio broadcast, does not pose the risk of subjecting the viewer or listener to unexpected program content.[152] Although art exists in many public places, an individual may avoid exhibitions in museums when a museum posts a warning to viewers about the possible offensiveness of some of the works exhibited. Furthermore, a work of art is not uniquely accessible to children.[153]

The United States Supreme Court, in *Cohen v. California*,[154] drew similar distinctions between viewers and listeners.[155] In *Cohen* defendant Cohen wore a jacket that displayed the words "Fuck the Draft" in a corridor of the county courthouse.[156] The Los Angeles Municipal Court convicted Cohen for offensive conduct, and the Court of Appeal of California affirmed the conviction.[157] The United States Supreme Court considered whether the First Amendment protected Cohen's communication, and held that, absent a substantial invasion of an individual viewer's privacy interest, the state cannot violate the communicator's freedom of speech or expression.[158] The Court distinguished between people confronted at the courthouse with Cohen's jacket and those confronted with the same expression at their private residences.[159] The Court characterized the public as

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149. *Id.* at 748-49.

150. *Id.* at 750.

151. *See infra* notes 152-61 and accompanying text (discussing why creation of art may be distinguished from broadcasting in effect on viewers); *but see* Note, *To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting*, 42 Hastings L.J. 635 (1991) [hereinafter *To Air or Not to Err*] (analogizing 1990 legislative obscenity restrictions on visual arts to FCC regulation of broadcasting and concluding that twenty-four hour ban on indecency is unconstitutional).

152. *Pacifica*, 438 U.S. at 748.

153. *Id.* at 749.

154. 403 U.S. 15 (1971).

155. *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

156. *Id.* at 16.

157. *Id.* at 16-17.

158. *Id.* at 21.

159. *Id.* at 21-22. Justice Harlan commented that:

> . . . [P]ersons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when

captive to offensive and objectionable speech once outside the privacy of the home,[160] and held that the government may not suppress speech such as Cohen's that is offensive, shocking or inconsistent with the public morality.[161]

In addition to the inapplicability of the broadcasting definition of indecency to the visual arts, a further problem arises because the definition of indecency continues to raise problems of vagueness.[162] Both broadcasters and individuals involved in the NEA view the definition of decency in the broadcasting context as inherently vague.[163] Members of the NEA literature grantmaking panel resigned from their positions in protest of the decency provision.[164] Subsequently, the NEA literature grantmaking panel demanded that the NEA chairman clarify the decency standard.[165] Panelists concerned about the language wanted the NEA Chairman explicitly to state that artistic merit is the basis for grantmaking in the application procedure.[166] Even the NEA Chairman, John Frohnmayer, indicated concern over the indecency provision.[167]

Broadcasters, also, have challenged the meaning of "indecency" since the United States Supreme Court's ruling in *Pacifica*.[168] Following *Pacifica*,

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walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.

Id.

160. *Id.*

161. *Id.*; *see also supra* note 86 (discussing viewpoint discrimination in government funding); Testimony of the Legal Task Force, *supra* note 52, Statement of Kathleen M. Sullivan, at 6. Professor Sullivan argues that the "government may not ban—or deny funding to—'indecent' or 'homoerotic' art. Such terms are inherently geared to the viewpoint of the artists or the anticipated viewpoint of the audience." *Id.*

162. *See infra* notes 163-74 and accompanying text (discussing broadcasting definition of indecency as vague in eyes of both broadcasters and NEA).

163. *See infra* notes 164-74 and accompanying text (discussing reactions by NEA panel members and director to decency provision and ongoing clarification of definition of indecency by broadcasters).

164. *See* Masters, *Some Resign Adjourned NEA Panel*, Wash. Post, Nov. 14, 1990, at B10, col. 1 (discussing resignation of members of NEA literature panel). Nine members of an eleven-member NEA literature panel resigned in protest of the Congressional requirement that grantmaking procedures consider general standards of decency. *Id.* Panel member Helaine Harris declared that decency is too vague a term by which to make a judgment, that the term is restrictive, and that it is subject to different interpretations. *Id.* at B10, col. 2.

165. *See* Masters, *What Makes for Indecency? NEA Panel Seeks Clear Wording*, Wash. Post, Nov. 15, 1990, at C2, col. 1 (discussing response of NEA literature and playwright panel members to decency provision and definition of decency in broadcasting context).

166. *Id.*

167. *See* Masters, *Arts Chief Refuses to Be 'Decency Czar'—Hill Staff Critical of Reaction to New Law*, Wash. Post, Dec. 15, 1990, at B1, col. 5 (discussing reaction to decency provision). The legislation provides that the chairman of the NEA must ensure that the grantmaking procedure takes into consideration standards of decency. *Id.* Frohnmayer stated his refusal to reject a grant on the basis that the grant violates the decency provision. *Id.* A congressional aide commented that Frohnmayer appears to be delegating his authority to apply the decency standard to panel members. *Id.* at B7, col. 3.

168. *See supra* notes 139-46 and accompanying text (citing Supreme Court's holding and

the FCC issued a public notice that expanded its regulation of indecency beyond the type of indecent material at issue in that case.[169] Broadcasters affected by the public notice, alleging the standard was unconstitutionally vague, requested a clarification of the indecency standards.[170] The FCC responded by releasing a consideration order that rejected the vagueness challenge.[171] The United States Court of Appeals, District of Columbia Circuit, subsequently affirmed the FCC's indecency standard, holding that the standard was not constitutionally overbroad and giving deference to the Supreme Court in *Pacifica*, even though the District of Columbia Circuit Court stated that vagueness was inherent in the definition of indecency.[172] Following the FCC 's decision to enforce the indecency standard through a blanket ban on broadcast indecency, petitioners again challenged the FCC's standard, arguing once more that the definition of indecency is unconstitutionally vague.[173] Currently the FCC standard remains in effect, as the

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rationale in *Pacifica* case that George Carlin's seven dirty words were indecent and therefore FCC had authority to regulate broadcast of Carlin monologue); *see also infra* notes 169-74 and accompanying text (discussing broadcasters' action, subsequent to *Pacifica*, to clarify definition of indecency).

169. *See New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees*, 62 Rad.Reg. 2d (P&F) 1218 (1987). The FCC defined indecency as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at 1219.

170. *See* Note, *To Air or Not to Err*, *supra* note 151, at 661 (discussing making of more stringent changes in indecency standard by FCC since 1987). Broadcasters argued that the standard was unconstitutionally vague and overbroad, creating a chilling effect on editorial freedom, because the standard did not clearly distinguish between obscenity and indecency. *Id.* (citing In re Infinity Broadcasting Corp., 3 F.C.C. Rec. 930, paras. 1 n. 1, para 7, 28 (1987)).

171. *See* Reconsideration Order, 3 F.C.C. Rcd 930 (1987) (rejecting vagueness challenge, adopting view for need for "safe harbor" hours for adults to view material and rejecting proposition for blanket ban on indecent speech).

172. *See* Action for Children's Television v. FCC ("Act I"), 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) [hereinafter ACT I] (inferring from *Pacifica* holding that Court did not view FCC definition of indecency as so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application"). The United States Court of Appeals, District of Columbia Circuit, held that the standard is not overbroad in failing to take exception to material with serious merit, because serious merit could not preclude government action when the interest of the government is the protection of children. *Id.* at 1340. The *Act I* court additionally referred to the Supreme Court's noting of the FCC definition of indecency in *Pacifica* to indicate "patent offensiveness." *Id.* at 1339 (*citing Pacifica*, 438 U.S. at 740).

173. *See* Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 464, 4 F.C.C. 457, 457-458 (1988) (stating that FCC will enforce standard of indecency provided in 18 U.S.C. § 464 on twenty-four hour basis in accordance with Pub. L. No. 100-459). The FCC acted in response to government legislation ordering the FCC to enforce the twenty-four hour ban against indecency. *See* Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Pub. L. No. 100-459, § 608 (1988).

See also Note, *To Air or Not to Err*, *supra* note 151, at 669 (commenting that FCC

latest constitutional challenge resulted in an affirmation of the standard as protecting the compelling government interest to "safeguar[d] the physical and psychological well-being of a minor."[174]

The controversial and vague language of the FCC indecency standard, if applied by the NEA, invites a chilling effect similar to that which the legal task force of the Independent Commission and the court in *Bella Lewitsky* envisioned as resulting from the NEA's anti-obscenity pledge requirement.[175] The more innovative and experimental federally funded art surely will suffer as a result of the decency clause, because the NEA may choose not to award grants to such art for fear of coming close to the line of indecency.[176] Even if the decency clause is not an explicit restriction against art that an artist may create with federal funds, the decency clause still directs the chairman of the NEA to award grants only after considering general standards of decency and respect for the diverse beliefs and values of the American public.[177] Consequently, the NEA may deny funding to any art that falls within this grey area of indecency. The government should not, however, overlook the qualities of art that warrant federal funding, such as the fresh vision that the art may bring to the public,[178] even if the

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definition of indecency is unconstitutionally vague). The FCC standard of indecency is vague because neither the courts nor the FCC clearly defined the requirement that the material be "patently offensive." *Id.* The FCC instead maintains that it will make such a determination depending on the context of the material. *Id.*

174. *See* Action for Children's Television v. FCC ("Act II"), 932 F. 2d 1504, 1509 (D.C. Cir. 1991), *reh'g denied* (August 28, 1991). In *Act II* broadcasters petitioned for review of the FCC order that imposed a blanket ban on broadcast material that the FCC determined indecent. *Id.* at 1506. Petitioners challenged the constitutionality of the order, alleging vagueness and overbreadth. *Id.* at 1507. The United States Court of Appeals, District of Columbia Circuit, held that its decision in *Act I* governed resolution of the issues of unconstitutionality, and rejected petitioners' challenge to the definition of indecency. *Id.* at 1508. The *Act II* court cited its deference to the Supreme Court in *Act I*, stating "In our view, the Supreme Court's decision in *Pacifica* dispelled any vagueness concerning the definition." *Id.*, citing *Act I*, 852 F. 2d at 1338-39. The *Act II* court concluded that the FCC could regulate indecent material, since such material could have a negative effect on children. *Id.* at 1508. The court held, however, that the FCC must provide reasonable times that broadcasters may air such material, and rejected a total ban by the FCC of indecent material. *Id.* at 1509.

175. *See supra* notes 49-57, 112-13 and accompanying text (describing statements by Independent Commission's legal task force and court's rationale in *Bella Lowitsky* that NEA pledge requirement creates chilling effect); *see also infra* notes 176-79 and accompanying text (stating that indecency clause of 1991 Appropriations language creates similar chilling effect).

176. *See supra* note 130 (quoting statement by Senator Yates in reference to decency language and probable effects).

177. *See supra* notes 125-28 (discussing language of 1991 Appropriations Bill for funding art).

178. *See* Testimony of the Legal Task Force, *supra* note 52, Statement of Floyd Abrams, at 4 (commenting that funding only art that is "safe" ignores qualities that should warrant public funding). Floyd Abrams, a First Amendment attorney, directly and candidly expressed a significant concern when he commented:

> If we are to fund the arts at all, we should take the arts as they are . . . to fund artistic expression only if it is 'safe' art or 'responsible' art is simply to ignore the qualities of art that should lead to its public funding in the first place—its freshness

work of art falls within that grey area. The government also must not forget that the First Amendment protects indecent speech.[179]

Congress created the NEA to foster the creation of art in the United States,[180] and restrictions on art must not inhibit that purpose. The primary basis for NEA funding of the arts should be a criteria of artistic excellence alone. Congress invaded the pure standard of artistic value in its initial imposition of restrictions in the 1990 legislation.[181] In that legislation, Congress forbade the NEA from funding art that Congress considered obscene.[182] Following controversy over the pledge requirement which the public called censorship, Congress reconsidered the language directed toward the funding of the arts.[183] Congress left the public with a provision that Congress asserts is less restrictive, and which directs the NEA to consider general standards of decency in its grantmaking.[184] Yet, the decency provision of the 1991 legislation also presents new legal problems of vagueness to the NEA procedures.[185] Even the NEA, the federal agency employed to carry out the 1991 legislation, hesitates to apply such vague standards.[186] Because the NEA may decide not to fund indecent creations, which is expression protected by the First Amendment,[187] and because the NEA's failure to fund art that the NEA considers indecent could result in a multiplier effect of non-federal refusal to fund artists' works,[188] the arts may suffer more from the 1991 legislative language than from the pledge requirement implemented in the 1990 Appropriations Act. Congress ignored the recommendation of the Independent Commission to avoid legislative restrictions in arts funding.[189] Instead, in the form of the Appropriations Act of 1991,

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of vision, its willingness to look anew at what the rest of us overlook and are incapable of seeing.

Id.

179. *See* Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that indecent expression that is not obscene is protected by First Amendment); Action for Children's Television v. FCC ("Act I"), 852 F.2d at 1344 (holding that First Amendment protects broadcast material that is indecent but not obscene).

180. *See supra* note 24 (discussing creation of NEA and governmental purposes for its creation).

181. *See supra* notes 25-26 and accompanying text (discussing 1990 Appropriations language).

182. *Id.*

183. *See supra* notes 114-23 and accompanying text (discussing Congressional proposals for reauthorization of NEA).

184. *See supra* notes 124-28 and accompanying text (discussing decency provision of 1991 Appropriations bill).

185. *See supra* notes 162-78 and accompanying text (discussing issues of vagueness raised by new decency clause).

186. *See supra* notes 164-67 (discussing NEA Chairman's refusal to act as "decency Czar," and resignation of panel members in protest of vague term "indecency").

187. *See supra* note 179 and accompanying text (citing Supreme Court holdings that indecent and not obscene material is protected by Constitution).

188. *See supra* notes 55-57 and accompanying text (commenting on court's discussion in *Bella Lewitsky* of multiplier effect of NEA decision not to fund obscene art).

189. *See* Independent Commission Report, *supra* note 13, at 89 (setting out specific

Congress passed legislation that is inappropriate,[190] restrictive and unconstitutional, and has taken from the public a liberal flourishing of the arts in the United States.

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ADDENDUM

At the time of publication of this Note, the controversy over federal funding of the arts continues. At present, Congress is debating over the correct standard by which to make the 1992 fiscal appropriations to the NEA. The House of Representatives has passed a bill which maintains that NEA grants must satisfy a standard of decency. The Senate, however, has gone one step further in restricting the 1992 NEA funding. Supporting an amendment proposed by Senator Helms and, observe, adapted from FCC broadcasting language, the Senate seeks to prohibit materials that "depict or describe, in a patently offensive way, sexual or excretory activities or organs." Representative Yates correctly noted in opposition to the amendment that "Art that is patently offensive to Senator Helms may not be objectionable to other people, and that's been recognized by the Supreme Court."

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recommendation to Congress about NEA reauthorization). The Independent Commission made the recommendation against content restrictions, stating that criteria in addition to artistic excellence should not be "isolated and treated as exogenous considerations." *Id.*

190. *See supra* notes 149, 153 (concluding that government regulation of indecency is more appropriate in broadcasting medium because government interest in that area is for protection of children).