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THE IDENTICAL TREATMENT OF OBSCENE AND INDECENT SPEECH: THE 1991 NEA APPROPRIATIONS ACT

STEPHEN N. SHER*

"I disapprove of what you say, but I will defend to the death your right to say it."

"De gustibus non est disputandum. Just as there is no use arguing about taste, there is no use litigating about it."

INTRODUCTION

As a result of 1980s conservatism, fundamentalist groups have recently sprung up across the country, which advocate a back-to-the-church or back-to-the-family approach to life. These organizations consider themselves the exclusive dictators of moral righteousness. In their effort to rid society of "immorally harmful" items, such as racy rap groups and revealing bathing suits, they have facilitated

* I would like to thank Professor Cheryl I. Harris, for without her this Note never would have been possible.


Voltaire did not write: 'I disapprove of what you say, but will defend your right to say it, unless the subject is sex.' Nor did the framers of the United States Constitution. . . . We will tolerate without a murmur a movie showing the most brutal murder, but display a couple in the act of love and the outcry is deafening. This is not meant to be a defense of the sleazy movies and adult bookstores which pander to the bizarre and the deviant, but it is a plea for perspective in deciding whether such materials genuinely warrant an intrusion into the rights guaranteed by the first amendment.


3. Fundamentalist has been defined as, "a movement in 20th century Protestantism emphasizing the literally interpreted Bible as fundamental to Christian life and teaching." THE NEW BRITANNICA/WEBSTER DICTIONARY & REFERENCE GUIDE 364 (1981). However, for purposes of this article a fundamentalist is one who denounces anything they do not understand under the guise of God and family. These fundamentalists have frequented history many times, for example in the arrest of John Scopes, as well as in the banning of books such as Native Son by Richard Wright and Twain's masterpiece, Huckleberry Finn.


forces that have resulted in religious and sexual censorship. In 1989, several of these groups joined forces to protest the display of the controversial photographs taken by the late Robert Mapplethorpe.

6. A law prohibiting tong bathing suits in Florida was passed under their Indecent Exposure statute. FLA. STAT. § 847.001.

7. These fundamentalist groups are typically better organized than the "silent majority." They write letters, make phone calls and lobby to make their views known. However, according to Nancy Sutton, chairman of the Citizens for Family First, "[m]ost of the battles that are won are won in prayer long before we go into the public arena." Graham, supra note 4, at 13.


9. A chain of convenient stores, 7-Eleven, stopped selling certain magazines (Playboy and Penthouse) for fear of being "blacklisted." See Playboy Enterprises v. Meese, 639 F. Supp. 581, 584 (D.D.C. 1986). For a discussion of recent controversial works which have been grouped as sexual, religious, and political, see Siobahn M. Murphy, A First Amendment Analysis of Government Funding for the Arts (unpublished manuscript, on file with the Chicago-Kent L. Rev.).

10. The Mapplethorpe and Serrano exhibits contained everything needed for a controversy: the religious aspect of a crucifix in a cup of urine, the sexual demeanor of the homoerotic photographs, the general detest of wasted tax dollars, all at a time of conservatism in the United States.

11. See, e.g., Barbara Gamarekian, Corcoran, to Foil Dispute, Drops Mapplethorpe Show, N.Y. TIMES, June 14, 1989, at C22; Elizabeth Kastor, Corcoran Decision Provokes Outcry, WASH. POST, June 14, 1989, at B1; Alan Parachini, Endowment, Congressmen Feed Over Provocative Art, L.A. TIMES, June 14, 1989, Part 6, at 1; Rorie Sherman, Calm Presence in the Middle of the Art Battle, The NAT'L L.J., July 2, 1990, at 8. Mapplethorpe was born in 1946 and brought up with a "suburban" Catholic upbringing in Floral Park, Queens. Karin Lipson, Celebration and Crisis; Photographer Robert Mapplethorpe Wins Recognition From the Mainstream as He Fights for His Life, NEWSDAY, Aug. 1, 1988, part II, at 4. According to Ingrid Sischy, while walking through Times Square, in the late 1960s he noticed the intense sensations brought forth by the skin magazines and wanted to transfer these sensations to the domain of his photography. Id. He said, "I thought if I could somehow bring that element into art, if I could somehow retain that feeling, I would be doing something that was uniquely my own." Id. In the early 1970s he studied at the Pratt Institute in Brooklyn, but got most of his support and motivation from Patti Smith, the avant-garde rock and roll star, and Sam Wagstaff, curator and collector. Id. Two art dealers, Holly Solomon and Leo Castelli first displayed his work, in 1977, after he left the Pratt Institute. This early work was mostly documentary photographs of New York’s S & M scene. Id. As Mapplethorpe said, "[t]he S & M photographs] end[ed] up documenting a certain thing that was going on in New York at a certain moment. . . . It was an exploration of extremities—sexual extremities." Id. Since the 1970s he began to attract serious national attention for his refined portraits of art celebrities, friends, and the portrait-like images of flowers. Andy Grundberg, The Allure of Mapplethorpe’s Photographs, N.Y. TIMES, July 31, 1988, § 2, at 29. The elite of the art world almost immediately accepted him in the same group with photographers Cindy Sherman and Joel-Peter Witkin. Theodore F. Wolff, Mapplethorpe: Fusing Originality With Classicism, CHRISTIAN SCI. MONITOR, Aug. 15, 1988, § Arts and Leisure, at 19. By the early 1980s he was universally regarded as one of America’s most original photographers. Id. He held successful museum exhibits in Paris, Amsterdam, London. Id. A book containing a collection of his photographs was highly acclaimed and he was called the "greatest photographer in America." Roger Lewis, My Book of the Year, Nov. 26, 1988, FIN. TIMES, § Weekend, at XX, and "today’s most famous photographer," Douglas Balz, Pictures Perfect, A Bountiful Harvest of Photography Books, CHI. TRIB., Dec. 4, 1988, § C, at 5. His most successful exhibit was at the Whitney Museum of American Art in New York City. See, e.g., Roberta Smith, It May Be Good But Is It Art?, N.Y. TIMES, Sept. 4, 1988, § 2, at 1. One critic stated, "In a way, the most old-fashioned of today’s successful young photographers is Robert Mapplethorpe, whose style has veered from half-hearted conceptualism toward highly charged fashion photography. His work is classically beautiful, like Edward Weston’s, but unabashedly decorative." Richard B. Woodward, It’s Art but is it Photography, Oct. 9, 1988, N.Y. TIMES, § 6, at 29. Mapplethorpe died in 1986 at the age of 42.
The Mapplethorpe exhibit was funded by the National Endowment for the Arts ("NEA"). The NEA is an organization that grants artists federal funds to subsidize some or all of the costs associated with the production of art.\textsuperscript{12} Although the NEA has come under fire several times for funding risque art,\textsuperscript{13} in 1990 special-interest group pressure directed at Congress had the NEA fighting for its very existence.\textsuperscript{14} Yet, in a hastily passed\textsuperscript{15} bill, Congress approved legislation to extend funding for the NEA for another three years.\textsuperscript{16} However, in order to accommodate the right wing fundamentalists,\textsuperscript{17} Congress included in the bill a requirement that the head of the NEA must ensure grants are made only after "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" ("decency requirement").\textsuperscript{18} The bill also stipulates that the NEA can recoup funds from grant recipients who have created works which a court later determines to be obscene ("repayment requirement").\textsuperscript{19}

Since the passage of the bill, nine of the eleven members of the NEA literary panel resigned after "question[ing] the constitutionality of the [restrictive] language."\textsuperscript{20} Other NEA members have also confessed confusion over the definition of decency, and protested by refusing to enforce

\begin{enumerate}
\item See generally, 136 CONG. REC. S17,990 (daily ed. Oct. 24, 1990) (statement by Sen. Helms). In 1969, the NEA was criticized for giving a $1,000 grant for the creation of a one word poem "Lighght". In 1971, an avant-garde group called the Living Stage had public school children perform obscenities as part of a performance. The NEA came under fire again in 1973 after it gave funds to Erica Jong to write a book called "Fear of Flying," which recounted her sexual experience with a German Shepard; see also MICHAEL STRAIGHT, NANCY HANKS 328-33 (1988). In 1977, William Proxmire gave the NEA the Golden Fleece Award for paying an artist to throw crepe paper out of an airplane. Again in 1984, the NEA came under congressional fire after Representative Biaggi voiced opposition on the floor concerning a production of Verdi's "Rigoletto" that made the opera's characters members of the Mafia. Enrique R. Carrasco, Note, The National Endowment for the Arts: A Search for an Equitable Grant Making Process, 74 GEO. L.J. 1521, 1522-23 (1986). In 1985, Representatives Dick Armey and Tom DeLay, both Republicans from Texas, voiced opposition on the floor of the House to the financing of what they considered pornographic poems. Congress responded by requesting that the endowment be more careful in the future. 131 CONG. REC. 6,985 (1985).
\item See, e.g., Donald Martin Reynolds, Fund Art for Community's Sake, NEWSDAY, Nov. 6, 1990, at 45.
\item According to Frohnmayer, "It was just all of a sudden, bang, a done deal." Kim Masters, Art Chief Refuses To Be "Decency Czar"; Hill Staff Critical Of Reaction To New Law, WASH. POST, Dec. 15, 1990, at B1.
\item Id.
\item CHI. TRIB., Nov. 13, 1990, at 14. Others in arts community have also protested the decency provision. For example, the Pacifica Foundation refused to apply for grants in 1991 and New York theater producer Joseph Papp declined a $325,000 grant for the Shakespeare Festival. Mas-
the decency prerequisite. Thereafter, the NEA Advisory Council voted unanimously not to include any guidelines for the grant-making panels concerning "standards of decency" explaining that the members of the panels would apply them as a matter of course because of their diverse makeup.21 The next day, NEA Chairman John Frohnmayer announced his reluctance to be a "decency czar" and declared that he will not decline any grants because they violate the decency requirement.22 Accordingly, the NEA has continued to honor grants to controversial artists and organizations that use nudity in their productions. In 1991 the NEA awarded $20,000 to Karen Finly and $15,000 to Holly Hughes for their performance art.23 Both Finly and Hughes have been criticized for their risque performance art.24 The NEA also approved a $163,000 grant to support the 1991-92 season of the Washington Opera, although last year there were two complaints about total nudity in some scenes from Salome.25

This Note focuses on the NEA decency requirement and argues that this condition should fail to pass constitutional scrutiny under either of two theories. First, the NEA decency requirement is an attempt by Congress to regulate nonobscene protected speech. Second, the restriction is so vague that people of average intellect would have to guess about its meaning. Part I of this Note discusses the history of arts funding, looking specifically at the NEA.26 Part II will argue that the decency requirement is an unconstitutional limitation on nonobscene indecent sexual speech that is protected under the first amendment.27 Part III argues that the decency provision is also unconstitutionally vague.28 Part IV asserts that even though the restriction is merely a condition placed on a subsidy, it is still unconstitutional because it infringes on the fundamental right of free speech.29 Accordingly, this Note concludes with suggestions that uphold Congress's preference to prevent the NEA from

24. William A. Henry III, "You Can Take This Grant and . . . "; Arts groups are spurning the NEA's anti-obscenity clause, TIME, July 16, 1990, at 85.
26. See infra notes 31 to 98 and accompanying text.
27. See infra notes 99 to 248 and accompanying text.
28. See infra notes 249 to 290 and accompanying text.
29. See infra notes 291 to 315 and accompanying text.
I. GOVERNMENTAL FUNDING OF THE ARTS

In 1965, Congress approved and President Johnson signed into law the National Foundation of the Arts and Humanities Act. The history of the NEA has been recounted elsewhere, and need not be fully related here. However, a brief historical discussion of art patronage is helpful in order to place the recent uproar over public support for the arts in perspective and to evaluate the available alternatives.

A. Art grants before 1965

Art subsidies began in Europe during medieval times when the church generously commissioned artists to create religious art for its churches. During the Renaissance, European aristocrats, especially in Italy, continued financing arts, though most of their support went directly toward music. However, in the United States there were many reasons why the government did not support the arts until the twentieth century. In early America, the religious puritan background coupled with the high expense of leisure time led to a general repression of the arts. However, after the Revolutionary War, there were two main views concerning the democratic funding of the arts. Many Americans felt the arts were not essential to everyday life and accordingly that the young government could not afford to support them; while others, like George Washington, felt that the arts were essential to the prosperity of the new republic. As a result of these two diverse ideas, an unwritten

30. See infra notes 316 to 318 and accompanying text.
33. See, e.g., Stuart Taylor, Poor Taste Makes Bad Law, LEGAL TIMES, April 23, 1990, at 25. The chaos surrounding arts funding has been evolving for years.
36. See Carrasco, supra note 13, at 1525. The early American view towards the arts is exemplified by a 1665 case in which three Virginians were prosecuted for their production of a play and by a 1700 Pennsylvania statute that prohibits "stage plays, masks, [and] revels." TOFFLER, supra note 34, at 13.
37. John Adams wrote "I must study politics and war that my sons may have the liberty to study mathematics and philosophy . . . geography, natural history and naval architecture, navigation, commerce and agriculture, in order to give their children a right to study painting, poetry, music, [and] architecture." Letter from John Adams to Portia Adams (1780), reprinted in 2 LETTERS OF JOHN ADAMS, ADDRESSED TO HIS WIFE 66, 68 (Charles Francis Adams ed., 1841).
compromise was achieved which permitted government funding of the arts only when it was “practically necessary” (i.e. would directly benefit the government).39

This concept directed governmental arts funding for the next two centuries.40 For example, in the 1850s, when President Buchanan attempted to create a National Commission of Fine Arts, Congress refused to subsidize it.41 Yet, the lack of government sponsorship went largely unnoticed because private individuals were willing and able to support the arts. Many of these people were wealthy barons who amassed private fortunes during the industrial revolution42 and maintained museums, opera companies,43 and symphonies.44

During the first half of the twentieth century there were many practical reasons for governmental programs in support of the arts. However, the government did not finance the arts because of an altruistic national need for cultural enrichment; rather, financing was motivated by other forces. For example, in response to the large amounts of private donations to the arts, President Taft attempted to establish a Commission for the Fine Arts in 1910.45 The Commission would not fund the arts with governmental funds; instead, the President designed the Commission to channel and appropriate the large amount of private donations to artists.46 Then, as part of the New Deal, Congress created the Work’s Progress Administration (“WPA”) as a nationwide program to finance public art.47 Congress did not design the WPA to promote the arts, but to help the unemployed.48

In the 1940s, with the increased costs of war, congressional funding for the WPA diminished sharply.49 After the war and during the “Red

39. Id. For example, in 1790 the U.S. Marine Band was formed in order to give military splendor for formal ceremonies and in 1800 the Library of Congress was established. Id.
40. Id.
42. See Carrasco, supra note 13, at 1525.
43. The theater was largely subsidized by William C. Ralston, a shipping and railroad baron.
44. TOFFLER, supra note 34, at 169.
45. TOFFLER, supra note 34, at 169-70. In 1881, the Boston Symphony Orchestra was founded by Henry Lee Higginson, a wealthy financier. Id. at 62. Other affluent sponsors of the arts included John Rockefeller, Thomas Corcoran, J.P. Morgan, Solomon Guggenheim, and Andrew Mellon. See Carrasco, supra note 13, at 1525.
46. DUBOFF, supra note 41, at 158.
47. Id. at 159.
48. Id. at 160.
Scare," the State Department organized displays of American art with the purpose of touting the American way to the free world. However, when Congress felt that the objectives of the WPA and the State Department tours were met, they eradicated the programs.

In the 1960s the United States led the world in scientific accomplishments and had the highest standard of living in the world. The federal government was supporting the natural sciences at an astronomical rate compared to federal subsidies for the arts. Moreover, private contributions to the arts were no longer sufficient to properly support art programs. The insufficient funding of the arts resulted in art that was not comparable to that of other countries. Congress was unwilling to tolerate an outside perception of the United States as culturally deficient. Political conditions were ideal for the inception of a direct federal subsidization of the arts as part of President Johnson's Great Society.

**B. The NEA**

In 1965, the drafters of the NEA bill attempted to create an organization unbiased by political factors that would champion only the "best" work and that would not subject recipients of federal funds to governmental control. Congressional opponents of the bill were concerned that governmental sponsorship of the arts would lead to de-

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51. See BAUMOL & BOWEN, supra note 50, at 357.

52. See National Arts and Humanities Special Foundations: Hearings Before the Subcomm. on the Arts and Humanities of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st Sess. 258 (1965) (statement of Dr. Fredrick Darian, Professor of Music, Carnegie Institute of Technology).


54. Id. at 3188. The increased cost of arts production coupled with increasing inflation left the future of the arts in doubt because private individuals were donating less. TAYLOR & BARRESI, supra note 38, at 2. In 1960, the Metropolitan Opera Association was forced to cancel its season after a labor strike. EDWARD C. BANFIELD, THE DEMOCRATIC MUSE 47 (1984).

55. See NETZER, supra note 48, at 3. "The United States suffers from an inferiority complex about its culture." TOFFLER, supra note 34, at 3.


57. Artistic excellence may be the only criterion used by the NEA for grant approval. See The Grant Making Process of the National Endowment for the Arts: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 98th Cong. 2d Sess. 5 (1984) [hereinafter Joint Hearings] (statement of former NEA Chairman Hodsoll).

creased private donations and mediocrity. Artistic freedom surfaced as a recurring theme during the lengthy debates over the bill. The artists wanted to ensure that the federal government would allow artists the freedom to create art that was not of an “official” art form. Some critics of the bill feared that it would create “federal czars over the arts and humanities.” Other artistic and Congressional antagonists of the bill felt that the bureaucratic hand should be “kept from the palate, the chisel and the pen.” In passing the National Foundation on the Arts and Humanities Act (“the Act”), Congress maintained that “[t]he encouragement and support of national progress and scholarship in the humanities and arts, while primarily a matter for private and local initiative, is also an appropriate matter of concern to the Federal Government.”

The Act established the National Foundation on the Arts and Humanities, comprised of the National Endowment for the Humanities (“NEH”) and the NEA. The Act provides for a Chairman of the NEA. The Chairman will award the grants after considering various standards that stress creativity, the preservation of “professional excellence,” “professional standards,” and the applicant’s need for a grant. Most of the Endowment’s funds are in the form of matching grants. These require that half the cost of the project must be contrib-

59. NETZER, supra note 48, at 59. BANFIELD, supra note 54, at 60-61.
60. The concern over federal involvement in the arts is legitimate and has been outlined by Juffras: “[t]he artist should be free to conceive his art in whatever manner he wishes. Artists have revolted against the restrictions of tradition. . . . It is obvious that Western artists are countercultural.” Angelo Juffras, The Sociology of Ancient Art and Some Philosophical Implications, in THE SOCIOLOGY OF THE ARTS 5, 6 (Mildred W. Weil & Duncan Hartley eds., 1975). Cf. “[T]he artist’s point of view, I suppose, has always been reduced to its simplest terms, ‘Give me the money, but do not tell me what to do with it.’” Joint Hearings, supra note 57, at 57-58 (testimony of Charlton Heston).
62. NETZER, supra note 48, at 59 n.14. Artist Larry Rivers remarked that “The government taking a role in art is like a gorilla threading a needle. It is at first cute, then clumsy, and most of all impossible.” TOFFLER, supra note 34, at 188-89.
64. The National Endowment for the Humanities provides grants to encourage scholarship in the humanities. 20 U.S.C. § 958. The distinction between the NEH and the NEA has been described by an NEH staff member as, “Arts deals with people who can write but can’t spell; Humanities supports those who can spell but can’t write.” VIRGINIA P. WHITE, GRANTS: HOW TO FIND THEM AND WHAT TO DO NEXT 90 (1975).
66. Id. § 954(c)(1).
67. Id.
68. Id. § 954(c)(2).
69. Id. § 954(c)(3).
uted by nonfederal sources. One type of matching grant is called the challenge grant, which requires a three-to-one ratio of private support to federal dollars.

An applicant must endure careful scrutiny before the NEA will award a grant. First, the applicant must describe both the subject matter and the anticipated audience of the proposed art, summarize the estimated costs of the project, specify the total amount requested from the NEA, and provide figures regarding the overall fiscal activity, including information about private sources of funding. The applications are usually submitted one fiscal year before the applicant needs the funds. NEA staff members review the application to decide if the applicant has complied with all legal requirements. Then the staff directs the applications to a Peer Advisory Panel that examines the application and gives its recommendations to the National Council. The Council then makes suggestions to the Chairman who is ultimately responsible for granting approval.

Since 1965, Congress has modified the NEA to accommodate both internal and external pressures. The NEA aspirations for a greater budget and significant obligations to large organizations lead to a more formalized grant-making procedure where delegates from diverse backgrounds and communities make funding determinations. Unfortunately, external pressures have not commanded the same positive reaction. Since its inception, there have been seven NEA reauthorization hearings, which have typically been forums for Congress to illustrate its displeasure over arts funding.

C. The 1989 and 1991 NEA Appropriations Bills

During the present tense climate between the arts community and

70. Virginia P. White, Grants for the Arts 64 (1980).
71. Id. at 65.
74. Id. The selection of a chairman, members of the Panels and Council are made after a thorough process. See Riggio, supra note 49, at 637-38.
75. See Note, supra note 32, at 1974.
77. See Note, supra note 32 at 1974-75.
78. See sources cited supra note 13.
80. Id.
the right wing, Congress has again had to confront the issue of appropriations for the NEA. In 1989, Congress interjected explicit content restrictions in the NEA's 1990 fiscal funding bill. The bill stipulated that no funds authorized for appropriation for the NEA, or the NEH, may be used to "promote, disseminate, or produce [art that the NEA may consider] obscene, including but not limited to, depictions of sadomachism, 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." The 1989 Bill contained serious constitutional infirmities because it infringed upon protected speech.

President Bush took a "half step toward free speech" when he signed into law the 1991 Appropriations Bill, which funds the NEA for an additional three years. The new law is free of the explicit restrictions that the 1989 Bill imposed on the NEA. However, the new statute requires the NEA Chairman to ensure that grants are only made after "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." It additionally provides that if a court deems an NEA funded project obscene, the artist or institution that produced the art must repay the grant to the NEA or lose the possibility of receiving future grants for three years.

Recently the NEA received a boost of its funding of the popular and highly acclaimed Civil War series on PBS. Yet, John Frohnmayer and the NEA have once again come under fire by Rev. Donald Wildmon, president of the American Family Association. He claims that the NEA-funded movie "Poison," winner at this year's Sundance Film Festi-

81. See supra notes 4-11 and accompanying text.
83. A District Judge in Los Angeles ruled that the mandatory obscenity pledge was unconstitutional. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Calif. 1991). The NEA argued that it was not restricting free expression because the recipients could just go elsewhere for their grants. Id. at 785. But, the court disagreed stating that, "[t]his is the type of obstacle in the path of the exercise of fundamental speech rights that the constitution will not tolerate." Id.
84. While obscene speech has been construed as being unprotected by the first amendment, the production and even sale of depictions of sadomachism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts without serious literary, artistic, political, or scientific value is protected by the Constitution. Miller v. California, 413 U.S. 15, 24 (1973). See infra notes 151-88 and accompanying text.
val, "includes explicit porno scenes."90 Wildmon is referring to a section of the movie where a young thief is sent to prison and while attempting to escape is raped, brutalized and shot. Frohnmayer acknowledged that the NEA did give $25,000 for the film's editing. Yet, he called the film nonobscene and not prurient when taken as a whole. Wildmon later admitted that he had not seen the film.91

During the 1992 presidential primaries, Patrick Buchanan took a page out of President Bush's book on campaigning92 when he criticized President Bush for subsidizing the NEA, which he labeled an "upholstered playpen of the arts and crafts auxiliary of the Eastern liberal establishment"93 that championed "filthy and blasphemous"94 works. To further express his views, Buchanan also aired television commercials that accused the NEA of advocating art that "exploited children and perverted the image of Jesus Christ" to a backdrop of Marlon Riggs' documentary entitled "Tongues Untied."95 One day after the issue arose, John Frohnmayer announced his retirement from the NEA, effective May 1, 1992.96 It is likely that Anne-Imelda Radice will be named the acting director of the NEA.97 She is the current NEA deputy director and is seen by many as a conservative who would impose content restrictions on NEA grants.98

II. THE FIRST AMENDMENT AND THE DECENCY REQUIREMENT

The function of the Constitution is not to enforce popular opinions, but instead to defend unpopular opinions and ideas from majoritarian

90. Id.
91. Id.
92. There is a clear correlation between the Buchanan tactics of criticizing Bush for his funding of the NEA, and the 1988 presidential campaign, when Bush ran commercials that attacked Michael Dukakis for the Massachusetts early furlough program, that released convicted rapist Willie Horton. Michelle Quinn, Buchanan TV Ad Angers Filmmaker, L.A. TIMES, Feb. 29, 1992, at F4.
93. Deborah Zabarenko, Art or Pornography: Unlikely Battlefield for Presidential Race, REUTERS, Mar. 2, 1992. This type of bashing has been labeled "politiporn." See Murray Kempton, Long Walk Down the Low Road, NEWSDAY, Mar. 1, 1992, at 39.
96. Id. It is more accurate to state that White House Chief of Staff, Samuel Skinner, demanded Frohnmayer's resignation in an attempt to diffuse the criticism of Bush. As Congressman Sidney Yates stated, "[t]here is no doubt that he is one of the casualties of the New Hampshire election. The people in the White House want to avoid possible vulnerability from the conservative wing of the party." Buchanan Celebrates Exit of Embattled Arts-Fund Head, THE GAZETTE (Montreal), Feb. 24, 1992, at A8.
97. Id.
98. Id.
limitations on individual liberty. The framers of the Constitution presumed that the legislative branch would represent majority views while the first amendment would protect the views of minorities. The first amendment comes into play when the majority convinced beyond any doubt that something should not be said, written, or expressed would like to silence the minority. The first amendment provides that “Congress shall pass no law . . . abridging the freedom of speech.” Speech has been defined as any expression of thoughts through conduct. Accordingly, governmental suppression or censorship of written, spoken, symbolic, and artistic expression has often been curbed when the Court invoked the free speech passage.

Every taxpayer has the right to ensure that the government is not appropriating their tax dollars for unlawful activities. However, it is not now, nor has it ever been, illegal to produce art that merely offends some subjective standard of decency. The decency requirement is a vague, content-based regulation of protected nonobscene artistic speech. The decency requirement, as a condition upon the receipt of an NEA subsidy, amounts to an obstacle in the path of free speech.

A. First Amendment Methodology

In the first amendment context, government restrictions imposed be-

99. See, e.g., Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).
101. U.S. Const. amend. I.
105. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (burning the American flag was protected); Spence v. Washington, 418 U.S. 405 (1973) (taping a peace symbol to an upside down American flag was protected expression); Cohen v. California, 403 U.S. 15 (1971) (the words, “Fuck the Draft” worn into court was protected); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing black armbands to protest the Vietnam war was protected expression); Stromberg v. California, 283 U.S. 359 (1931) (flying red flag as a symbol of opposition to the government was protected expression).
107. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 909-10, § 12-16 (2d ed. 1988).
cause of the message communicated have historically been subject to intense scrutiny; however, the Court gives restrictions that limit communication without regard to the message conveyed a lower level of judicial review.\textsuperscript{108} The two types of restrictions on speech are content-based and content-neutral.

Content-neutral restrictions do not make any reference to the content of the speech, the viewpoint, or the opinion of the speaker.\textsuperscript{109} Traditionally, the Court has applied either the time, place and manner test or the incidental test to content-neutral regulations.\textsuperscript{110} The Court introduced the time, place and manner principle in the late 1930s and 1940s.\textsuperscript{111} Today the test requires that all content-neutral regulations be justified by a "significant government interest" and must preserve "ample alternative channels" for the expression of the interest.\textsuperscript{112} The incidental regulation standard provides that if the claimed conduct is actually pro-


\textsuperscript{109} Cox v. New Hampshire, 312 U.S. 569 (1941). In Cox, the Court upheld a New Hampshire statute that required all participants to obtain a license before marching in a parade or procession on a public street. Id. The Court reasoned that "[i]f a municipality has authority to control the use of its public street for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets." Id. at 576.


\textsuperscript{112} Virginia Bd. Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); see also United States v. Grace, 461 U.S. 171 (1983) (a protester who was distributing leaflets containing the text of the first amendment on the steps of the Supreme Court proved that the federal statute, which prohibited that type of activity on the grounds, was unconstitutional as applied where the Court found the statute to be content-neutral); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (political demonstrators unsuccessful at challenging camping permit requirements for occupation in tent cities because the statute was found content-neutral for time, place and manner); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981) (Court found content-neutral a regulation that required sales, distribution and solicitation activities confined to certain "fixed" booths.). The Court requires that substantial restrictions have an equally substantial state interest. See Schad v. Mount Ephraim, 452 U.S. 61 (1981); NAACP v. Button, 371 U.S. 415 (1963). Further, the Court will not view a content-neutral restriction as neutral if it is applied in such a way that it singles out certain speech. See Niemotko v. Maryland, 340 U.S. 268 (1951). The Court will prevent the government from using content-neutral regulations as a guise for content regulation. Carey v. Brown, 447 U.S. 455, 462 (1980). See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (Court employed content-based test where it found that the school adopted a prohibition on armbands after learning of the student's plan of protest.).
tected then the Court will decide what amount of protection is proper.  

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." This often-cited passage is the cornerstone for evaluating content-based restrictions. However, in application the Court has never literally followed this principle. Instead the Court has followed a different approach when ruling in this area: if the speech is fully protected the Court will require the government to prove the justification for the restriction against a heavy burden; yet, if the speech is unprotected the government only needs to show a rational basis for the restriction.

When the government attempts to control the expression of a specific position, the Court will employ a higher level of scrutiny. This type of regulation will nearly always be struck down because it amounts to censorship. The courts have held that, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . if there be any danger that the people cannot evaluate the information and arguments advanced, it is a danger contemplated by the Framers of the First Amendment." Further, this type of restriction reduces the free marketplace of ideas, prevents individuals from searching for the truth, prevents participa-

113. Day, supra note 110, at 500 (citing Laurie Magid, Note, First Amendment Protection of Ambiguous Conduct, 84 COLUM. L. REV. 467, 468 (1984)).
114. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted).
116. See Tribe, supra note 107, at 832.
118. See, e.g., Schacht v. United States, 398 U.S. 58 (1970) (Court found unconstitutional a statute that forbid actors from wearing military uniforms in a movie or play if the portrayal tended to dishonor the military.).
120. This concept has been credited to Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919), where he pronounced:
Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.
Id. (emphasis added).
However, sixty years earlier John Stuart Mill explained that there is an important benefit in being exposed to ideas and attitudes different to one's own. JOHN STUART MILL, ON LIBERTY ch. 2 (Norton ed. 1975).
tion in self-governance,¹²² and attainment of self-fulfillment.¹²³

Through the decency requirement, the NEA is forced to treat art that violates a standard of decency differently from the way it treats other art. This restriction must be examined by looking to the content of the speech. Therefore, the restriction will be characterized as content-based and accordingly any unconstitutional infringement will be examined under a high level of scrutiny. For purposes of deciding if art that violates "standards of decency" can be constitutionally regulated, this Note will next attempt to classify that type of work by discussing obscene speech and nonobscene indecent speech.¹²⁴

The Supreme Court has not considered all forms of speech as equal. Justice Holmes first articulated this idea in 1919 when he explained that the first amendment would not protect someone from falsely screaming fire in a theater.¹²⁵ The hierarchy established in Chaplinsky v. New Hampshire initiated only a "two-level theory."¹²⁶ Under this concept some forms of expression are considered low-value and are thus entitled to less protection than the high-value or more traditional forms of expression.¹²⁷

However, since Chaplinsky, the Court has gradually adopted a hierarchy of speech in first amendment law.¹²⁸ The only clear characterizations are at the ends of the spectrum. Political speech is generally seen as highly protected,¹²⁹ while obscene speech,¹³⁰ child pornography¹³¹ and fighting words¹³² are left totally unprotected by the first amendment. In

¹²⁴. Professor Sunstein suggests that in deciding whether certain categories constitute "low value speech", the cases suggest the relevance of the following: 1) whether the speech is "far afield from the central concerns of the first amendment"; 2) whether the speech is cognitive or noncognitive; 3) whether the speaker is attempting to communicate a message; and 4) whether the government is "acting for constitutionally impermissible reasons." Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 603-04.
¹²⁶. 315 U.S. 568 (1942).
¹²⁸. See, e.g., Nahmod, supra note 125, at 222.
¹³². Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). However, even though Chaplinsky has never been expressly overruled and may reemerge, it seems that fighting words are now consid-
the middle are a number of other types of speech, including: commercial speech, defamatory speech, and indecent or offensive speech.

B. Obscenity

Public concern with the legal repression of obscene materials is a relatively novel occurrence. The Framers of the Constitution did not consider the issue monumentally serious, possibly because many of them were buyers or makers of lewd literature. Thus, it took the Supreme Court many years to finally address the obscenity issue; it did not pronounce an opinion on the topic until 1948.

However, throughout constitutional history the lower federal courts considered obscenity significant and heard many cases which have a bearing on current obscenity law. At first, American courts recognized obscene speech as speech, and thus allowed it to be regulated only to protect children and other vulnerable members of society. This concept has its origin in the English case of Regina v. Hicklin, cited as authoritative support in many early obscenity cases. In Hicklin, Lord Chief Justice Cockburn defined obscenity as any material that has the "tendency . . . to deprave and corrupt" its most defenseless potential viewers. Under this test works such as D. H. Lawrence's *Lady Chatterly's...
Lover'\textsuperscript{143} and Theodore Dreiser's An American Tragedy\textsuperscript{144} were suppressed in Massachusetts.

However, in 1913 Judge Learned Hand questioned the Hicklin standard because he felt the definition was based on Victorian morals and not the morals of the day.\textsuperscript{145} In 1933, in United States v. One Book Called "Ulysses",\textsuperscript{146} a federal court outright rejected the Hicklin standard as a test for obscenity. The Ulysses Court found two problems with the Hicklin standard. First, it effectively constrained adults to observing materials only suited for children.\textsuperscript{147} Second, it did not require a court to consider the work as a whole, and thus, obscenity could be found based solely on isolated sections of a work.\textsuperscript{148} Over the next twenty years more courts rejected the Hicklin standard while others accepted it.

This section will attempt to unravel obscenity law by focusing on three seminal Supreme Court decisions: Roth v. United States,\textsuperscript{149} Memoirs v. Massachusetts,\textsuperscript{150} and Miller v. California.\textsuperscript{151} In Roth v. United States,\textsuperscript{152} the Supreme Court addressed the split in the circuits over an appropriate obscenity test. Yet it only managed to further confuse the legal definition. However, this was the first case where the obscene speech was expressly found\textsuperscript{153} to no longer be entitled to first amendment protection.\textsuperscript{154} The Court reached this result only after finding obscene speech "utterly without redeeming social importance."\textsuperscript{155} Obscenity now joined fighting words as unprotected by the first amendment.\textsuperscript{156} In finding that obscenity was beyond the shelter of the Constitution, the Court had to espouse a definition for obscene speech. The Roth standard for obscenity centered on "whether the average person, applying contemporary community standards, [found that] the dominant

\textsuperscript{143} Commonwealth v. DeLacey, 171 N.E. 455 (Mass. 1930).
\textsuperscript{144} Commonwealth v. Friede, 171 N.E. 472 (Mass. 1930).
\textsuperscript{145} United States v. Kennerly, 209 F. 119, 120 (C.C.S.D.N.Y. 1913).
\textsuperscript{146} Id. 72 F.2d 705 (2d. Cir. 1934).
\textsuperscript{147} Id. at 707-08.
\textsuperscript{148} Id.
\textsuperscript{149} 354 U.S. 476 (1957).
\textsuperscript{150} 383 U.S. 413 (1966).
\textsuperscript{151} 413 U.S. 15 (1973).
\textsuperscript{152} 354 U.S. 476, 485 (1957).
\textsuperscript{153} The Supreme Court alluded to this in an earlier case, Chaplinsky v. New Hampshire, where it declared that "lewd and 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." 315 U.S. 568, 572 (1942).
\textsuperscript{154} Roth, 354 U.S. at 485.
\textsuperscript{155} Id. at 484.
\textsuperscript{156} Fighting words are words directed to the hearer which would have a tendency to cause acts of violence by the person to whom the remark is addressed. They are not protected because by their very utterance they inflict injury or tend to incite an immediate breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
theme of the material taken as a whole, appeals to the prurient interest."\textsuperscript{157} The Court also stated that obscenity was not "synonymous" with sex and that artistic, literary, or scientific works could be obscene.\textsuperscript{158}

Succeeding obscenity cases before the Court have done nothing more than attempt to fill in the omissions and explain the ambiguities in Roth.\textsuperscript{159} For example, nine years later\textsuperscript{160} in Memoirs v. Massachusetts,\textsuperscript{161} the Court, in a plurality opinion, expanded the definition of obscenity and pronounced that the following three factors must "coalesce" before material will be found obscene and thus outside of constitutional protection: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."\textsuperscript{162}

Between 1966 and 1973 the Court did not uphold any obscenity conviction it reviewed\textsuperscript{163} that dealt with distributing sexual materials to adults, except those cases involving "hard core" pornography.\textsuperscript{164} Fi-

\textsuperscript{157.} Roth, 354 U.S. at 489. The Court defined prurient interest as any "material having a tendency to excite lustful thoughts." Id. at 487 n.20. Justice Brennan stated for the majority that this definition is essentially the same as the definition set forth by the American Law Institute in Model Penal Code § 207.10(2). Roth, 354 U.S. at 487 n.20; see also William B. Lockhart & Robert C. McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 55-58 (1960).

\textsuperscript{158.} Roth, 354 U.S. at 487.


\textsuperscript{160.} Although none of the majority decisions between 1957 and 1966 added anything considerable to the standard, two opinions fostered some views about the standard that were later confirmed by the majority in Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (Brennan & Goldberg, JJ., plurality) advocated a social value theory, and Manual Enterprises, Inc. v. Day, 370 U.S. 478, 486 (1962) (Harlan & Stewart, JJ., plurality) supported a theory of offensiveness.

\textsuperscript{161.} 383 U.S. 413 (1966).

\textsuperscript{162.} Id. at 418.


\textsuperscript{164.} See, e.g., Mishkin v. New York, 383 U.S. 502 (1966). The Court later cited the following as example of "hard core": "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Miller v. California, 413 U.S. 15, 25 (1973).
nally, in the 1973 landmark case of *Miller v. California*, the Court, reorganized with four Nixon appointees, agreed on an appropriate obscenity test. In revising the *Roth-Memoirs* test, the Court announced that to be considered obscene a trier of fact must follow the basic guidelines of:

(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.

In *Paris Adult Theater I v. Slaton*, decided on the same day as *Miller*, the Court held that distribution of obscene materials could be banned, even where the exposure was limited to consenting adults. This Court based its holding on the government's "right . . . to maintain a decent society." Three additional obscenity cases were decided during the same term which applied the *Miller* standard to: private interstate transportation of films; importation for an importer's private use; and printed descriptions of sexual activities. Since *Miller*, two cases have further modified the test. In *Smith v. United States*, the Court stressed that prurient appeal and patent offensiveness were questions of fact to be evaluated by applying contemporary community standards. Then in *Pope v. Illinois*, the Court decreed that the third *Miller* prong (i.e. serious value) should be decided according to a reasonable person standard. Additionally, the Court has emphasized that the boundary between protected and unprotected expression must be "finely drawn" and requires "sensitive tools" for any separation. As a result, statutes

169. Id.
170. Id. at 59 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).
175. 431 U.S. at 292-93.
devised to restrict obscenity must be cautiously designed to avoid the dangers associated with a "chilling effect" that results in reducing the production of nonobscene art.\textsuperscript{179}

The definition of obscenity has been defined and modified by the Court several times in order to reach a generally acceptable definition.\textsuperscript{180} As Justice Brennan's dissent in Paris\textsuperscript{179} reflects, there are many problems with the current test for obscenity. Justice Brennan, the author of the Roth decision, concluded that even though there have been many modifications to the definition of obscenity, they were invariably and unconstitutionally vague.\textsuperscript{181} He specifically argued that the standards failed to give adequate notice regarding what conduct was prohibited and therefore had a chilling effect upon speech.\textsuperscript{182} This view has since been advocated by Justice Scalia when he noted "the need for reexamination of Miller."\textsuperscript{183}

Yet, the Court has struggled with the Roth-Memoirs-Miller obscenity test for so long that it is unrealistic to believe that it will be overruled. Instead, the Court will likely add to and subtract from the test so many times that eventually it will become obsolete, except as a footnote in the long history of obscenity tests. Until the Court realizes that obscene speech is speech and should be protected, litigants are forced to apply the vague and unhelpful Roth-Memoirs-Miller obscenity test.\textsuperscript{184}

The current NEA Appropriations Act requires that the Chairman only grant recipients funds for art that does not offend standards of decency. Even though Congress was attempting to obstruct the funding of obscene art, in its haste Congress passed the decency provision which results in catching nonobscene art in the web of unprotected speech. It is unlikely that the average person applying contemporary community standards will necessarily find that all art that violates a standard of de-


\textsuperscript{181} Justice Harlan remarked, a decade after Roth, that "obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Ginsberg v. New York, 390 U.S. 676, 704-05 (1968). "[In the] thirteen obscenity cases [since Roth] in which signed opinions were written, [there] has been a total of 55 separate opinions among the Justices." \textit{Id.} at 704 n.1.

\textsuperscript{182} Paris Adult Theater I v. Slaton, 413 U.S. 49, 86 (Brennan, J., dissenting). Justice Brennan also declared his dissatisfaction with the Roth obscenity approach. He noted that it "cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach." \textit{Id.} at 73-74.

\textsuperscript{183} \textit{Id.} at 86-88.


\textsuperscript{185} TRIBE, supra note 107, at 909.
cency also appeals to the prurient interest. It is also doubtful that all art that breaches a standard of decency also depicts or describes sexual conduct in a patently offensive way. However, even assuming arguendo that a standards of decency provision meets the first two prongs of the Miller test, no piece of art, when taken as a whole, could lack important or significant artistic value. Few pieces of art have ever been construed as obscene because of the difficulty in jumping over the hurdle of the third prong of Miller.

Many people believed that the NEA-funded Mapplethorpe exhibit was obscene. However, a jury in Cincinnati, one of the most conservative cities in the country, found that the exhibit was not obscene. Whether they would have found that it violated a standard of decency is not known. However, it is apparent that Congress and the NEA cannot label art that merely offends some arbitrary standard of decency as obscene and leave it without any protection whatsoever. Thus, we must determine if art that would violate a standard of decency is unconstitutional even though it is classified as indecent speech.

C. Nonobscene Indecent Speech

Over the last twenty years the Court has followed a policy of treating nonobscene offensive or indecent speech with less protection than other speech. The framework for this view originated in a 1942 case where Justice Murphy, speaking for the Court, explained that certain classes of words by their very nature cause injury. Therefore, he stated, preventing the use of these words would not prompt any constitutional problems. The Court defended the repression of these words by balancing the importance of the first amendment against the societal interest in preventing a listener's emotional injury.

186. The definition of "serious" has never been fully explained by the Court. See Elkin, supra note 177, at 855. However, it is absurd to reason that the Court intended to define obscenity on the ability of the work to invoke laughter.


189. Emerson suggests that the government could regulate obscenity to protect individuals against the "shock effect" of unwanted exposure to obscene speech. He believes that "a communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault." Emerson, supra note 123, at 496. However, this line of reasoning is flawed.


192. Id. at 572.

193. Id.

When the Roth Court declared only obscene speech unprotected by the first amendment, it implied that the first amendment would protect less explicit sexual or offensive speech. The Court has generally upheld this proposition when the regulation concerned profane speech. However, the Court's treatment of sexually indecent speech has proven that the Court will not always follow this rule, unless the Court believes the speech has some artistic merit.

In 1971 the Court upheld the implication that the first amendment would protect nonobscene speech when it found offensive language protected in Cohen v. California. In Cohen, the Court overturned a conviction of a protester who wore a jacket painted with the words "Fuck the Draft" in the local courthouse. The Court based its decision on the following factors: the speech was political, the context of the speech was not erotic, and there was no captive audience.

Six years later, in FCC v. Pacifica Foundation, the same issue arose again, this time in the context of whether the Federal Communications Commission had the power to regulate a nonobscene, but profane radio broadcast. A radio station owned by Pacifica broadcast George Carlin's twelve minute monologue, titled "Filthy Words," at 2:00 in the afternoon, when children were supposedly in the audience. A man who heard part of the broadcast while driving with his son complained to the FCC. The FCC did not assess any formal charges, but it did place

198. Id.
199. Id. at 19-22.
201. The seven dirty words "you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever . . . were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter)." Id. at 751. The entire monologue is reprinted as an appendix to the Pacifica opinion. Id. at 751-55.
202. Id. at 732. While the complaint was brought by a man who heard the broadcast while in the car with his son, there is no evidence that any other children heard the broadcast. Id. at 730. To the contrary, no one could reasonably assume that there were children in the listening audience at 2:00 in the afternoon because most of them are in school at that time of the day. Also, the radio station, WBAI, does not play popular "top forty" music, instead it targets an adult, left-to-radical, upper-middle-class audience. TRIBE, supra note 107, at 937 (citing Nicholas von Hoffman, Nine Justices for Seven Dirty Words, MORE, June 1978 at 12; Amicus Brief of American Broadcasting Companies, Inc.).
203. He did not hear the warning at the beginning of the show, which explained that the broadcast included "sensitive language which might be regarded as offensive to some." Pacifica, 438 U.S. at 730.
an order granting the complaint in Pacifica's licensing file for possible future use.\textsuperscript{204} The FCC based its regulatory power on a federal statute that allows the regulation of "any obscene, indecent or profane language by means of radio communication."\textsuperscript{205} Justice Stevens, writing for the majority, held that the FCC order did not violate the first amendment.\textsuperscript{206} The Court found that the government could regulate "indecent" speech even though it was not obscene.\textsuperscript{207} Its justification for the regulation was the unique properties of the broadcast industry, which could intrude into the home, coupled with the potential harm to children resulting when they hear profane speech. Therefore, it appears that profane speech will be protected unless the justification for the regulation is the protection of minors in a captive audience.\textsuperscript{208} Even profane speech that has the purpose of sexual excitement has been held to the same standard.\textsuperscript{209}

Yet, in the 1976 case of \textit{Young v. American Mini Theaters},\textsuperscript{210} the Court was faced with the question of how to handle sexually indecent speech. In that case Justice Stevens laid out the framework for the treatment of nonobscene sexual speech that the Court has applied since.\textsuperscript{211} In \textit{Young}, the Court addressed the question of the constitutionality of content-based zoning ordinances in Detroit. Specifically, the ordinances directed that all "adult theaters"\textsuperscript{212} must be located a particular distance from "regulated uses."\textsuperscript{213} The purpose of the regulation was to scatter the theaters throughout the city so that adult theaters would not converge in one area.\textsuperscript{214} The regulation did not purport to regulate obscene

\textsuperscript{204} \textit{Id.}
\textsuperscript{206} \textit{Pacifica}, 438 U.S. at 750.
\textsuperscript{207} \textit{Id.} at 741.
\textsuperscript{208} See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (nominating speech at student assembly held unprotected); FCC v. Pacifica Found., 438 U.S. 726 (1978) (broadcast of offensive speech repeated over and over held unprotected where the regulation is for the protection of children).
\textsuperscript{209} See Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (interstate transmission of indecent commercial telephone messages (dial-a-porn) found protected because a child would have to take some affirmative action to receive the indecent speech).
\textsuperscript{210} 427 U.S. 50 (1976).
\textsuperscript{212} Theaters were classified as adult if they showed movies that highlighted certain sexual activities or anatomical areas. For definitions of these terms see \textit{Young}, 427 U.S. at 53 n.4.
\textsuperscript{213} The theater could not be located within 1,000 feet of another adult theater, "mini" theater, adult bookstore, cabaret, bar, hotel, motel, pawnshop, or pool hall. The theater also could not be within 500 feet of any area zoned for residential purposes. \textit{Id.} at 52 nn.2-3.
\textsuperscript{214} \textit{Id.} at 54-55. The Detroit Common Council believed that a concentration of "adult" movie theaters in one area led to the secondary effects of deterioration and crime. \textit{Id.} at 55.
speech and accordingly does not include a provision for a judicial determination of obscenity.

The Court upheld the constitutionality of the ordinance, stating that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." Justice Stevens justified the second-class treatment of borderline speech by maintaining that "few people would march [their children] off to war for a person's right to view nonobscene, erotic materials in theaters of their choice." Stevens then found the nonobscene films regulated in Young on the borderline and undeserving of first amendment protection.

The opinion does not define what sexual expression the Court will include on the border between pornography and artistic expression. The lack of a definition leads to the same difficulty that the Court has with obscenity where the terms have not and perhaps cannot be defined. Another problem with the opinion is that Justice Stevens finds pornography unprotected, though the Court has explicitly given it protection. The Court has stated that "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment" and that "sex and obscenity are not synonymous . . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself [a] sufficient reason to

215. "This case does not involve . . . a regulation of obscene expression or other speech that is entitled to less than full protection of the First Amendment." Young, 427 U.S. at 84-85 (Stewart, J., dissenting).
216. Id. at 85 n.3 (Stewart, J., dissenting).
217. It is interesting to note the Court's use of the word pornography instead of obscenity. In Miller the Court distinguished pornography from obscenity: "The word now means '1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.' . . . [Obscene material is] 'offensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome.' " Miller v. California, 413 U.S. 15, 19 n.2. (1973) (quoting Oxford English Dictionary (1933 ed.)). As Frederick Schauer states: "certain uses of words, although speech in the ordinary sense, clearly are not speech in the constitutional sense . . . . [Speech] is designed to appeal to the intellectual process. . . . [H]ardcore pornography is designed to produce a purely physical effect . . . . hardcore pornography is sex, [not speech]." Frederick Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 GEO. L.J. 899, 906, 922, 923, 926 (1979), quoted in GEOFFREY R. STONE, CONSTITUTIONAL LAW 1206 (2d. ed. 1991); see also ANDREA DWORIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1989).
219. Id. at 70. This statement suggests that the only values worth protection under the first amendment are those which are so important that one would send their children to war over the loss of the values.
220. Id. at 70-73.
221. See supra text accompanying note 182.
223. Id. (quoting Jenkins v. Georgia, 418 U.S. 153 (1974)).
deny [that] material the constitutional protection of freedom of speech and press." 224 Justice Stewart dissented 225 from the Young majority and insisted that if Steven's justification was correct then the first amendment would only be reserved for "expression that more than a 'few of us' would take up arms to defend, [and that] then the right of free expression would be defined and circumscribed by current popular opinion." 226

Ten years later in City of Renton v. Playtime Theaters, Inc., 227 the Court returned to the issues raised in Young with the consideration of a similar regulation. It prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, or park, and within one mile of any school. 228 In this case the Court, claiming to base its holding on Young, 229 viewed the regulation as content-neutral 230 and upheld it. The Court did not explicitly mention Stevens' borderline speech theory, but it still treated the nonobscene sexual speech as unprotected.

More recently in FW/PBS, Inc. v. City of Dallas, 231 six justices of the Court found that licensing and zoning schemes for regulation of adult bookstores violated the first amendment where the government did not follow the proper procedural safeguards. 232 The case was decided on prior restraint grounds. Still, the case is relevant because it outlines the Justices' different opinions about the treatment of adult bookstores. 233

The nude dancing cases provide an example of the treatment of sexually indecent artistic speech. 234 Dancing is an artistic form of speech,
and accordingly the Court has afforded it more first amendment protection than adult theaters. The first case where the Court had an opportunity to confront the issue of nude dancing was *California v. LaRue*. In that 1972 case, the issue involved a regulation declaring that no liquor shall be served in places where "certain grossly sexual exhibitions are performed." The majority, however, skirted around the issue of nude dancing and upheld the state statute under the twenty-first amendment. Nonetheless, Justice Marshall, in his dissent, argues that the regulation should have been held unconstitutionally overbroad because it touches both indecent and obscene speech. While a majority of the Court did not agree with Justice Marshall in *LaRue*, the Court came around a few years later in *Doran v. Salem Inn, Inc.* where it found a regulation that prohibited nude dancing in all public places to be overbroad. The Court stated that nude dancing is entitled to first amendment protection only "under [the] same circumstances." However, in *Schad v. Mt. Ephraim*, the Court found a zoning regulation that attempted to prohibit all live entertainment overbroad because all live entertainment includes nonobscene nude dancing that is otherwise protected by the first amendment.

The most recent Supreme Court nude dancing case is *Barnes v. Glen Theater, Inc.*, in which the Court allowed nude dancing to be regulated, even though it fell within the "outer perimeters of the First Amendment." Thus, the Court has shifted from a view in which nude dancing was not protected, to an ideology where it may be protected, to a doctrine where it is protected, to a result where it is protected.

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236. *Id.* at 119 (Stewart, J., concurring).
238. 422 U.S. 922 (1975).
239. *Id.* at 932.
241. *Id.* at 74. In a case involving the modeling of a child the Court upheld the regulation. *Massachusetts v. Oakes*, 491 U.S. 576 (1990). However, in their dissent, three members found nude modeling protected. *Id.* at 590 (Brennan, J., dissenting).
243. *Id.* at 2460. For the first time the Court applied United States v. *O'Brien*, 391 U.S. 367 (1968), to a specific proscription on individual conduct. *Id.* at 2472 (White, J. dissenting). It then found that nude dancing could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest, as long as that interest is unrelated to the content of the expression. *Id.* at 2460-63.
protected yet can be infringed.\textsuperscript{247} It is doubtful that the law in this area has come to a rest or will be stabilized as long as the Court refuses to completely protect low-value speech as speech.\textsuperscript{248}

Considering the \textit{Young}, \textit{Renton}, and \textit{Glen Theater} holdings, it is clear that the Court will give speech that lies somewhere between art and pornography less than full protection under the first amendment, especially where the speech is sexual in nature. However, art would appear to increase one’s self-fulfillment more than nude dancing or adult theaters. Additionally, it is not for the legislature to decide if this art is worthy, but it is for individuals themselves to choose. Accordingly, the amount of protection assigned to art that violates a standard of decency should be greater than that afforded to adult theaters and nude dancing that would violate the same standard of decency. Justice Stevens’ borderline theory provides the parameters of indecent speech as artistic indecent speech and pornographic indecent speech. The Court has followed this theory by leaving speech that it deems pornographic (adult theaters) unprotected, while protecting speech that it believes to have some artistic merit (nude dancing). Indecent art should be treated as deserving at least as much protection from regulation as nude dancing is afforded. Neither nude dancing nor indecent art is obscene. Also, both the nude dancing regulations and the decency clause are aimed at preventing nonobscene sexual speech. These two types of regulations differ in that nude dancing can be seen as having the purpose of sexual arousal, while art has as its purpose mental stimulation. Therefore, the restriction on nonobscene, indecent art should be seen as unconstitutional because it infringes upon protected speech.

III. VAGUENESS

The most common free speech claims of invalidation are overbreadth and vagueness. The 1991 NEA Funding Bill provides a textbook example of vagueness by requiring the Chairman to censor art before it is given funding. It is not unusual for censorship bodies to embrace vague language; the blurred borders of vague wording permits personal and prejudicial decisions by the group. The 1991 NEA Appropriations Bill is vague because it employs language that could be interpreted in so many different ways that it erratically forces people of “common intelligence” to “guess as to its meaning.”\textsuperscript{249} Vague statutes are void because the un-

\begin{footnotesize}
248. Tribe, supra note 107, at 909-10.
certain language punishes the innocent without giving fair warning.\textsuperscript{250}

The NEA Appropriations Bill requires the chairman to ensure that an artist adheres to the "standards of decency."\textsuperscript{251} "Decency" is an ambiguous and abstract term that has had many different meanings attributed to it. It has been defined as "whatever is proper or becoming: standards of propriety."\textsuperscript{252} Propriety in turn has been defined as "socially acceptable in conduct, behavior, [and] speech."\textsuperscript{253} Everyone naturally assigns different meanings to "proper," "becoming," and "socially acceptable." Therefore, one would expect Congress to define what it meant when it directed that the Chairman apply the term to a claimant's proposed art. However, Congress did not supply any definition for the phrase in the Act.\textsuperscript{254}

One cannot even guess at what Congress intended when it passed the Amendment. If members of Congress were asked which art deserves federal grants there probably would be different answers from each member of the Senate and House of Representatives. The problem arises because Congress could not agree on which art was actually deserving of funding and then passed this arbitrary "standards of decency" clause as a means of pleasing the fundamentalist right wing.\textsuperscript{255}

It is possible that Congress intended the definition used in the Restatement (Second) of Torts that requires "extreme" or "outrageous" conduct similar to what is required for an emotional distress claim.\textsuperscript{256} The Restatement definition was adopted in the emotional distress definitions of several states;\textsuperscript{257} Florida,\textsuperscript{258} Maryland,\textsuperscript{259} Massachusetts,\textsuperscript{260} side, Hoffman Estates, Inc., 455 U.S. 489 (1982); Anthony G. Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960).

250. U.S. CONST. amend. V; U.S. CONST. amend. XIV. Due process demands that proper notice be given before punishment. A vague statute violates the procedural aspects of the due process clause because it does not give adequate notice to individuals prior to punishment.


252. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 584 (1981); see also BLACK'S LAW DICTIONARY 366 (5th ed. 1979).

253. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1819.

254. During the congressional debates concerning NEA funding Representative Conte stated that "[d]ecency" is not a word easily definable in legal terms." 136 CONG. REC. H12,417 (daily ed. Oct. 27, 1990). Congressional use of the word elsewhere does not give the reader guidance. Congress has recently used the term in debates over the Gulf War where a member of Congress mentioned that Saddam Hussein violated "standards of decency" when he used chemical weapons against his own people. 136 CONG. REC. H11,512-02 (statements of Rep. Levine) (daily ed. Oct. 22, 1990).

255. See supra notes 3-11.

256. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

257. In California, however, the courts have used the "standard of decency" terminology as an aid in determining whether a party has made a contract in bad faith. See, e.g., Neal v. Farmers Ins. Exch., 582 P.2d 980, 986 n.5 (Cal. 1978) (violation of community standards of decency or bad faith can be equated with bad faith acquired from the Restatement of Contracts). It has also utilized the
Utah,261 and Virginia.262 However, it would be difficult for the NEA to administer grants only to art that is not "extreme" or "outrageous." Often modern art is attempting to shock society by being extreme and outrageous.263 Therefore, application of this definition of "standards of decency" to NEA grants is theoretically improbable and practically unworkable.

The Supreme Court has used the language "standards of decency" frequently264 in the eighth amendment context. The Court has established265 the principle that in defining cruel and unusual punishment, it will look to "the evolving standards of decency that mark the progress of a maturing society"266 as a barometer of contemporary values.267 The Court looks to Congress for the prevailing standards of decency268 because it feels that Congress possesses the most reliable and objective source of contemporary views.269

However, one cannot look to the eighth amendment cases for guidance on a meaning for "standards of decency." It appears that the Court is using the term to transfer death penalty accountability to Congress and in turn to the public.270 Conceivably, the Court may again deliver the ideological responsibility to Congress by looking to it for guidance in deciding whether the NEA Chairman applied "standards of decency," in the grant-making process. As a result of all the ambiguity term to describe a publication that is not newsworthy enough for protection under the freedom of the press clause. See Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34 (Cal. 1971). 258. See Anderson v. Rossman & Baumberger, 440 So. 2d 591 (Fla. Dist. Ct. App. 1983).


260. See Miga v. City of Holyoke, 497 N.E.2d 1, 8 (Mass. 1986) (for a successful punitive damage emotional distress claim, conduct must be shocking to the conscience and offensive to all so as to offend standards of decency).


263. See Adler, supra note 177, at 1359.

264. Standards of "common decency and honesty" was the criteria used in a 1939 breach of fiduciary relationship agency case. Pepper v. Litton, 308 U.S. 295, 311 (1939). However, the phrase has not been used before or since by the Court in an agency law context.


surrounding the definition of "standards of decency" the judicial and legislative branches have added little to the definition of decency advanced by Webster, leaving the NEA and artists confused over regulations within the "standards of decency" phraseology. A top NEA official stated that: "I'm at a loss to understand how ["standards of decency"] can be, quote—regulated—unquote . . . . There's no accounting for taste." Therefore, the word "decency," without any guidance from Congress as to its intended use, remains vague.

A vague regulation that even hints at constraining first amendment freedoms can operate to inhibit the exercise of free speech. The semininal case on this chilling effect is Speiser v. Randall. In Speiser the Court ruled that vague statutes cause people to "steer far wider of the unlawful zone" than if the boundaries of the forbidden area were clearly marked. In Speiser a vague oath was required of public employees. The Court stated that "[t]hose with a conscientious regard for what they solemnly swear or affirm" could only avoid the threatened sanction "by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." While a chilling effect is not necessary for unconstitutionality, the concept of a "chilling effect" has become a vital substantive issue in first amendment cases. The chilling occurs when a person chooses not to produce art that may violate "standards of decency," but not obscenity, for fear of not receiving federal funding. Artists receiving NEA grants will be forced to produce "safe art" because they lack direction in determining what art may be deemed obscene. The pressure to create "safe art" is magnified when one considers the dominant position that the NEA occupies in the financial affairs of the United States art world.

271. See CONG. REC., supra note 251, and accompanying text.
275. Id. at 526.
277. Schauer, supra note 179, at 685.
278. "It is of course unlikely that Ulysses will again be banned, but there is a danger under the new (Miller) test that a second-rate Ulysses which the Court does not regard as sufficiently 'serious' will be." HARRY KALVEN, JR., A WORTHY TRADITION 50 (1988); see United States v. One Book Entitled "Ulysses", 72 F.2d 705 (2d Cir. 1934).
The production of "safe art" is in effect self-censorship.\textsuperscript{280}

Nevertheless, before the Supreme Court will find a vague regulation unconstitutional, it requires that the restriction punish the unpunishable,\textsuperscript{281} and it will permit a free speech challenge based exclusively on vagueness if the "law reaches 'a substantial amount of Constitutionally protected conduct.'"\textsuperscript{282} The rationales for voiding the law are: 1) the importance of avoiding the chilling effect on expression;\textsuperscript{283} 2) the assurance that those responsible for enforcing the restriction are provided with objective standards that will avoid the weaknesses associated with the arbitrary exercise of discretionary power;\textsuperscript{284} and 3) the guarantee that those acting within protected speech are guarded from the government.\textsuperscript{285}

It is paramount that artists are free to produce art free of the burdens associated with vagueness; therefore vague restrictions should be facially struck down. From the assumption that individuals will usually attempt to minimize risks as much as possible,\textsuperscript{286} one can deduce that people will not undertake an activity that the legislature has surrounded by an ambiguous statute, unless they are confident that they will be free from its reach.\textsuperscript{287} The Court and commentators have characterized these types of restrictions as having a "chilling effect"\textsuperscript{288} on free expression. The "chilling" of an activity occurs anytime a regulation deters a person from an activity which the first amendment protects.\textsuperscript{289}

The importance of objective standards is highlighted where all of the decision-making power is allotted to one person. All final decisions regarding the approval of the grant application are made by the NEA Chairman, John Frohnmeyer. Although he is a product of the art com-

\textsuperscript{280} Senator Yates explained that experimental and "challenging" works "will be subject to very close scrutiny under the terms of that clause." Kim Masters, Congress Approves Arts Funding Compromise, WASH. POST, Oct. 28, 1990 at A17.


\textsuperscript{283} Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 797 (1984).

\textsuperscript{284} Stromberg v. California, 283 U.S. 359, 369 (1931).

\textsuperscript{285} Id.

\textsuperscript{286} Schauer, supra note 179, at 685.

\textsuperscript{287} See id.

\textsuperscript{288} The term "chill" as used in the first amendment context has been traced to Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), where Justice Frankfurter noted the inhibiting effect the loyalty oath requirements can have on teachers. Schauer, supra note 179, at 685 n.1. Within fifteen years, chilling effect claims had become "ubiquitous." Zwicker v. Koota, 389 U.S. 241, 256 n.2 (1967) (Harlan, J., concurring) (cited in Schauer, supra note 179, at 685 n.2).

\textsuperscript{289} Schauer, supra note 179. Broadly defined, chilling can occur as a result of any statute, civil, criminal, or regulation. Id. at 689 (citing Freedman v. Maryland, 380 U.S. 51, 59 (1965); Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 556-57 (1963)).
munity and respected among both grant recipients and Congress, the next chairperson may not be as competent to make ad hoc decisions regarding "decency" as Frohnmayer. With one person having substantial power the chances of arbitrary decisions are augmented. Vague congressional regulations also result in a lack of warning to the artists about which art is acceptable for NEA funding. This vague warning causes arbitrary enforcement because it leaves even the decision-makers confused.

Therefore, the decency requirement is unconstitutional because it is a vague infringement upon a protected form of speech. However, an inquiry concerning the constitutionality of the decency requirement must consider whether the NEA may premise the receipt of a benefit on an infringement of a constitutional right.290

IV. CONDITIONS291

The federal government's powers are seen as plenary.292 Thus, it may only do what is specifically prescribed in the Constitution. Since the Constitution does not specifically give Congress the power to support the arts,293 one can only assume that the NEA has been justified under the Spending Power.294 Under this power, Congress has repeatedly attached conditions to the receipt of federal funds to further "the federal interest in particular national projects or programs."295

However, the Spending Power is limited by four separate limitations: the expenditure must be for the general welfare,296 the conditions imposed may not be ambiguous,297 they must be reasonably related to the purpose of the expenditure,298 and the legislation may not violate any

291. While unconstitutional conditions has recently become an issue in the area of abortion, I believe that the law surrounding abortion is essentially sui generis and, as much as I would relish discussing my views on the issue, any discussion of abortion is unfortunately beyond the scope of this Note.
293. It has been suggested that the only Constitutional confirmation for Congressional support of the arts was the one authorizing Congress to provide for a seat of government. Banfield, supra note 54, at 40.
independent constitutional prohibition.299 Congress has repeatedly used the power "to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives."300 However, the Court has stressed that the government may not do indirectly what it cannot directly do.301 Further, the Court has stated that the government may not impose an unconstitutional condition on the exercise of a fundamental right.302 However, a practice of not subsidizing the exercise of a fundamental right is different from a complete ban on the exercise of a fundamental right303 or from the encumbrance of an unconstitutional condition on the exercise of a fundamental right.304 When the American aspiration to encourage free speech conflicts with a governmental goal, the regulation of conduct will be considered acceptable where the regulation is constitutional and does not aim at suppressing political speech.305

However, the Court recognizes that "there are some purported interests — such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate" that even a "significant and legitimate state interest"306 cannot outweigh the right to free speech. When the restriction is based on the content of the speech, the Court will view it as unconstitutional because of "the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."307 Thus, a regulation is uncon-
stitutional if it infringes upon a protected class' free speech, singles out a certain idea or message, or seeks to control speech based on content.\(^3\) Thus, though art has a "preferred" place in society,\(^4\) the government may suppress it so long as the provisions are constitutional and the Congressional aim is not directed at the suppression of dangerous ideas.

Congress' purpose in formulating the restrictions in the 1991 NEA Appropriations Bill was not the suppression of dangerous ideas. The decency provision is merely a congressional attempt to ensure that artists use the funds in a manner that taxpayers would approve.\(^5\) However, the provision itself is unconstitutional because it is an infringement on constitutionally protected nonobscene speech and it is so vague that one would have to guess about its intended meaning. Thus, the government may put restrictions on who and how it subsidizes as long as it does not do so in a manner that is vague and violates the first amendment.\(^6\) This Note does not state that the government could not place clear and concise restrictions on the ability of the NEA to fund obscene art. However, the vague manner that Congress has chosen to infringe upon protected speech is unconstitutional.

One may argue that the decency requirement does not force artists to make a decision between the subsidy and free speech. This, however, is not true. Realistically, the NEA has a substantial and influential role in the funding of all art.\(^7\) Its decision to fund a project lends such credibility to an undertaking that matching grants are easily obtained.\(^8\) Therefore, without the support of the NEA, an artist could not receive private or public funding for an undertaking.\(^9\) "This is the type of obstacle in the path of the exercise of fundamental speech rights that the constitution will not tolerate."\(^10\)

Some may argue that the NEA decency restriction is de minimis because it will affect only a limited number of artists. However, when it is applied, it imposes a harsh punishment on recipients who wish to produce art that does not ultimately conform to the decency requirement. The general response to this argument is that if artists wish to produce indecent art then they can always fund their own art projects. Yet, the
sanction is exceedingly harsh considering that artists often do not have the money to fund their projects. Therefore, the condition is anything but de minimis.

V. AN ALTERNATIVE TO THE 1991 NEA AMENDMENT

In passing the Amendment, Congress was attempting to appease the right wing, which was placing pressure on Congress to control the funding of obscene art. Members of the 101st Congress walked a fine line between the fundamentalist right and the Constitution. The "lobbying" executed by the fundamentalists is legal. Every citizen or taxpayer has the right to be heard by Congress, especially where a dispute involves an organization that is funded with taxpayer dollars. Also, Congress has the power and the right to prevent the funding of obscene art because obscenity is not a form of protected speech. However, by prohibiting the funding of art that violates "standards of decency," Congress has overstepped its authority by treating sexually indecent artistic speech differently from other types of art.

Congress should have realized that "[s]ome degree of abuse is inseparable from the proper use of everything. . . . [I]t is better to leave a few noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." The first option available to Congress is not to fund the arts at all. It is possible for the wealthy in this country to support the arts. Still, it is irrational to believe that individuals can or will sustain the arts at their current funding levels. There is little evidence that the 1990s foster a better atmosphere for charitable contributions than did the 1960s. During the 1960s, when the costs associated with the production of the arts were considerably less, private donations were insufficient. It is unrealistic to believe that without government funding, the arts in the United States can be sustained at a sufficient level.

Another option for Congress would be to directly cease funding the NEA, while allowing a dollar-for-dollar tax incentive, up to a specified limit, for contributions to the arts. Congress could set a limit on the maximum allowable contribution based on its computation of the amount of taxes needed. If this plan were adopted, Congress would not

316. See supra note 3.
317. See supra notes 99-188 and accompanying text.
save any money, but the purpose of this alternative is not to save Congress from spending.

This alternative is facially appealing because individuals can then decide for themselves what type of art they wish to fund. The process also seems more democratic. For example, those people who do not want to fund experimental art do not have to finance experimental art. Similarly, those people who do not wish to fund a Brahms recital do not have to "spend" their money on a donation. However, society would be moving back to the early 1960s when support for the arts was insufficient. These options are not practical because it is difficult to imagine the private sector voluntarily maintaining the arts to the same extent as the NEA supports them.

Another less drastic alternative would be to invoke constitutional restrictions on the receipt of art funding. First, retain the obscenity repayment requirement with its imperfections. If a court later finds the art obscene, then it only seems fair that the artist should be forced to repay the amount of funding back to the NEA. The government should not be subsidizing obscene art. This would also accommodate political interests by placating fundamentalists and soothing the brow of the art community. However, the decency provision is unconstitutional and should be removed.

Another feasible alternative would be to retain the prior restrictions on art funding, while construing this restriction narrowly and definitely enough so that no constitutional problems will arise when the law is challenged. The decision-making process should be in the hands of a small committee, perhaps made up of seven or nine people, instead of vested entirely in one person. This committee should be made up of recognized artists and anyone with a serious interest in the arts.

CONCLUSION

Funding for the NEA has given many the opportunity to voice their opinions concerning the extent to which their tax dollars support governmental programs. They may be rebelling against art that they find graphic, shocking, and outright revolting; however, the art that the decency requirement affects is not necessarily legally obscene and is, therefore, protected by the first amendment. As protected speech, Congress cannot treat it unlike any other form of art, without abridging the first amendment.

The 1991 NEA Amendment tests constitutional doctrine in a myriad of anticipated (the difference between indecent and obscene speech)
and unexpected ways—the relationship between content-neutral and content-based, the distinction between profane indecent speech and sexual obscene speech, and the commitment to clearly written legislation. It is possible, however, to draft such legislation within the confines of conventional doctrines. Nonobscene artistic sexual speech is entitled to the full protection of the first amendment. Therefore, the NEA should fund it in the same way it funds all other art. This conclusion can be attained without compromising other well-accepted doctrines.

Congress should encourage important social benefits without posing significant threats to a well-functioning system of free expression. In both Eastern Europe and the former Soviet Union, people who have endured censorship and oppression for decades are rising up and winning new freedoms. It is shameful that Congress must fail the test of liberty by erecting new barriers against free expression. Still, the judicial branch has a duty to find the decency requirement void because it goes against the constitution; for if free speech is not protected for the Maplethorpes of the world, then soon it will not be there for any of us.

320. Id.