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CONTENT RESTRICTIONS AND NATIONAL ENDOWMENT FOR THE ARTS FUNDING: AN ANALYSIS FROM THE ARTIST'S PERSPECTIVE

by Courtney Randolph Nea*

Visual art occupies a precarious position in the spectrum of artistic endeavors. In recent years, there has been less censorship of the arts than of books, plays, or recordings, but visual art has often been a source of public ridicule and debate. The primary issues in this conflict are: "What kind of art is appropriate?"; "Who decides?"; and even "What is art?"¹

Implicit in this dialectic is the tension between artistic freedom and the boundaries of the First Amendment. Throughout the history of art, artists have challenged traditional customs and conventions. Artists have pushed the boundaries of accepted norms in their pursuit of personal expression. "Artists are significant symbolic deviants in our society, their work calling out negative responses from large numbers of people. But this is neither surprising nor unique: every society draws its moral line in the sand, and these sands, of course, shift from era to era and from place to place."²

In 1988, two artists produced works which elicited a profound response from the general public. Andres Seranno and Robert Mapplethorpe created photographs which self-consciously embody and comment on the very elements of shock and disgust which the typical viewer will bring to them. As artists who embrace the Post-Modern idiom, their philosophy aims to extend the boundaries of previously accepted expression.

In 1989, many Americans believed that artists such as Mapplethorpe and Seranno pushed the limits of art too far and entered into the realm of indecency. In response, Congress passed arts funding laws which restricted the National Endowment for the Arts' (NEA) grant making procedures. These very actions highlight the trend regarding the guiding purpose of the NEA. At its inception, the agency was committed to unfettered funding of artistic expression. Increasingly, the NEA has moved from this neutral position toward a more ideological stance.

The recent content restrictions express doctrinal controls. The 1989 Helms amendment prevented the NEA from funding art that was deemed obscene under the standard expressed in *Miller v. California*,³ the subsequent 1990 amendment provided that the NEA must be guided by general standards of decency. However, from the artist's perspective, such laws have serious ramifications.

Congress has . . . craft[ed] a content restriction that doesn't look like one. It's very subtle. If the law had called for diverse esthetic content, that would be content neutral. But when it speaks of diverse beliefs and decency, it's making a political judgment.⁴

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¹ Jayne Merkel, *Art on Trial*, ART IN AMERICA, Dec. 1990, at 41.

² STEVEN C. DUBIN, ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL ACTIONS 2 (1992).

³ 413 U.S. 15 (1973).

⁴ William H. Honan, *Finding Fault With New Arts-Grant Law*, N.Y. TIMES, Nov. 10, 1990, § 1, at 13 (quoting Peter Kyros, former cultural adviser to President Jimmy Carter).

Artists see these content restrictions as seriously limiting their creative vision.⁵ To support their position, they rely on a rich tradition of art which has challenged societal conventions and norms throughout the ages. Therefore, any restrictions, and particularly obscenity restrictions, will cause artists to change the course of their work.

This note examines the current debate concerning artistic freedom of expression from the artist's perspective. Part I discusses the evolution of the National Endowment for the Arts from its original mission to Congress's debate surrounding the NEA and its subsequent amendments. Part II discusses the NEA and the artist's mind. Part III offers a reexamination of Mapplethorpe and Serrano's works from the artist's perspective and asks if there are any limits on the NEA.

I. THE EVOLUTION OF THE NATIONAL ENDOWMENT FOR THE ARTS

A. *The Creation of the National Endowment for the Arts*

The American government has funded the arts throughout its history. However, the United States has never had a unified position concerning its national cultural policy. In a sense, this dichotomy exists because the discussion of public funding has consistently generated considerable controversy.⁶ Traditionally, the notion of publicly funded art was perceived as "inimical to the Republican principles upon which the [United States] was founded."⁷ However, as one commentator stated, "Arts help define the American spirit, that mix of practicality and spirituality that we must nurture and encourage and defend."⁸ Therefore, the decision to fund art has precarious philosophical underpinnings.

In the past, public funding took the form of rather innocuous activities; for instance, the government provided money for ceremonial bands and the adornment of public buildings. The first formal funding for artists occurred during the Depression when the severity of economic conditions necessitated expanded governmental involvement. Roosevelt's "New Deal" administration established programs under the Treasury

⁵ Artist Elizabeth Sisco stated:

The conservative "moral" war is a crusade to enforce an exclusionary cultural vision. The attempt to control artistic content at the Endowment is an aspect of growing governmental infringement on individual rights.

Art is social currency. It can be used to communicate in public and construct arenas for public dialogue that are not bound to the government and the media, thereby stretching the boundaries of accepted discourse and legitimating a wider spectrum of viewpoints.

Art and Politics: A Pre-election Symposium, ART IN AMERICA, Oct. 1992, at 41, 42.

⁶ See, e.g., Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control* 103 HARV. L. REV. 1969 (1990). "In the early years of the United States, there was no consensus that government had a role in arts funding. Although some saw the arts as essential to civilization, others saw them as elitist, a luxury not fit for a democratic government's support." *Id.* at 1970 (citation omitted).

⁷ MaryEllen Kresse, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?* 39 BUFF. L. REV. 231, 250 (1991). Compare S. Wyszomirski, *Controversies in Policymaking*, in PUBLIC POLICY AND THE ARTS 11 (K. Mulcahy and C. Swain eds., 1982).

While Americans have traditionally envied European tradition and achievements in the arts, we have also recognized the roles of monarchies, aristocracies, and churches have played in providing public patronage for the arts. The close historical relationship between the arts and the elite institutions has created a cross-current of American opinion which suspects that artistic excellence may not be compatible with secular, democratic values.

Id. at n.89.

⁸ John E. Frohnmayer, *Works of Art on Trial—Or Is it Democracy? Critics of Recent Grants to Artists Might Profit by Rereading History, The First Amendment*, BOSTON GLOBE, Mar. 29, 1992, Focus at 71 (address before the National Press Club).

Department and the Works Progress Administration (WPA).⁹ The WPA, motivated principally by economic concerns, provided emergency assistance for artists.¹⁰

In 1965, President Lyndon Johnson ushered in a new era for public funding by signing the National Foundation on the Arts and Humanities Act (the Act).¹¹ The National Endowment for the Arts (the NEA) was one of several agencies created under this rubric.¹² The Declaration of Purpose of the National Foundation on the Arts and Humanities Act reads as follows:

[T]he practice of art and the study of the humanities requires constant dedication. . . . [I]t is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.¹³

In part, Congress passed this legislation responding to a fear that American cultural development lagged behind its industrial development. It acknowledged that our nation's role in world leadership "cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit."¹⁴ Also, it further acknowledged that although encouragement for the arts was "primarily . . . a matter for private and local initiative,"¹⁵ private funds were often inadequate.¹⁶

⁹ Kresse, *supra* note 7, at 250.

¹⁰ [A] surprising number of our most well known artists who helped to bring American art to international prominence after World War II, such as Pollock, Gorky, DeKooning, Rothko, and Newman, accepted government support during the Depression in order to keep active as artists. The Works Progress Administration . . . allowed many of the best American artists to continue in their profession at crucial moments in their careers.

1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 336 (2d ed. 1987).

¹¹ Pub. L. No. 89-109 §§ 1-14, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. §§ 951-68 (1988 & Supp. III 1991)) (establishing the Endowment).

¹² The NEA was created with an extremely broad mandate:

[to] establish and carry out a program of grants-in-aid to groups or . . . to individuals engaged in or concerned with the arts, for the purpose of enabling them to provide or support in the United States—

(1) productions which have substantial artistic and cultural significance, giving emphasis to American creativity and the maintenance and encouragement of professional excellence;

(2) productions, meeting professional standards or standards of authenticity, irrespective of origin which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens in many areas of the country;

(3) projects that will encourage and assist artists and enable them to achieve standards of professional excellence

Id. at § 5(c).

¹³ 20 U.S.C. § 951(7) (1988 & Supp. III 1991). In light of this recognition, it was hoped that the Foundation would help "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States." H.R. Rep. No. 618, 89th Cong., 1st Sess. 5 (1965), *reprinted in* 1965 U.S.C.A.N. 3186, 3190. And that in "decentralizing" the arts, "artistic excellence could be enjoyed and appreciated by far greater numbers of our citizens." 20 U.S.C. § 953(b) (1988 & Supp. III 1991).

¹⁴ 20 U.S.C. § 951(8) (1988 & Supp. III 1991).

¹⁵ *Id.* at § 951(2).

¹⁶ In part, the forerunner of the NEA was created in response to the realization that: "There is a financial crisis facing the arts in the United States, which stems primarily from the inadequacy of private sources to support artistic excellence at an appropriate level and to foster and develop an environment which would fully stimulate the resources of American creative expression." H.R. REP. NO. 618, 89th Cong., 1st Sess. 5

From its inception, the Act engendered considerable comment. Supporters argued that such legislation would advance civilization by enhancing cultural progress.¹⁷ Critics countered that an "official art" would be created through censorship and content-based discrimination; "Artists expressed concern that government oversight would infringe upon artistic freedom."¹⁸

To guard against these perceived dangers, Congress structured the NEA so as to insulate the funding process from political pressure.¹⁹ First, to assure that Endowment posts were not "political payoffs,"²⁰ the Chairperson position was subject to restrictions: the chairperson must be widely recognized for his experience in the arts, and may only serve for a fixed term. Second, Endowment administrators developed a panel system to make initial decisions about the merit of applications and the amount of funding to be provided.²¹ Third, each application for a grant includes the NEA's statement of mission,²² which assures that the Endowment exercises "care to preserve and improve the environment in which the arts have flourished"²³ and that the Endowment "must not, under any circumstances, impose a single aesthetic standard or attempt to direct artistic content."²⁴ Finally, although artists may work independently and keep their work, the Act generally prohibits funding of more than fifty percent of the cost of a particular project.²⁵

Despite these safeguards, the Endowment has continually struggled against charges of elitism, censorship, and political dependence. The desire for larger appropriations has carried a certain political price for the Endowment. Also, the NEA developed major commitments to established institutions.²⁶ These concerns have made the NEA a target for political pressure. As one commentator stated:

(1965), *reprinted in* 1965 U.S.C.C.A.N. 3186, 3188-89.

¹⁷ *Id.* at 3190.

¹⁸ Kresse, *supra* note 7, at 252-53.

¹⁹ The enabling legislation provided that "no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any . . . non-Federal agency." 20 U.S.C.A. § 953(c) (1990).

²⁰ Note, *supra* note 6, at 1972.

²¹ *Id.*

²² The Preamble of the NEA's Statement of Mission states:

Throughout the ages, humanity has striven to go beyond the limits of the immediate physical world to create that which was not there before and thus nourish the human spirit. The first record of our perception of the world around us was through art scratched on cave walls, carved in stone, or modeled in clay. Our need to make, experience, and comprehend art is as profound as the need to speak. It is through art that we can understand ourselves and our potential. And it is through art that we will be understood and remembered by those who will come after us.

This nation's governance is based on our people's commitment to freedom of imagination, thought, and expression. Our many aesthetic and cultural traditions are precious to us for the rich variety of their beauty and as a symbol of the diverse nature of the United States.

NATIONAL ENDOWMENT FOR THE ARTS, GUIDE TO FUNDING OPPORTUNITIES 2 (December 1991).

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ 20 U.S.C. § 954(e) (1988 & Supp. III 1991).

²⁶ "Between 1965 and 1988, the NEA reviewed approximately 302,000 grant applications and funded approximately 85,000 grants. In 1988, out of 18,000 applications, the NEA distributed more than \$169 million through 4,500 grants to art institutions and individual artists." Stephen F. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, in LEGAL PROBLEMS OF MUSEUM ADMINISTRATION (ALI-ABA Course of Study, C579 ALI-ABA 485 (1991)).

The significant issues were always there in latent form: populism versus elitism, imbalances in the geographic distribution of grants, perplexing art styles, and agency accountability for topics which could offend some viewers, especially topics with blatantly sexual or adversarial political themes.²⁷

Therefore, the NEA was susceptible to attacks by critics. These charges provoked a more ideological stance on the part of the NEA.

B. *The New Guidelines for the National Endowment for the Arts*

The desire to regulate the content of NEA grants by amending the Endowment's structure and grant making procedure surfaced in 1989. In light of two recent controversies,²⁸ concerning artists Andres Serrano²⁹ and Robert Mapplethorpe,³⁰ Senator Jesse Helms proposed legislation which would severely curtail the NEA's grant making policy. His response was not novel; prohibitions had been introduced in the past.³¹ However, Helms' protest posed a serious threat to the vitality and independence of the NEA, as free from political interference.³²

²⁷ DUBIN, *supra* note 2, at 283.

²⁸ In 1988, the NEA supported an exhibition at the Southeastern Center of Contemporary Art (SECCA) in Winston-Salem, N.C., which included a photo by Andres Serrano entitled "Piss Christ." The photo featured a plastic crucifix suspended in a jar of the artist's urine. In 1989, the Corcoran Gallery in Washington, D.C. mounted an NEA funded exhibition of photographs by Robert Mapplethorpe that included frontal nudity.

²⁹ On May 18, 1989, Senator Alfonse D'Amato (R-N.Y.) took the Senate floor and denounced the NEA for helping to fund a \$15,000 fellowship for artist Andres Serrano. He characterized Serrano's photograph, entitled Piss Christ, as "garbage" and a "deplorable, despicable display of vulgarity." Later, 27 senators signed a letter to the NEA demanding changes in its procedure to prevent federal funding of "sacrilegious art." Helms also issued his own denunciation of Serrano, saying he "is not an artist. He is a jerk. And he is taunting the American people." Allan Parachini, *Endowment, Congressmen Feud Over Provocative Art*, L.A. TIMES, June 14, 1989, § 6 at 1.

³⁰ "Robert Mapplethorpe: The Perfect Moment" set to open at the Corcoran Museum in Washington, D.C. was voluntarily cancelled. Dr. Christina Orr-Cahall, director of the Corcoran, acknowledged that the issue of federal funding for "provocative artists and their work 'was becoming a major political controversy,'" and announced that "'by presenting this show, we were doing so at the wrong place at the wrong time. We had the strong potential to become some persons' political platform.'" *Id.*

³¹ For example, the Biaggi proposal (in response to the NEA's funding of two productions of Verdi's *Rigoletto*) would have prohibited funding to any projects that 'stereotype' or 'denigrate' ethnic groups. T.R. Reid, *Discord Over 'Rigoletto'*, WASH. POST, Feb. 23, 1984, at B1. In 1985, charges that NEA grants had been awarded for obscene and stereotypical works ultimately resulted in the amendment of the agency's grant making procedure.

³² The Helms proposal provides in the pertinent part:

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

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

(2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or

(3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.

1. *The 1989 Helms Amendment*

In June of 1989, an appropriations bill covering the NEA's fiscal year 1990 was introduced; debated and amended, it passed in July. The bill cut the Endowment's proposed budget by \$45,000, a figure determined by the amount of funding that the NEA provided for the Mapplethorpe and Serrano exhibits. Furthermore, this legislation also called for the creation of a temporary Independent Commission.³³ This agency's function was to review the NEA's panel system, and its procedures and criteria for making grants including the consideration of the *Miller v. California* standard of obscenity.³⁴

In addition, Congress included legislation which prohibited funds from being used to produce "obscene" art. The amendment provides in the pertinent part:

None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.³⁵

Thus, the Act authorized the NEA to determine when a work is obscene.

Following the enactment of the 1989 appropriations act, the NEA included the restrictive language quoted above in its grant applications, and required all recipients to sign a form certifying that they will abide by all of the terms and conditions that the NEA prescribes.³⁶ Furthermore, the NEA's statement adopted the definition of obscenity set forth in *Miller v. California*.³⁷ The NEA, consequently, suggested that it would review

³³ Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 1989 U.S.C.C.A.N. (103 Stat.) 701, 741. The commission's purpose is as follows:

to determine whether there should be standards for grant making other than "substantial artistic and cultural significance, giving emphasis to American creativity and cultural diversity and the maintenance and encouragement of professional excellence" (20 U.S.C. §954(c)(1)) and if so, then what other standards. The criteria to be considered by the commission shall include but not be limited to possible standards where (a) applying contemporary community standards would find that the work taken as a whole appeals to a prurient interest; (b) the work depicts or describes in a patently offensive way, sexual conduct; and (c) the work, taken as a whole, lacks serious artistic and cultural value.

Id. at 742.

³⁴ Beverly M. Wolff, *Government Funding of the Arts: Content Based Regulation and Unconstitutional Conditions*, 15 COLUM.-VLA J.L. & ARTS 47, 49 (1990).

³⁵ Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741 (1989) (codified as amended at 20 U.S.C. § 954 (1988 & Supp. III 1991)).

³⁶ In the Newport Beach and Bella Lewitsky cases, Judge Davies held that the certification set the NEA up as a federal government arbiter of what constitutes obscenity—a role clearly at odds with the U.S. Supreme Court rulings which have held that only standards of individual communities can be employed to determine what constitutes obscenity. Allan Parachini, *NEA Pledge on Obscenity Struck Down*, L.A. TIMES, Jan. 10, 1991, at A3.

³⁷ 413 U.S. 15 (1973). The *Miller* standard includes the following test:

(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

all grant applications with reference to this standard and would deny grants for projects that it deemed to violate these principles.³⁸

In September of 1990, the Independent Commission submitted a report which declared "that the standard for publicly funded art must go beyond the standard for privately funded art."³⁹ The Commission's report diffused anxieties over obscenity: it came out strongly against specific content restrictions and argued that questions of obscenity should be answered by courts employing the *Miller* standard.⁴⁰ The report called for structural and procedural changes and counseled that the grant panels should remain purely advisory. Under its guidelines, the Chairperson would take a more authoritative role by ultimately deciding the fate of grants.⁴¹ Thus, the report mandated changes that would ultimately affect the NEA's day-to-day operations.

2. *The 1990 Reauthorization Legislation*

In November of 1990, Congress reauthorized the NEA by amending the original authorization of 1965.⁴² After protracted debate, a final compromise was achieved: the NEA's life would be extended for three years with no explicit restrictions on the content of grants.⁴³ However, if a work of art funded by an NEA grant was deemed obscene by the courts, the artist would be forced to repay the money and face exclusion from additional funding for three years if the money was not repaid at that time.⁴⁴ Moreover, the reauthorization bill substituted a statement of artistic suitability for the more specific anti-obscenity Helms provision: "the Chairperson shall ensure that . . . artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."⁴⁵ Additionally, the legislation

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

³⁸ Wolff, *supra* note 34, at 49.

³⁹ *Id.* at 50 (quoting Independent Commission, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS (Sept. 11, 1990)).

⁴⁰ "[The] Consensus Statement concludes . . . that while there is no constitutional obligation to fund the arts, if federal funds are used for this purpose, 'constitutional limitations . . . may come into play.'" Beverly Wolff, *The NEA and the Conflict Over Content Restrictions in Federal Grants*, in LEGAL PROBLEMS OF MUSEUM ADMINISTRATION (ALI-ABA Course of Study, C579 ALI-ABA 581 (1991)) (quoting Independent Commission, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS (Sept. 11, 1990)).

⁴¹ "During the August National Council meeting Frohnmayer indicated his concerns over the NEA's 'responsibility, accountability and sensitivity,' anxieties which led National Council member Lloyd Richards of the Yale School of Drama to caution 'We could end up with the National Endowment of the Agreeable.'" DUBIN, *supra* note 2, at 291 (citing Allan Parachini, *NEA Panel Ends Weekend With a Bow to the Right*, L.A. TIMES, Aug. 6, 1990, at F10; and Kim Masters, *Arts Panel Urges End to Grant Pledge*, WASH. POST, Aug. 4, 1990, at G5).

⁴² 20 U.S.C. § 954 (1988 & Supp. III 1991).

⁴³ "A modified Gunderson plan was adopted after compromises were made during the NEA reauthorization process: the NEA is required to increase the increment of its contribution to state arts councils to thirty-five percent by 1993." DUBIN, *supra* note 2, at 287.

⁴⁴ This provision, along with other changes to the NEA in the late 1980s and early 1990s, created an uproar in the artists' communities. Artist Holly Hughes stated, "I would say that what was happening in the NEA is not so neatly called censorship; it would be easier to fight if it were." Artist Leon Golub ruminated: "The NEA has received blows from which it will probably never recover, and it will end up either as a tame organization giving out tame grants to artists, or stop giving grants to artists altogether and simply give them to the Metropolitan Opera and places like that." *Id.* at 293.

⁴⁵ 20 U.S.C. § 954(d)(1) (1988 & Supp. III 1991).

provided for changes in the structural administration of the NEA, particularly by modifying the panel system and by firmly placing all final decision making with the Chairperson.⁴⁶

3. *The After-Effects of the Law*

The debate focusing on the funding laws had instituted profound changes in the political and social climate concerning the arts. Since the first restrictive funding law went into effect in October of 1989, at least four suits⁴⁷ have been filed against the NEA contesting the constitutionality of its restrictive funding.⁴⁸ Museum directors and board members resigned in protest to sponsorship of various exhibits.⁴⁹ The NEA promised grants and then rescinded them; some were regranted.⁵⁰ Recipients of grants refused to accept money in protest over the funding restrictions and over the requirement placed on applicants.⁵¹

⁴⁶ The reauthorization legislation provides for the following changes:

- (1) Under the new law, the Chairperson must issue regulations requiring advisory panels to keep written records of all meetings, discussions, and recommendations. Those records are to be made available to the public.
- (2) All panels must now include individuals who, though knowledgeable about the arts, are neither professional artists nor members of arts or artists organizations.
- (3) The prohibition against individuals who had applied for financial assistance under the Act serving as a member of the subpanel or panel (where a subpanel did not exist) before which the application was pending has been extended to employees and agents of organizations with pending applications.

Wolff, *supra* note 40, at 581.

⁴⁷ See *Finley v. NEA*, 795 F. Supp. 1457 (C.D. Cal. 1992) (this case was brought by the so-called "NEA Four," artists Karen Finley, John Fleck, Holly Hughes and Tim Miller); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991); *New School v. Frohnmayer*, No. 90-351 (S.D.N.Y. 1990) (settled and suit terminated in 1991).

⁴⁸ The gist of Judge Tashima's decision [in the "NEA Four"] was this: first, that government funding of the arts is subject to the constraints of the First Amendment; second, that the decision made some two years ago by Frohnmayer to deny grants to performance artists Karen Finley, Holly Hughes, John Fleck and Tim Miller because of 'political realities' violated the First and Fifth Amendments; and third, that the most recent change in the NEA law, which would require the agency to deny funds to art projects that might breach 'public standards of decency,' violated (on its face) constitutional due process and freedom of expression.

Edward de Grazia, *Indecency Exposed, National Endowment for the Arts Case Editorial*, 255 THE NATION 4 (July 6, 1992).

⁴⁹ Christina Orr-Cahall, director of the Corcoran Museum, and Chad Wick, Chairman of the Board of Contemporary Art Center in Cincinnati, resigned during the Mapplethorpe controversy.

⁵⁰ Artists whose grants were vetoed include "the NEA Four" performers Karen Finley, Holly Hughes, John Fleck, and Tim Miller. Todd Allan Yasui, *Performance Front and Center*, WASH. POST, July 16, 1990, at D7. The Institute of Contemporary Art in Boston was denied a \$40,000 grant to mount the work of Mike Kelley after the peer panel advised the NEA to issue the grant. Patti Hartigan, *ICA Faces Rejection of Grant by NEA; \$ 40,000 was Slated to Support Exhibit*, BOSTON GLOBE, Oct. 22, 1990, at Metro/Region 1.

⁵¹ Leonard Bernstein refused to accept the National Medal for the Arts award in protest of a grant rescission by the NEA for an art show on AIDS (the grant was later restored). *Getting Even*, N.Y. TIMES, Nov. 18, 1989, § 4 at 7. About 20 individuals and institutions rejected their endowment grants rather than sign the obscenity pledge; an unknown number of recipients did not formally reject their grants but crossed out the pledge on the endowment forms and did not accept any money. *Arts Agency Gets "Out of the Obscenity Business" After Fighting Suits*, CHICAGO TRIBUNE, Feb. 14, 1991, at News 28.

II. THE NATIONAL ENDOWMENT FOR THE ARTS AND THE ARTIST'S MIND

A. *What is Art?*⁵²

Throughout the ages, artists have created works to shock or protest against oppressive and unresponsive governments.⁵³ John Frohnmayer, former chairman of the NEA, stated:

Artists, often without varnish and sometimes without much civility, tell us the truth as they see it. And sometimes they're right, and sometimes they're not. Sometimes they're profound. . . . And sometimes the artists tell us unkind truths about ourselves: truths which are difficult to hear, which make us uncomfortable. But as a famous artist put it, artistic growth is a refining of the sense of truthfulness. The stupid believe that to be truthful is easy. Only the artist, the great artist, knows how difficult it is.⁵⁴

In fact, the movement of Modernism began as an attempt to "liberate society" by denouncing the "established order."⁵⁵

Public outcry against unfamiliar artistic expression is a cyclical phenomenon. For instance, in the sixteenth and seventeenth centuries, governments across Europe destroyed artwork and jailed, exiled, and otherwise punished artists who protested against the government.⁵⁶ In the nineteenth century, the Impressionists were alienated by French society and excluded from the established salons. Manet, a leading painter in this movement, was widely criticized for his 1863 work, *Olympia*. The principal public objection concerned the unabashed nakedness of the figure. Reality was not adequately disguised. And the passage of years did not dampen the critical commentary: "[S]he is a scandal, an idol; public presence and power of the skeleton in Society's closet."⁵⁷ The general public found the work obscene, and yet, the same public approved of erotic

⁵² "[I]t is . . . often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁵³ [Pablo] Picasso indicated that as 'political beings', artists naturally create art which responds to the political events taking place around them:

What do you think an artist is? An imbecile who only has eyes if he's a painter, ears if he's a musician, or a lyre in every chamber of his heart if he's a poet. . . . Quite the contrary, he is at the same time a political being constantly alert to the horrifying, passionate or pleasing events in the world, shaping himself completely in their image. . . . No, painting is not made to decorate apartments. It's an offensive and defensive weapon against the enemy.

Anne L. Rody, Note, *Federal Arts Funding at What Cost? The Impact of Funding Guidelines on the First Amendment and the Future of Art in America*, 1 *FORDHAM ENT. MEDIA & INTELL. PROP.* 176, 204 n.178 (1991) (citing 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 242-43 (2d ed. 1987) (quoting Dore Ashton, *Picasso On Art*, in *DOCUMENTS OF TWENTIETH CENTURY ART* 149 (1972))).

⁵⁴ Frohnmayer, *supra* note 8, at 71.

⁵⁵ Modernism challenges preconceived notions:

Modernity revolts against the normalizing function of tradition; modernity lives on the experience of rebelling against all that is normative. . . . [I]t continuously stages a dialectical play between secrecy and public scandal; it is addicted to a fascination with that horror which accompanies the act of profaning, and yet it is always in flight from the trivial results of profanation.

Rody, *supra* note 53, at 197 n.126 (quoting Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC: ESSAYS ON POST-MODERN CULTURE* 10 (Foster ed., 1983)).

⁵⁶ LEONARD D. DUBOFF, *ART LAW IN A NUTSHELL* 246-247 (1984).

⁵⁷ FRANÇOISE CACHIN ET AL., *MANET 1832—1883*, at 174 (John P. O'Neill et al. eds., 1983) (quoting Valéry, 1932).

female figures in the right classical garb.⁵⁸ It is significant that Cabanal's *Birth of Venus*, another depiction of a reclining nude, received the highest honor in the Salon in Paris in the same year.

During the first half of this century, critics bitterly condemned the modern movement and the art created by Picasso, Cezanne, Matisse, and others. When Nazi ideology attempted to remake German culture, Hitler sought to destroy the intellectual and artistic movement that he equated with Jews and communists.⁵⁹ "In place of art that questioned, experimented, and challenged, Hitler sought an aesthetic that depicted unchanging images of a Germany based on race, soil and war."⁶⁰

The struggle was not confined to Nazi Germany. In the United States, critics condemned modern art from 1910 until after World War II, and the battle was waged in the churches, the print media and on the streets.⁶¹ In 1949, Michigan Representative George A. Dondero attacked the major categories of twentieth century art as "depraved" and "destructive":

Cubism aims to destroy by designed disorder. Futurism aims to destroy by the machine myth... Dadaism aims to destroy by ridicule. Expressionism aims to destroy by aping the primitive and insane. Abstractionism aims to destroy by the creation of brainstorm... Surrealism aims to destroy by the denial of reason.⁶²

This criticism was not confined to the visual arts. In the 1920s, a movement to censor jazz occurred; critics described jazz as decadent, and as the devil's music composed of jungle rhythms. A professor tried to prove that pregnant women who listened to jazz had deformed babies.⁶³

B. *The Artist's Mind*

The negative public reaction to the current work of the artists Andres Serrano and Robert Mapplethorpe may be seen as a part of this cyclical phenomenon. From the artist's perspective, however, the controversy is merely a by-product of the truly great artist's purpose and vision. Throughout history, the artist has pushed boundaries. Continually, the artist forces his viewer to reexamine accepted norms. In fact, in western art, each successive movement rebels against the formal doctrines of a previous period. For

⁵⁸ *Id.* at 179.

⁵⁹ John Frohnmayer has compared the recent NEA controversy to the events in Nazi Germany. Kim Masters, *Frohnmayer Decries Cultural War; Departing NEA Chief Blasts Congress and the Religious Right*, WASH. POST, Mar. 24, 1992, at A1. He looks to leaders such as Pat Buchanan, who have said that "the arts crowd is after more than our money, more than an end to the congressional ban on funding obscene and blasphemous art. It is engaged in a cultural struggle to root out the old America of family, faith, and flag, and recreate society in a pagan image." Rohde, *supra* note 26 (quoting Patrick Buchanan, *This Is the Battle for America's Soul*, L.A. TIMES, Mar. 25, 1990, at M5).

⁶⁰ Jess Bravin, *The Art Hitler Hated in 1937, The Nazis put 650 "Degenerate" Works on Exhibition, To Teach the German People What Kind of Art to Avoid. Now, 175 of These Works are on Display as an "Astounding Group of Masterpieces"*, PHILADELPHIA INQUIRER, May 18, 1991, at D1. *See also*, Adolph Hitler, *Speech Inaugurating the Great Exhibition of German Art, 1937*, in THEORIES OF MODERN ART 474 (Herschel Chipp ed. & Ilse Falk trans., 1968).

⁶¹ Michael Kilian, "Art Wars" Began 81 Years Ago with Chicago Leading a Nationwide Assault on such "Loathsome" Artists as Picasso, Cezanne, Matisse, CHICAGO TRIBUNE, May 26, 1991, at Sunday Magazine 19.

⁶² William Hauptman, *The Suppression of Art in the McCarthy Decade*, ARTFORUM, October 1973, at 48.

⁶³ Frohnmayer, *supra* note 8 at 71.

instance, Mannerism was a reaction against the Renaissance's insistence on classical rules and orders, and it introduced capriciously elongated figures and harsh colors. Baroque art revolted against Mannerism's affectation of style by producing an art that aimed at discord instead of harmony and repose. The Rococo movement rebelled against the ponderous and formal style of the preceding movement and sought to promote charming, elegant, and light-hearted effects. Neoclassicism responded to Rococo's frivolity with a renewed interest in classical motifs, subjects, and decorations. Romanticism resisted Neoclassicism's interest in reason and the past, focusing instead on the subjective and the imagination. Realism was a reaction against the subjectivity and suggestiveness of Romanticism.

Art challenges the viewer; art's value depends on the deep responses it provokes. Holger Cahill suggested, "Surely art is not merely decorative, a sort of unrelated accompaniment to life. In a genuine sense it should have use; it should be interwoven with the very stuff and texture of the human experience, intensifying that experience, making it more profound, rich, clear, and coherent."⁶⁴ The artist, Constant, whose work epitomized the Cobra movement, defined the artist's creative process and its ability to challenge. He stated, "For those of us whose artistic, sexual, social, and other desires are farsighted, experiment is a necessary tool for the knowledge of our ambitions . . . [A]ny real creative activity . . . must have its roots in revolution . . . This results in experiment, or the release of knowledge."⁶⁵

This lofty goal shows the intrinsic value of art for the artist. Artists, in their search for a new personal vision, challenge the viewer to look at the world in a different manner. Modernism began the direct assault against the viewer. Post-Modernism continues this tradition and represents the current state of the artist's mind.

1. *Modernism and the Rise of Post-Modernism*

The rise of Modern art reveals the artist's rebellion against established norms. Modernism began in the 1860s with the artist Manet, who, following the advice of the poet Baudelaire, painted modern life. This was a radical response to traditional concepts of art, and it challenged artists to think about art in a new way. Around the beginning of the century, the seemingly steady and leisurely developments in the arts suddenly shattered. This phenomenon reflected a similar change in man's view of the world: social, political, and economic changes signaled the gradual collapse of authoritarian systems and values. In the arts, the traditions of the past were challenged, questioned, and rejected.

From their inception, Modern art movements and concepts were intentional, purposeful, and directed. Each movement attempted to make a point; manifestos and programmatic doctrines formulated concepts. The role of the critic became important in shaping new artistic developments.

Modernism reached its apogee in the 1960s under Minimalism's single color canvases.⁶⁶ Minimalism, a highly conceptualized construct, abandons all pretensions of either expressiveness or illusion. The critic Clement Greenberg suggested that Modernism,

⁶⁴ Holger Cahill, *The Federal Art Project*, in THEORIES OF MODERN ART, *supra* note 60, at 471, 473.

⁶⁵ Constant, *Our Own Desires Build the Revolution*, in THEORIES OF MODERN ART, *supra* note 60, at 601 (Lucy R. Lippard trans., 1968).

⁶⁶ Minimalism "uses a rationally evolved, conceptual method of composition which consists of simple arrangements of identical and interchangeable units, often modular, mathematically derived, or working out geometric permutations, grids or repetitions which can be continued or extended indefinitely." THE THAMES AND HUDSON DICTIONARY OF ART AND ARTISTS 225 (Herbert Read et al. eds., 1966. Nikos Stangos ed., rev. ed., 1985) [hereinafter DICTIONARY OF ART AND ARTISTS].

and particularly Minimalism, was a purist movement; art could “maintain [its] past standards of excellence by using the characteristic methods of a discipline to criticize the discipline itself — not in order to subvert it, but to entrench it more firmly in its area of competence.”⁶⁷ Thus, late Modernism distinguished between good and bad art: good art was pure, self-critical, original, sincere, and serious.

After Minimal art ran its course, it was succeeded by an artistic form which denied even the most basic assumption of art. “The characteristic Modernist preoccupation with concepts led, finally, to these very concepts becoming actual substitutes of what was commonly understood by art until then.”⁶⁸ Minimal art’s replacement, Post-Modern art, “attacked the... distinctions between good art and bad, between high art and popular culture, between the sanctity of the art context and real life.”⁶⁹ Artists employing this idiom “rejected the idea that art must [be serious or] have any traditional ‘value’ at all.”⁷⁰

2. Post-Modernism Defined

Post-Modern art has its roots in Dada, Surrealism, and Pop art. The name Dada comes from “the child’s first sound [which] expresses the primitiveness, the beginning at zero, the new in our art.”⁷¹ The movement, composed of political radicals, was specifically anti-art: “[It] aimed at provoking the public, destroying traditional notions of good taste, and liberation from the constrictions of rationality and materialism.”⁷² Surrealism claimed “to take in the whole spectrum of human activity, with the object of exploring and unifying the human psyche, embracing hitherto neglected areas of life like the dream and the unconscious.”⁷³ Pop art embraced the imagery of consumerism and mass culture with irony, and it glorified the nature of urban popular culture.⁷⁴

The widespread abandonment of traditional concepts of art can first be seen in the Dada movement and Marcel Duchamp’s concept of the “readymade.”⁷⁵ His philosophy reduced art to a rudimentary level: “the single, intellectual, largely random decision to name this or that object or activity ‘art.’”⁷⁶ Mainstream artists of the 1960s embraced some of these ideas. For instance, the concept of non-art is present in Robert Rauschenberg’s *Erased DeKooning Drawing* (exactly that) of 1953, Arman’s 1960 exhibition consisting of two truckloads of garbage, and the “happenings” of Claes Oldenberg, Jim Dine, and Alan Kaprow, which introduced the medium of multi-media performance art.

The experiments during the 1960s paved the way for Post-Modern philosophy. Post-Modern art rejects the notion that art must be new, original, or avant-garde; this art is

⁶⁷ Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1363 (1990) (quoting Clement Greenberg, *Modernist Painting*, in MODERN ART AND MODERNISM: A CRITICAL ANTHOLOGY (F. Franciscus & C. Harrison eds., 1982)).

⁶⁸ Dawn Ades, *Dada and Surrealism*, in CONCEPTS OF MODERN ART 115 (Nikos Stangos ed., Harper & Row 1981) (1974).

⁶⁹ Adler, *supra* note 67, at 1364.

⁷⁰ *Id.*

⁷¹ Ades, *supra* note 68, at 110 (quoting Richard Huelsenbeck, DADA LIVES! in DADA PAINTERS AND POETS 280 (Motherwell ed., 1951)).

⁷² *Id.* at 115.

⁷³ *Id.* at 124.

⁷⁴ EDWARD LUCIE-SMITH, THE THAMES AND HUDSON DICTIONARY OF ART TERMS 149 (1984).

⁷⁵ Duchamp exhibited ordinary objects (e.g. a urinal, bicycle wheel, snow shovel) calling them “readymades.” FREDERICK HARTT, ART: A HISTORY OF PAINTING, SCULPTURE, ARCHITECTURE 918 (1985).

⁷⁶ Robert Smith, *Conceptual Art*, in CONCEPTS OF MODERN ART, *supra* note 68, at 257.

aggressively derivative.⁷⁷ Artist Sherrie Levine takes famous art photographs and rephotographs them.⁷⁸ David Salle layers images that he appropriates from art history with those from popular culture: pornographic images, pictures from magazines, and cartoons.⁷⁹ Jeff Koons makes works that look like lawn sculpture, thus challenging the distinction between trash and valuable art.⁸⁰ In recycling images, these artists suggest that art does not have to be original.

Post-Modern art frequently deliberately shocks or offends. These artists not only defy standards like "serious value" but also disregard the basic premise of *Miller* that art can be distinguished from obscenity. For instance, performance artist Karen Finley is "known for stripping and smearing herself with chocolate."⁸¹ John Fleck, a homosexual artist, gained notoriety when he "urinated onstage during a performance about the homeless."⁸²

3. *The Post-Modern Dilemma*

The goals of Post-Modern art conflict with the NEA's general decency standard. Post-Modernism is a revolutionary artistic movement, a pluralistic, many faceted rebellion against the dictates of Modernism. It emphasizes the non-serious, the irreverent, and the impure. It resists the *Miller* standard and its demands that art be "serious" or have any traditional "value" at all. First, under the premise of Post-Modernism, the artwork does not make an important or original contribution to art. Second, the artwork is not serious and does not reflect the sanctity or solemnity of high art. Finally, the artist is not serious or sincere in his attempt to make art.

Therefore, Post-Modern art presents a profound dilemma: artists attack notions of decency when they produce their art.⁸³ They rebel against the traditional notions of visual expression. Furthermore, the courts, acting as the final arbiter of obscenity, may not "know it when they see it."⁸⁴

C. *Manifestations of the Artist's Mind*

Artists continually produce shocking art. Senator Danforth said of the Mapplethorpe pictures, "These are gross. These are terrible . . . I do not think that they are art . . . and my guess is that not a single resident of my State would like them."⁸⁵ Strong sentiments

⁷⁷ "It was Goethe who said, 'Every good idea has already been thought: suffice it only to think it again.'" SANDY NAIRNE, *STATE OF THE ART: IDEAS AND IMAGES IN THE 1980S* 30 (1990).

⁷⁸ *FLASH ART: TWO DECADES OF HISTORY: XXI YEARS 172-174* (Giancarlo Politi & Helena Kontova eds., 1990).

⁷⁹ See H.H. ARANSON, *HISTORY OF MODERN ART: PAINTING SCULPTURE ARCHITECTURE PHOTOGRAPHY* 646-47 (3d ed. 1986).

⁸⁰ "While Pop Artists could make art that looked like trash and slyly celebrated high art, Mr. Koons makes art that looks like trash and trashes high art." Michael Brenson, *Review/Art: Shifting Image and Scale*, N.Y. TIMES, Dec. 2, 1988, at C22.

⁸¹ Eric Pianin, *Helms Wins Senate Vote to Restrict NEA Funds; Action Targets "Offensive" Materials*, WASH. POST, Sept. 20, 1991, at B1.

⁸² *Id.*

⁸³ "Decency, of course, is in the mind of the hearer, the receiver of information. The First Amendment . . . protects the speaker." Frohnmayer, *supra* note 8, at 71.

⁸⁴ This refers to Justice Stewart's remark on hard-core pornography, "I know it when I see it," in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁸⁵ 135 CONG. REC. S12116 (daily ed. Sept. 28, 1989) (statement of Sen. Danforth). Although Senator Danforth was personally outraged by the works, he was opposed to any content restrictions on the grounds that Congress cannot and should not attempt to "define" art. *Id.*

such as this were responsible for the NEA's content restrictions. However, the prohibitions in the statute, namely that the NEA should not promote or disseminate "depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts,"⁸⁶ contradicts persistent themes in western art.

According to the artist, sexual eroticism in art deserves protection:

The portrayal of sex . . . in art . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech. . . . Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.⁸⁷

Sexual eroticism, as a part of the artist's vision, is a subject which is pervasive throughout the history of western art.

1. *Sadomasochism in Western Art*

European civilization has always shown a predilection to cruelty, a cruelty often sanctified and made respectable by the machinery of Church and state.⁸⁸ Mythological and religious works illustrate sadistic fantasies; for instance, paintings depicting Perseus and Andromeda frequently combine the fantasy of bondage with the fantasy of an inviting female. Also, the theme of Prometheus provides for sexual fantasies. According to legend, Prometheus is punished for stealing fire from the gods by being chained to a rock and having his liver perpetually eaten by an eagle.⁸⁹ One interpretation of Ruben's *Prometheus* suggests that Prometheus's crime was voyeurism: the untoward visual curiosity which impels the artist towards creativity. If this hypothesis is correct, the picture hints at several facets of the desire for self-punishment.⁹⁰

Religious themes of martyrdom provoke masochistic and sexual undertones: St. Lawrence writhing on a gridiron, St. Andrew being crucified, St. Bartholomew being flayed, and St. Sebastian bound and pierced by arrows. In Sebastiano del Piombo's *Martyrdom of St. Agatha*, the saint is subjected to a particularly overt form of sexual torture and seems to welcome it.

Certain movements in art are more amenable to sadistic visions. For instance, Baroque art frequently expresses sado-masochistic fantasies. This movement emphasized the colorful and dramatic: "The ensemble made a theatrical and emotional assault on the spectator, enmeshing him in a spatial geometry whose lines are never still."⁹¹ Some of the most highly erotic works of the period show either martyrdoms or incidents from the passion. The disturbing subject of *Christ after the Flagellation*, by Murillo, illustrates this tendency.

In the nineteenth century, French Romantic artists emphasized the following elements: "[a] feeling for nature . . . ; [an] emphasis on subjective sensibility and emotion and on

⁸⁶ Pub. L. No. 101-121, Tit. III § 304, 103 Stat. 741 (codified in part in 20 U.S.C. § 954 (1988)).

⁸⁷ Kim M. Shipley, Comment, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms* 40 EMORY L.J. 241, 263-264 (1991) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 87 (1976) (Stewart, J. dissenting)(citation omitted)).

⁸⁸ EDWARD LUCIE-SMITH, *THE BODY: IMAGES OF THE NUDE* 14 (1981).

⁸⁹ MANDFRED LURKER, *DICTIONARY OF GODS AND GODDESSES, DEVILS AND DEMONS* 289 (G.L. Campbell trans., Routledge 1988) (1984).

⁹⁰ CHRISTOPHER WHITE, *PETER PAUL RUBENS* 132 (1987).

⁹¹ *DICTIONARY OF ART AND ARTISTS*, *supra* note 66, at 30.

imagination, as opposed to reason; and interest in the past, the mysterious and the exotic.⁹² Therefore, a sadistic element is often justified by the emotional events of the time. For instance, Goya's *Disasters of War* depicts the terrifying scenes attested to by contemporary descriptions of the Peninsular campaign. Furthermore, the artist Delacroix's most famous compositions reveal many sadistic details. In the *Massacre at Chios*,⁹³ for instance, a Turkish horseman drags a woman across the ground, causing one commentator to state: "[s]uffering, violence, [and] emotional excess of all sorts are reveled in rather than lamented."⁹⁴

Sadomasochism persisted throughout nineteenth century art, and the Symbolists and Decadents inherited this theme. The symbolist movement is hermetic: ambiguity becomes a source of inspiration to the artist. The symbol becomes a catalyst. Sexuality plays a prominent role; for instance, Gustave Moreau's art emphasizes cruelty and suffering.

2. Homosexuality in Western Art

Greek art of the archaic and early classical periods seems to reveal little guilt about any form of sexual activity. Dionysiac scenes on vases frequently show erotic scenes of homosexual behavior and "[t]he release of orgy was as much to be celebrated as the dignity of the gods."⁹⁵

In Baroque art, realistic elements are transformed. There is an open acknowledgment of sensuality and an increased passion for the colorful and the dramatic. For instance, Carravaggio's paintings overtly reveal his homosexual predilections. For instance, in his *Saint Matthew and the Angel*, the role of the angel is ambiguous: he may be instructing the saint or may be attempting to seduce him.⁹⁶ According to contemporary sources, the church which commissioned the original picture rejected it because "it was not proper, nor like a saint, sitting there with his legs crossed, and his feet rudely exposed to the public."⁹⁷

Where European arts are concerned, the most richly represented of all sexual deviations is undoubtedly lesbianism.⁹⁸ Many mythological paintings, especially those showing Diana and her nymphs, have lesbian overtones. Rubens' representation of *Jupiter and Callisto* is particularly illustrative. Legend suggests that in order to win the affections of the obdurate nymph, Jupiter turns himself into the semblance of Diana. Consequently, Rubens represents one woman making sexual advances to another.⁹⁹

⁹² *Id.* at 286.

⁹³ The poet Baudelaire described Delacroix's work as follows:

Everything in his work . . . is desolation; everything bears witness to the eternal and incorrigible barbarity of mankind. Towns set afire and smoking, victims with their throats cut, violated women, the very children thrown beneath the hooves of horses or about to be stabbed by distracted mothers; this whole *œuvre*, I say, seems a terrible hymn composed in honor of fate and irremediable pain.

EDWARD LUCIE-SMITH, *EROTICISM IN WESTERN ART* 116 (1972).

⁹⁴ HARTT, *supra* note 75, at 809.

⁹⁵ LUCIE-SMITH, *EROTICISM IN WESTERN ART*, *supra* note 93, at 16.

⁹⁶ THE METROPOLITAN MUSEUM OF ART, *THE AGE OF CARAVAGGIO* 84 (1985).

⁹⁷ LUCIE-SMITH, *EROTICISM IN WESTERN ART*, *supra* note 93, at 85.

⁹⁸ Freudian theory inclines to the hypothesis that a voyeuristic interest in lesbianism is directly linked to the voyeur's own castration fear. A woman who acts as if she already possessed a penis is, for the watcher, a reassuring spectacle, in that she is less likely to try and rob him of his own.

Id. at 203.

⁹⁹ WHITE, *supra* note 90, at 107.

In the nineteenth century, mythological pretexts are cast aside. Courbet's *Sleep* is a celebrated representation of lesbians.¹⁰⁰ Similar couples can be seen in the work of Rodin, Klimt, Pascin, and Toulouse-Lautrec. Lautrec, like Courbet, often portrayed lesbians in a moment of repose. "The lesbianism frequent among professional prostitutes seems to have tickled his taste for what was grotesque, unnatural, and the same time humanly touching and pathetic."¹⁰¹ In an attempt to chronicle his era, Lautrec explored many facets of Parisian life: "[s]ociety at its lowest ebb was his favorite setting and his inspiration."¹⁰² Female homosexuality in the brothels became a frequent theme in his repertoire.

3. *The Depiction of Sexual Exploitation of Children*

A number of works dating from the sixteenth and seventeenth centuries reveal the taboo against incest. One particular theme depicts Lot engaging in dalliance with his own daughters. After the destruction of Sodom, Lot's daughters make him drunk so that he may impregnate them in order to conceive a son to carry on the race. Albrecht Altdorfer paints the scene with a startling sense of domesticity: "There is no feeling of guilt or shame—the patriarch clasps his beautiful daughter confidently, enthusiastically and . . . rather cosily. It seems like the fulfilment of a dream which many fathers have had about their daughters, and many daughters about their fathers."¹⁰³ The myth excuses the representation.

Roman Charity also reveals incest, though the imagery is less common. For instance, Matthaus Stomer illustrates this story of a dutiful daughter who kept her father alive, after he has been condemned to starve to death in prison, by feeding him with her own milk.

4. *The Portrayal of Individuals Engaged in Sex Acts*

Rape scenes are common in European art. Beginning in the sixteenth and seventeenth centuries, mythical themes served as inspiration. In Titian's *Rape of Europa*, Jupiter disguised as a white bull, carries off the distraught, yet yielding Europa. Rubens' *Rape of the Daughters of Leucippeus*, recalls Titian's composition. Poussin's rendition of *The Rape of the Sabine Women* attempts a lofty subject; the abduction of the Sabine women by the Roman bachelors assures the perpetuation of the Roman race.

Twentieth century art portrays sex acts with unmatched candor and ferocity. The works of Alice Neel, Lucien Freud, Philip Pearlstein, and Stanley Spencer illustrate this tendency. This art challenges the traditional tendencies of art "to ascribe emotional, psychological, erotic significance to the human subject-matter of the work."¹⁰⁴

¹⁰⁰ GEORGES BOUDAILLE, GUSTAVE COURBET: PAINTER IN PROTEST 107 (Michael Bullock trans., 1969).

¹⁰¹ LUCIE-SMITH, EROTICISM IN WESTERN ART, *supra* note 93, at 131.

¹⁰² FRANÇOIS MATHEY, THE IMPRESSIONISTS 159 (Jean Steinberg trans., 1961).

¹⁰³ LUCIE-SMITH, EROTICISM IN WESTERN ART, *supra* note 93, at 208-09.

¹⁰⁴ JANET HOBHOUSE, THE BRIDE STRIPPED BARE, THE ARTIST AND THE FEMALE NUDE IN THE TWENTIETH CENTURY 261 (1988).

III. MAPPLETHORPE AND SERRANO REEXAMINED

A. *How Artists View Mapplethorpe and Seranno*

Robert Mapplethorpe, a New York based artist was notorious for the aura of the illicit sexuality that he managed to convey in his photographs. As an active member of the gay sub-culture of New York in the 1970s and '80s, he drew upon extremist sexual preferences for his inspiration. His art has been classified as part of the Post-Modern idiom because it attempts to deconstruct the lines between sexually explicit behavior and art.

Mapplethorpe continually maintained that his work was over-aestheticized. He stated, "I don't think there's that much difference between a photograph of a fist up someone's ass and a photograph of carnations in a bowl."¹⁰⁵ His personal vision promoted a reexamination of the world around him. "My work is about seeing—seeing things like they haven't been seen before. Art is an accurate statement of the time in which it was made."¹⁰⁶

From the artist's perspective, Mapplethorpe's work conveys a serious artistic vision. Janet Kardon, director of the American Craft Museum, stated, "No matter what his subject matter, he brought a sense of perfection to it."¹⁰⁷ She further explained, "[A]ll of the attributes one characterizes a good formal portrait by, that is composition and light and the way the frame is placed around the image, all of those things are brought to bear in every image."¹⁰⁸ Martin Friedman, the director of the Minneapolis Art Center, suggested, "I recognize that they [the pictures of the X portfolio] are difficult. . . . But they do shine lights in some rather dark corners of the human psyche. . . . And they do reflect an attitude that is not necessarily limited to the artist."¹⁰⁹

Like Robert Mapplethorpe, Andres Serrano challenges traditional notions and conventions. His work seeks to come to terms with complex questions of religious beliefs. Early in his *œuvre*, Seranno often used meat within his scenes in order to combine carnality with religiosity. In 1987 and 1988, he began using urine and other bodily fluids to emphasize "the Catholic obsession with the 'body and blood of Christ.'"¹¹⁰

Certainly, Seranno's attempts to portray his own personal vision have been sincere. Likewise, his deliberate exploration of religious themes may be seen as a serious artistic endeavor. Donald Kuspit described Serrano's work in the SECCA exhibition catalogue:

[The pictures] are against American superficiality, which denies the "life blood" in things. In a stagey way that makes his choice of figures representative of a murky depth within American superficiality, and that seems to summarize the mediational/hallucinatory character of much of this century's abstraction.¹¹¹

¹⁰⁵ DUBIN, *supra* note 2, at 172 (citing Parker Hodges, *Robert Mapplethorpe, Photographer*, MANHATTAN GAZE, Dec. 10, 1979, at 5).

¹⁰⁶ RICHARD MARSHALL, *FIFTY NEW YORK ARTISTS: A CRITICAL SELECTION OF PAINTERS AND SCULPTORS WORKING IN NEW YORK 75* (1986).

¹⁰⁷ Robin Cembalest, *The Obscenity Trial*, ARTNEWS, Dec. 1990, at 136, 138.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ DUBIN, *supra* note 2, at 98-99.

¹¹¹ Donald Kuspit, *Objects and Bodies: Ten Artists in Search of Interiority*, in *AWARDS IN THE VISUAL ARTS 7*, at 7, 13 (Virginia S. Rutter & Vicki Kopf/Southeastern Center for Contemporary Art eds., 1988).

Kuspit's description captures the essence of Serrano's photography and seems to place the artist's work within the framework of mainstream modernist concepts.

B. *Are there Limits on the NEA?*

The NEA amendments which bar the funding of obscene or pornographic works represent the first congressionally imposed restrictions in the twenty-five year history of the NEA. Artists have seen these restrictions as a plan to bring the grant procedures into line with the moral and religious sensibilities of Jesse Helms and Catherine MacKinnon.¹¹² Artist Karen Finley stated, "[T]here are artists right now who are changing their art because they are scared."¹¹³

The 1990 amendments required the NEA to take into account a "general standard of decency" when considering grant applications.¹¹⁴ For the artist, this standard has serious repercussions: "Any legislative condition put on artists' speech, no matter how intemperate or immoderate, no matter how vague or specific, means you publish a dictionary with certain words deleted from the language, it means you lay out a palette with certain colors struck from the spectrum."¹¹⁵ Self-censorship could result from these formal requirements.

Furthermore, the focus on content is perplexing to the artists: neither the NEA's mandate¹¹⁶ nor its legislative history¹¹⁷ indicates that content can be the sole basis for funding. Nevertheless, the Helms amendment suggests that the NEA should look at the works content as separate and distinct from its artistic merit. However, from the artist's perspective, the form of work may be as significant as its content, and may in fact be its content.

Are there any meaningful limitations which the NEA could impose on funding? To Helms and those who supported funding restrictions, obscenity seemed to be a logical focal point. Arguably, a ban on obscenity still permitted serious artistic representations. Furthermore, the First Amendment does not protect obscene material.¹¹⁸ While the First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech,"¹¹⁹ that freedom is not absolute.¹²⁰ The government also limits speech that is "defamatory, fraudulent, or damaging to national security."¹²¹

¹¹² de Grazia, *supra* note 48, at 4-5. *See also*, Grace Glueck, *Border Skirmish: Art and Politics*, N.Y. TIMES, Nov. 10, 1989, § 2, at 1 (Artist Chuck Close views this as a return to an "officially sanctioned, state-supported, state-approved art.").

¹¹³ Adler, *supra* note 67, at 1373 (telephone interview with Karen Finley, Aug. 1989).

¹¹⁴ *See supra* notes 44-46.

¹¹⁵ E.L. Doctorow, *Art vs. The Unicuture*, 253 THE NATION 675, 676 (Nov. 25, 1991) (from testimony before a House Subcommittee hearing on the NEA).

¹¹⁶ *See supra* notes 11-15 and accompanying text.

¹¹⁷ *See supra* notes 16-25 and accompanying text.

¹¹⁸ All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment]. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Roth v. United States, 354 U.S. 476, 484 (1957).

¹¹⁹ U.S.CONST. amend. I.

¹²⁰ Perhaps the most famous limitation is Justice Holmes's observation that one cannot falsely yell "fire" in a crowded theater. Schenk v. United States, 249 U.S. 47, 52 (1919).

¹²¹ Beverly M. Wolff, *Restricted Images: What can Museums Exhibit? Nudity and the New Reach of Law*, in LEGAL PROBLEMS OF MUSEUM ADMINISTRATION (ALI-ABA Course of Study, C479 ALI-ABA 621 (1990)).

However, for the artist, obscenity has definitional problems. "Obscenity" is an elusive concept and cannot be equated merely with sex.¹²² It is a subjective matter based on individual's perceptions¹²³ and cannot be separated from the contemporary society in which it arises.¹²⁴

The standard under *Miller v. California*,¹²⁵ which governs the definition of obscenity today, established a three part test for determining whether a given work should be labeled obscene. *Miller* elucidated that "serious" material merited First Amendment protection; however, the court did not state whether contemporary local community standards or standards of a broader community should determine the value of the work. A 1987 decision, *Pope v. Illinois*,¹²⁶ clarified this requirement by suggesting that the "proper inquiry is . . . whether a reasonable person would find [serious] value in the material, taken as a whole."¹²⁷

The Court assumed that "serious value" provided a workable standard that could distinguish between sexually explicit art and obscenity.¹²⁸ However, this current "objective" standard is not foolproof, as individual taste necessarily factors into a determination of a work's value.¹²⁹ For the artist, any standard involving individual taste has serious ramifications.

IV. CONCLUSION

The words of the sculptor Rodin capture the artist's predicament:

In art, immorality cannot exist. Art is always sacred even when it takes for a subject the worst excesses of desire. Since it has in view only the sincerity of observation, it cannot debase itself. A true work of art is always noble, even when it translates the stirrings of the brute, for at that moment, the

¹²² *Id.*

¹²³ Justice Douglas stated:

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

Paris Adult Theatres I v. Slaton, 413 U.S. 49, 70 (1973) (Douglas, J. dissenting).

¹²⁴ In the early nineteenth century, obscenity suggested a violent or supernatural depiction. *See, e.g.*, Rody, *supra* note 53, at 189.

¹²⁵ 413 U.S. 15, 24 (1973). *Miller* involved an obscenity prosecution against a defendant who had mailed brochures advertising sexually explicit books.

¹²⁶ 481 U.S. 497 (1987). *Pope* was an obscenity prosecution against two "adult" bookstore attendants in Illinois.

¹²⁷ *Id.* at 500-01.

¹²⁸ As Justices Brennan and Douglas noted in their separate dissents in *Paris Adult Theaters I v. Slaton*, no test for obscenity would ever survive constitutional attack: "[S]hort of that extreme [of deeming obscene any depiction of human sexual organs] it is hard to see how any choice of words could reduce the vagueness problem"

413 U.S. 49, 94 (1973) (Brennan, J., dissenting).

¹²⁹ As Justice Scalia wrote in his concurring opinion in *Pope*:

[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is beauty" is a novelty even by today's standards.

Pope, 481 U.S. 497, 504-05.

artist who has produced it had as his only objective, the most conscientious rendering possible of the impression he has felt.¹³⁰

By its nature, art questions any definition that critics ascribe to it. Continually, artists violate boundaries, as that is what artists do. Consequently, society has one choice: either it protects art as a whole or it shields its citizens from obscenity. However, these terms are mutually exclusive; the NEA may choose one at the sacrifice of the other.

The guiding principle surrounding the formation of the NEA suggests that the agency should be free from governmental interference. Content restrictions, as found in the 1989 and 1990 amendments, conflict with the basic notions of the Act.

Theoretically, to support content controls, government could abandon funding for the NEA. However, if the NEA is dissolved, artists and art institutions would have to rely on private contributions and indirect tax subsidies. This is of major concern to artists as wealthy patrons would be given the ability to decide what art should be funded. As John Frohnmayer, the former chairman of the NEA stated, "Every society needs its artists; they are its watchers, its critics, its champions. It is a commentary on the strength and wisdom of a government which supports the arts without content restraints."¹³¹

If the government wishes to continue to provide the funding for the NEA, and it does not want to disband the organization, can any content controls survive? It would seem that only restrictions calling for diverse aesthetic content could endure. How can the NEA insure that artists will not abuse the system? Any institution may potentially suffer from abuse; however, given the goals of Post-Modernism and its willingness to stretch artistic boundaries to extremes, the NEA seems particularly vulnerable to claims lacking any aesthetic merit. Will members of society at large present objects utterly lacking artistic value to the NEA for funding? Perhaps. However, the onus should be on the advisory panel to determine the value of the proposal and its benefit to society. These panels are insulated from political pressure; their members, though established and knowledgeable experts in the arts, cannot be aligned with any particular arts organizations. Ultimately, oversight is vested in the Chairperson, who can influence the course and direction of funding. By investing the panel with considerable discretion, the artist is free to experiment. This protects the artist's integrity. History suggests that today's controversial works may be tomorrow's classics.

¹³⁰ Rody, *supra* note 53 (citing 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 240-41 (2d ed. 1987) (quoting ANTÉE, June 1, 1907)).

¹³¹ Allan Parachini & Joe Velazquez, *Federal Funding of Controversial Art Defended; Art: "Creativity Will be the Currency of the 21st Century," NEA Chief Frohnmayer Declares at House Subcommittee Hearing in Malibu's Getty Museum*, L.A. TIMES, Mar. 6, 1990, at F1.