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Promoting the Arts by Dissolving the National Endowment for the Arts

PRIYA SARA CHERIAN†

The National Endowment for the Arts ("NEA") has become a battle ground for the cultural war in the United States between conservatives and liberals. In the battle over funding for the arts, the conservative right continues to call for the abolition of the NEA.1 This call intensified when the courts thwarted attempts to stop the NEA from awarding grants to artists who, in the opinion of NEA foes, produce indecent work. Generally, liberals have supported the continued existence of the NEA as part of their general view that society is better off if individuals have broad and vigorous First Amendment rights.2 Both sides have taken a position on the NEA without necessarily considering what would be best to sustain excellence in arts in the United States.

This Comment argues that the NEA should be abolished because, given the desire of politicians to control the viewpoints promoted by government-funded art, the NEA is constitutionally suspect, if not altogether unconstitutional. The NEA should also be abolished for the good of artistic excellence in America, especially post-modern, homoerotic, and other types of avant-garde art. The creators of the NEA feared that government funding for the arts would become government control of the arts.3 The recent politicization and polarization of NEA funding demonstrate that the NEA has realized its founders' worst fears. The proposed Fowler Amendment of 1989, an effort to stop the NEA from funding "indecent" art work, illustrates that the realm of arts funding is irrevocably infused with politics.4

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3. See text accompanying note 7.
4. See subsection II.C.
Furthermore, although the creators of the NEA specifically did not want the award of an NEA grant to be the imprimatur of government approval, today the awards exert powerful influence in the arts community. Artists and artistic institutions that receive NEA grants are regarded by private and corporate sponsors as more legitimate and hence more worthy of funding. As a result, artists who receive NEA grants are more likely to receive funding from other sources. This pattern of funding means that NEA grants are exerting a signaling effect: they signal to non-government sources of funding which art and artists the government has deemed worthy of support and approval. In this way, the NEA now operates contrary to the intentions motivating the creation of the endowment.

Section I of this Comment discusses the history of the NEA to demonstrate that its original purpose was to support a so-called objective, artistically excellent aesthetic. Section II will discuss the now famous Mapplethore/Serrano NEA funding controversy. This incident has demonstrated how the NEA funding process has been captured by politicians who will inevitably attempt to control the viewpoint of art through funding decisions. Such decisions are constitutionally suspect.

Section III will examine the challenges brought against legislative attempts to restrict the flow of NEA funds to art that promotes points of view. This examination will demonstrate the futility of any attempt to craft a constitutionally sound method of controlling NEA funding in the post-modern world. This is because, in the post-modern world, all art expresses a point of view. Finally, Section IV will make the case for the abolition of the NEA. It will conclude that the only solution that is both constitutionally sound and supportive of arts in the United States is the dissolution of the NEA; the alternatives are constitutionally suspect and stifle the progress of art beyond the modern period.

I. The History of the National Endowment for the Arts

When the government began funding art it self-consciously decided to do so in a manner that insulated art from politics. In time, however, the govern-

5. See note 7.
6. See note 78.
7. Representative Powell, one of many who addressed the fear that government funding of the arts was really government control of the arts, stated:

That favorite old bogy, the camel who pokes his nose in the tent, is sure to be dragged into the picture to raise the issue of federal dictatorship of taste. Whether or not tyranny and artistic achievement are incompatible, there will be none of the former in this proposal. The restraining force of the broadly based 26-man national councils . . . will assure that no council chairman could act as a cultural czar blanketing the country with productions to his liking. The few strings that will be attached to the grants will be of a house-keeping nature only to avoid profligate use of tax money, not to guarantee imposed mediocrity.

ment's decision to fund the arts has become extremely politicized. 8

A. THE CREATION OF THE NEA

The United States government did not make a continuing and a permanent commitment to support the arts until 1965 with the creation of the NEA. 9 The goal of the bill founding the NEA was to promote artistic achievement, not to impose government control of the arts. 10 Many opponents of the NEA, who were often supporters of the arts as well, feared from the beginning that any government involvement in the arts, even funding, would result in government control of the art world. 11 They felt that the art world was better served by being ignored by the government altogether. They feared that government promotion of the arts would eventually become something more sinister like government control and censorship of the arts. One representative put his concerns as follows: "Things being what they are in Washington, we can be sure that if this bill is passed, the day will not be far off before we demand political

9. The National Endowment for the Arts was created by statute in 1965. The first instance of federal government support for the arts was during the Great Depression through the Works Project Administration ("WPA"). While the WPA supported artists, it did so largely for economic reasons rather than out of a sense that the government had a role to play in the promotion and stewardship of the arts. Note, Standards for Federal Funding of the Arts: Free Expression and Political Control, 103 Harv L Rev 1969, 1970 (1990).
10. In the words of President Lyndon B. Johnson:
We fully recognize that no government can call artistic excellence into existence. It must flow from the quality of the society and the good fortune of the nation. Nor should any government seek to restrict the freedom of the artist to pursue his calling in his own way. Freedom is an essential condition for the artist, and in proportion as freedom is diminished so is the prospect of artistic achievement.
11 Cong Rec 23,937, 23,954 (cited in note 7).
11. For example, Representative Bloomfield had dire predictions for the future of artists when the bill enacting the NEA was passed. He likened the NEA to the French National Academy, and noted at length the inability of the French government to recognize the genius of the Impressionists:

Mr. Chairman, there could be no more painful death to truly creative art in the United States, no surer punishment for the great artists in our country for daring to be different than passage into law of H.R. 9460.
This bill is straight plagiarism of Federal control of the arts which has done nothing for the truly great artist and instead has rewarded that which has no meaning.
France has had a National Academy of Arts for years [which] has had a consistent habit of turning its back on the man with talent and rewarding the man who follows the safe party line and does not dare to deviate from the norm.
To name just a few who were declared unfit and whose paintings were black-balled by official art in France, there were such men as Renoir, Cezanne, Van Gogh, Toulouse-Lautrec, Degas, Gauguin, and Rodin.
Now we are being asked to inflict the same sort of punishment, the same sort of vilification on our artists.
111 Cong Rec 23,941-42 (cited in note 7).
allegiance of those who receive federal grants, that we see the controversial ignored and mediocre praised.\textsuperscript{12}

Cognizant of the risk of politicization, proponents such as Representative Powell attempted to design the NEA in such a way as to insulate art from politics.\textsuperscript{13} Most importantly, two institutional safeguards in the structure of the NEA were designed to shield the grant-making process from political control. The first structural safeguard is the Chairperson-Council format. Although the power to make final grant decisions is vested in the Chairperson of the NEA, he is instructed by the enabling statute to make his decisions with the advice of members of the National Council on the Arts ("Council"), a group of arts professionals.\textsuperscript{14} The Council makes grants recommendations, but the Chairperson makes the final decision.\textsuperscript{15} The Chairperson will not approve a grant unless the Council has first recommended it.\textsuperscript{16} While it is true that the Council itself may be subject to political pressure, this pressure can not effect total control because neither the Chairperson nor the Council acts unilaterally.\textsuperscript{17}

Another structural safeguard designed to shield the grant-making process, and the arts generally, from government control is the statutory clause that prohibits the NEA from subsidizing more than fifty percent of any one project.\textsuperscript{18} Because the NEA is statutorily restricted from funding an entire project by itself, the creators of the NEA believed that the NEA would be unable to dictate the contents of any project.\textsuperscript{19}

Soon after the creation of the NEA, its administrators made at least one more attempt to shield the arts from politics. The NEA administrators created the Peer Advisory Panel which is composed of private experts who make recommendations to the Council and the Chairperson. The criteria developed to select the members emphasize professionalism.\textsuperscript{20} The Peer Advisory Panel makes initial recommendations to the Council that then makes recommendations to the Chairperson. This structure was an attempt to preserve the integrity of grant award decisions by taking the initial decision-making process out of the hands of the federal government.\textsuperscript{21} The panel members were envisioned as independent art experts who would remain free from political influence. The implementation

\textsuperscript{12} Id.
\textsuperscript{13} Representative Powell described the way in which arts would be shielded from politics. See text accompanying note 7.
\textsuperscript{14} National Endowment for the Arts, 20 USC § 954(c) (1995).
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} 20 USC § 954(e).
\textsuperscript{19} 111 Cong Rec 23,939 (cited in note 7).
\textsuperscript{20} Note, 103 Harv L Rev at 1973, citing National Endowment for the Arts: Panel Study Report 6-7 (1987) (detailing the origin of the panel system) (cited in note 9); see also 20 USC § 954(c).
of the Peer Advisory Panel was thus another institutionalized safeguard designed to prevent the NEA system from becoming a mere vehicle of political patronage. In time, however, these institutional safeguards proved insufficient to shield the grant-making process from the interference of politics. The safeguards proved insufficient because of the cultural shift that society underwent in the years following the NEA’s creation.

B. A CULTURAL SHIFT FROM PROFESSIONALISM TO PLURALISM

After the creation of the NEA in 1965, popular and high culture changed profoundly as the nation moved into the post-modern period. With the advent of post-modernism in the 1970s came a questioning of authority. Artists challenged the notion that a “professional” could identify objectively good art. They even questioned the very notion that art could be objectively distinguished from that which is not art. This period was characterized by a profound questioning of the meaning, content, and legitimacy of cultural values, including those of artistic value and excellence. These challenges to the concept of an objective aesthetic continue today. As one art observer put it, “the very notion of high artistic achievement is often regarded as a chimera and the products of these long and sophisticated Western traditions are often treated as if they have no greater claim on America’s attention than the latest music video.”

Unsurprisingly, these changes in political and cultural philosophy affected the NEA. No longer could so-called “elite” art professionals hold sway to the degree they had during the early years of the NEA when artistic values were considered ascertainable and even objective. The elite art professionals’ loss of the power to make dispositive judgments about art mirrored an increasing societal recogni-

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23. Id at 331.
24. The move from modernism to post-modernism was a move that rejected art as ahistorical and without subject. Arguably, a better term than “post-modern” is “post-structuralism.” Rosalind E. Krauss, The Originality of the Avant-Garde and Other Modernist Myths 5-6 (MIT 1986).
25. See, for example, Karen Finley, It's Only Art, Village Voice Literary Supp (Oct 1990), reprinted in Bolton, Culture Wars at 282 (cited in note 8).
26. See, for example, the juxtaposition of C. Carr, War on Art, Village Voice 25 (June 5, 1990), reprinted in Bolton, Culture Wars at 230 (cited in note 8), with Samuel Lipman, Say No to Trash, NY Times A29 (June 23, 1989), reprinted in Bolton, Culture Wars at 41 (cited in note 8) (Lipman purports to be able to distinguish between what is art and not art, as well as what is good art and bad art. Carr’s piece completely rejects Lipman’s distinctions.).
27. Edward Rothstein, The Tribulations of the Not-So-Living Arts, NY Times D1, 14 (Feb 18, 1996) (discussing the problem of audience attrition for major institutions of fine arts).
28. See, for example, 20 USC § 954(c)(2) (1954) (authorizing the NEA to support artistic endeavors which meet professional standards or standards of authenticity, irrespective of origin which are of significant merit).
tion of cultural diversity.\textsuperscript{29} This recognition, of course, was caused in part by the seizure of political power by previously marginalized groups, such as gays and lesbians. This kind of emergence set the stage for a cultural war.

Broadly speaking, the battle lines in the art world were drawn between, on the one hand, cultural conservatives who sought to maintain their “objective” aesthetic standards and, on the other hand, liberals who were willing to question these standards.\textsuperscript{30} The conflicts in the art world arguably reflected the clash of values in the political realm.\textsuperscript{31} Underlying the question of funding for the arts “was a debate over competing social agendas and concepts of morality, a clash over both the present and future condition of American society.”\textsuperscript{32} Many conservatives believed that avant-garde artists were promoting an agenda designed to legitimate “multiculturalism, gay and lesbian rights, feminism, and sexual liberation” and attack “the family, traditional religious beliefs, and the existing structure of power.”\textsuperscript{33} Liberals, on the other hand, saw the conservative attack on the arts as more than a mere attack on freedom of expression. They charged that the conservative assault was particularly insidious because it was “a right-wing political program to restore traditional social arrangements and reduce diversity.”\textsuperscript{34}

Given this state of affairs, the NEA funding process was ripe for capture by interest group politics.\textsuperscript{35} The Mapplethorpe/Serrano controversy was an almost inevitable result.

II. The Mapplethorpe/Serrano Controversy

The Mapplethorpe/Serrano controversy demonstrates the inability of the NEA to function in a constitutionally legitimate way.

A. THE SHIFT IN ART HISTORY FROM THE MODERN TO THE POST-MODERN PERIOD

The NEA was established during the modernist period in art history, a time when there was objective substance to the phrase “artistic excellence.”\textsuperscript{3} During this period it was believed that good art did not express a political point of view. Despite attempts to entrench the modern view of art, the modern period proved to be a transitory period in art history that was succeeded by post-modernism. The Mapplethorpe/Serrano controversy took place in the midst of these changing views about art and should be seen as part of the emergence of the belief that the

\textsuperscript{29} Note, 103 Harv L Rev at 1975 (cited in note 9).
\textsuperscript{30} Bolton, \textit{Culture Wars} at 3 (cited in note 8).
\textsuperscript{31} Id at 5.
\textsuperscript{32} Id at 3.
\textsuperscript{33} Id at 5.
\textsuperscript{34} Carole S. Vance, \textit{The War on Culture}, 77 Art in America 39, 43 (Sept 1989), reprinted in Bolton, \textit{Culture Wars} at 106, 113 (cited in note 8).
\textsuperscript{35} See, for example, Patrick Buchanan, \textit{Losing the War for America’s Culture?} Wash Times (May 22, 1989), reprinted in Bolton, \textit{Culture Wars} at 31 (cited in note 8).
phrase "artistic excellence" is almost wholly relative and that art is never viewpoint-neutral.

Modernism in art history began with Manet in the 1860s and reached its apogee with the Minimalists in the 1960s. The highly influential art critic Clement Greenberg described modernism as a purist movement. According to Greenberg, art should exist for its own sake and must be purposefully devoid of political content. Of course, if art has no content or subject, it seemingly has no point of view either. From the modern perspective, good art could be distinguished from bad art because good art was identified as "pure, self-critical, original, sincere, and serious." One should note, however, that even during the modern period, there were artists like Marcel Duchamp and movements like Surrealism, struggling against the precepts of modernism.

In 1972, the art critic Leo Steinberg coined the term "post-modern" to describe the art movement that was revolting against late-modernist art. Post-modernism rejected the precepts of modernist art by questioning both what is good art and what is art. This movement rejected the traditional distinction between high art and popular culture, and adamantly rejected the notion that only serious art is good art. In other words, "[p]ost-modernism not only rejected the Modernist demand that art be 'serious,' it rejected the idea that art must have any traditional 'value' at all. It mocked notions of originality and authenticity; it replaced sincerity with cynicism." An example of this is Andy Warhol's pop art with its emphasis on reproduction and repetition.

This studied rejection of the notion that good art must be serious was accompanied by the acknowledgment that art always reflects a point of view and values. Post-modern art critics pointed out that, far from being value neutral, "modernist art history celebrates a selective tradition which normalizes [a] set of practices." In contrast, post-modern art shuns modernist tenets like the transhistorical form and the idea of indestructible aesthetic categories and

37. Id at 1363.
38. In the modern period, "Art for art's sake" appear[s] and subject matter or content becomes something to be avoided like a plague." Clement Greenberg, Art and Culture: Critical Essays 5 (Beacon 1961).
40. Id at 1364.
41. Id at 1362.
42. Id at 1364.
43. Id at 1364, 1367
instead opens these concepts to historical analysis.\textsuperscript{45} Above all, post-modernism denies the modernist precept that art can be value-neutral.

Thus, over time, the very definition of what is art has changed. The law, however, has not kept up with these changes. When the Supreme Court in \textit{Miller v California}\textsuperscript{46} addressed the question of whether sexually explicit mailings are protected by the First Amendment, the Court said that a work is protected only if it has “serious literary, artistic, political or scientific value.”\textsuperscript{47} For the art world, this means that a work is not protected by the First Amendment unless it has serious artistic value. The court decided \textit{Miller} in 1973, during the last phase of the modernist art period. At least one commentator has noted that \textit{Miller}, probably unconsciously, entrenched the definition of modern art as art.\textsuperscript{48} While the \textit{Miller} definition of art—something that has serious artistic value—was correct in the modern period, the post-modern art world has rejected this definition.

Thus, \textit{Miller}’s notion of what speech is worthy of protection—work that has serious artistic value—mirrors the modernist conception of what is art.\textsuperscript{49} The \textit{Miller} standard leads to profound dissonance when it is applied to post-modern art, a movement that rejects the values of modernism altogether.\textsuperscript{50} Despite the fact that modernism was but one of many transitory phases in art history, \textit{Miller} has etched modernism’s definition of good art into the test that decides whether a work is constitutionally protected.

The Fowler Amendment, probably self-consciously, used language that echoed the wording of \textit{Miller}.\textsuperscript{51} The NEA also said it would use \textit{Miller} to interpret the obscenity oath.\textsuperscript{52} By using \textit{Miller}, these efforts to regulate funding projects chosen by the NEA were doomed from the start. Either they were unworkable because it makes no sense to apply a modernist notion of artistic value to post-modernist art, or the standard condemns NEA-funded art to stagnate in the tradition of modernism. Indeed, as previously noted, even during the modernist period there were artists like Marcel Duchamp and movements

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\item \textsuperscript{45} Krauss, \textit{The Originality of the Avant-Garde and Other Modernist Myths} 2 (cited in note 24). For example, collage, a paradigmatically post-modern medium, rejects “Modernism’s goal to objectify the formal constituents of a given medium. . . . Collages problematize that goal by setting up discourse in place of presence, a discourse founded on a buried origin, a discourse fueled by the absence.” Id at 38.
\item \textsuperscript{46} \textit{Miller v California}, 413 US 15 (1973).
\item \textsuperscript{47} \textit{Miller}, 413 US at 24. Note that the Court’s definition of protectible work is similar to Adler’s description of what defines good art in the modern period. Adler, 99 Yale L J at 1361-64 (cited in note 36).
\item \textsuperscript{48} Adler, 99 Yale L J at 1364.
\item \textsuperscript{49} “[T]he very foundation of \textit{Miller}, the belief that some art is just not good enough or serious enough to be worthy of protection, mirrors the modernist notion that distinctions could be drawn between good art and bad art, and that the value of art was objectively verifiable.” Id at 1364.
\item \textsuperscript{50} Id at 1365.
\item \textsuperscript{51} See text accompanying note 60.
\item \textsuperscript{52} See text accompanying notes 72 and 73.
\end{itemize}
like Surrealism that were struggling against the precepts of modernism. For them, the *Miller* definition of protected art was already too narrow. It is certainly too narrow to protect art, as it is defined in the art world, during the post-modern period.

**B. THE ART OF MAPPLETHORPE AND SERRANO**

The NEA came under fire in the spring of 1989 for two grants. The NEA was excoriated by Senators D’Amato and Helms and their supporters for having given grants to support a retrospective of the works of Robert Mapplethorpe, a critically-acclaimed photographer. The exhibition, entitled “The Perfect Moment,” included some of Mapplethorpe’s homoerotic photography. A grant award to the photographer Andres Serrano also drew fire. Among his works was “Piss Christ,” a photograph of a crucifix standing in a jar of urine.

Unfortunately for the NEA, this controversy exploded in the summer of 1989, just before the NEA’s budget allocation was to be debated in Congress. During the congressional debates, the very existence of the NEA was called into question.

**C. CONGRESSIONAL RESPONSE TO THE ART OF MAPPLETHORPE AND SERRANO**

The final result of the congressional debates and deliberations was a budget cut and the enactment of legislation to restrict the NEA’s ability to fund certain kinds of art. The NEA budget was cut by $45,000. The amount was symbolic of Congress’s displeasure with the NEA’s funding of Mapplethorpe and Serrano because $45,000 was the total amount that the NEA had given to fund the two controversial exhibitions.

Congress’s second response to the Mapplethorpe/Serrano debacle was to enact legislation intended to stop future funding of disfavored art. Although Congress did not pass the highly restrictive Helms Amendment, it did pass the

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55. Id.
59. The Helms Amendment provided as follows:
   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 sadomasochistic, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or
Fowler Amendment. The Fowler Amendment, which became effective in 1989, provided that:

None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including, but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.60

To actuate the Fowler Amendment, NEA Chairman John Frohnmayer implemented a certification requirement that had to be met before grant monies would be dispersed to the grantee.61 This certification requirement came to be known as the “obscenity oath.” The wording of the obscenity oath closely tracked the wording of the statutory amendment. The recipient had to certify that he or she was in compliance with “General Terms and Conditions for Organizational Grant Recipients.”62 A recipient could receive no funds unless the recipient vowed that the funds would not be used to “promote, disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene.”63 Dissatisfied with the Fowler amendment because it did not go far enough, Congress revised the NEA statute in 1990. It replaced the Fowler Amendment with the so-called “decency clause.”64 The decency clause demands that “artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for diverse beliefs and values of the American public . . . .”65

The constitutional legitimacy of the obscenity oath, the Fowler Amendment, and the decency clause was soon challenged in court.

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60. 20 USC § 954. See also Note, 103 Harv L Rev at 1976 n 44 (cited in note 9).
61. The proceeds of an award are actually distributed to the applicant after the applicant submits to the NEA a “Request for Advance or Reimbursement.” The NEA added the certification requirement to this document. Bella Lewitzky Dance Foundation v Frohnmayer, 754 F Supp 774, 776 (C D Cal 1991).
62. Id.
63. Id.
64. 20 USC § 954(d).
65. 20 USC § 954(d)(1).
III. The Legal Challenges to Legislative Restrictions
on the Funding of “Obscene” Art

These cases show the extent to which politics and partisan concerns have
infiltrated NEA funding decisions, making the grant awards process constitution-
ally suspect.

A. CHALLENGING THE OBSCENITY OATH

The first and only reported case to challenge the obscenity oath and by
implication the Fowler Amendment was Bella Lewitzky Dance Foundation v
Frohnmaier.66 The Bella Lewitzky Dance Foundation (the “Foundation”) was
awarded an NEA grant after the enactment of the Fowler Amendment. When the
Foundation submitted its request for actual grant monies, it completed the
certification letter, but it crossed out the obscenity oath section.67 The NEA
fulfilled the Foundation’s request for $15,000, but the NEA also wrote a letter
to the Foundation stating that the Foundation would be bound by all the terms
of the obscenity oath, including the crossed-out portion, if the Foundation were
to use the money.68 In response, the Foundation did not use the $15,000, and
the balance of the Foundation’s grant remained undistributed.69 Instead, the
Foundation sued the NEA, arguing that the obscenity oath requirement was
unconstitutionally vague under the Fifth Amendment and that it violated the
First Amendment.70

The NEA subsequently made an attempt to define the contours of the oath
requirement by sending to grantees a “Statement of Policy and Guidance for the
Implementation of Section 304.”71 This statement informed grant recipients that
the NEA essentially would rely on the Supreme Court’s decision in Miller72 to
cabin the meaning of “obscenity” for the purposes of the obscenity oath.73
Despite this reliance on the Miller standard, the Bella court held that the obscen-
ity oath requirement was unconstitutionally vague.74

The NEA had argued that the terms of the obscenity oath were not unconsti-
tutionally vague under the Fifth Amendment because the NEA’s policy statement
made it clear that the NEA would interpret “obscenity” by using the Miller
standards. The court said that this assertion did not solve the vagueness problem
for two reasons. First, the NEA was not bound by this policy statement.75
Second, even if the NEA were bound, it would be impossible for the agency to

66. Bella, 754 F Supp at 774 (preceding the institution of the decency clause).
67. Id at 777.
68. Id.
69. Id.
70. Id at 781.
71. Id at 777 (The “Statement” is commonly known as the “obscenity oath.”).
73. Bella, 754 F Supp at 777.
74. Id at 781.
75. Id at 782.
provide the same procedural safeguards that were the bedrock of the *Miller* decision.\(^7\) The court said that one of the important procedural safeguards afforded in *Miller*, a jury of citizens applying the standards of a community to determine obscenity,\(^7\) is "unobtainable by an administrative agency of the federal government."\(^7\) It is simply impossible for a national agency to apply varying community standards because only a jury can do so. Moreover, it would be unworkable for NEA funding decisions to be made through the required jury of community citizens.\(^7\) Thus, the obscenity oath is unconstitutionally vague because it forces "grantees . . . [to] speculate at their own peril."\(^8\) Despite the NEA’s reference to *Miller*, a grantee could still not know precisely what actions were prohibited.

The *Bella* court also found that the obscenity oath contravened the First Amendment.\(^8\) The court noted that the effect of the vague oath is to force grant recipients to give extremely wide berth to anything that is arguably obscene\(^8\) This result is unacceptable under the First Amendment because it impossibly chills speech.\(^8\)

The *Bella* court further rejected the NEA's attempt to shield the oath behind a line of cases that allows the government to grant some subsidies without having to subsidize everything.\(^8\) The court noted that while the Foundation did not have a right to a government subsidy, once the subsidy was granted the government could not place restrictions on it that violate the Fifth and First Amendments.\(^8\) By requiring that grantees adhere to the obscenity oath, the government was allowing grantees access to their award monies only on the condition that they waive their Fifth and First Amendment rights. Thus, the court also struck down the obscenity oath on a theory of "unconstitutional condition."\(^8\)

Finally, the court recognized that the chilling effect on freedom of speech and expression is exacerbated by the signaling effect caused by the award of an NEA grant.\(^8\) The court noted that NEA grants indisputably influence whether others

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76. Id.
78. *Bella*, 754 F Supp at 782.
79. Id.
82. Id.
83. Id.
84. Id at 784, citing *Cammarano v US*, 358 US 498 (1959) (holding that even though an activity may be constitutionally protected, here lobbying efforts, the government does not have an obligation to subsidize that activity); *Regan v Taxation Without Representation of Washington*, 461 US 540, 549 (1983) (holding that government may deny tax-exempt status to a lobbyist group).
86. Id at 784, citing *Perry v Sinderman*, 408 US 593, 597 (1972) (holding that the government may not deny a benefit to a recipient for reasons that infringe on the recipient's freedom of speech).
will give grants to arts organizations.\textsuperscript{88} Quoting the Amicus Theatre Communications Group, the court said that “most non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient’s artistic merit and value. NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and [arts] companies to attract non-federal funding sources.”\textsuperscript{89}

\section*{B. CHALLENGING THE DECENCY CLAUSE}

Like the obscenity oath, the decency clause was also challenged in court. In \textit{Finley v NEA},\textsuperscript{90} the plaintiffs challenged the decency clause, the successor to the Fowler Amendment. It is the first and only reported case to do so. The plaintiffs in \textit{Finley} were all artists who had applied for individual artists’ funding from the NEA. They had been unanimously approved by the Peer Review Panel that considered Performance Artists.\textsuperscript{91} Ordinarily, the actual awarding of a grant after a recommendation from the Panel is a mere formality.\textsuperscript{92} NEA Chairman Frohnmayr, however, questioned the panelists repeatedly about their decision.\textsuperscript{93} In May of 1990, the panel again unanimously recommended the four plaintiffs for grant funding. Nevertheless, by the end of June the plaintiffs were told that their grant requests had been denied.\textsuperscript{94}

In their suit, the plaintiffs initially alleged that the NEA had “violated their First Amendment rights by denying their applications on impermissible political grounds and by failing to adhere to procedural safeguards mandated by the First Amendment.”\textsuperscript{95} After the suit was filed, however, Congress repealed the Fowler Amendment and replaced it with the decency clause.\textsuperscript{96} The new language required the chairperson to ensure that grantees meet a “decency” requirement in addition to a standard of “artistic excellence and artistic merit . . . [which takes] into consideration general standards of decency and respect for diverse beliefs and values of the American public.”\textsuperscript{97} In response to this change in the law, the

\begin{itemize}
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id. Other than quoting the Amicus Theatre Communications Group, the court did not offer any independent evidence in support of this assertion.
\item \textsuperscript{90} \textit{Finley v NEA}, 100 F3d 671 (9th Cir 1996), aff'g \textit{Finley v NEA}, 795 F Supp 1457 (C D Cal 1992).
\item \textsuperscript{91} \textit{Finley}, 795 F Supp at 1462.
\item \textsuperscript{92} Id at 1462 n 9.
\item \textsuperscript{93} Id at 1462.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} 20 USC § 954(d).
\item \textsuperscript{97} This phrase is situated as follows:
No payment shall be made . . . except upon application therefor which is . . . in accordance with . . . procedures established by the Chairperson. In establishing such regulations . . . the Chairperson shall ensure that—
(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
(2) . . . [s]uch regulations and procedures shall clearly indicate that obscenity
plaintiffs in *Finley* filed an amended complaint that challenged the new subsection as also void on First Amendment and Fifth Amendment grounds.98

The Ninth Circuit found that the decency clause violated the Constitution on Fifth Amendment vagueness grounds because the term “decency” is inherently subjective and “[p]ersons of common intelligence must necessarily guess at the meaning and differ as to the application” of the decency clause.99 Moreover, the Ninth Circuit reasoned that the decency clause neither reveals the criteria for NEA selection nor cabins the NEA’s discretion in any way.100 Thus, it contravenes the Fifth Amendment requirement of due process.101

Perhaps more importantly, the Ninth Circuit discussed the plaintiff’s First Amendment claim that the NEA’s governing statute now violates the First Amendment by imposing content-based restrictions on protected speech.102 As the district court noted, the gravamen of the plaintiffs’ argument was that “public subsidization of art, like public funding of press and university activities demands government neutrality.”103

In considering this challenge, the Ninth Circuit adopted the district court’s analysis which stated that “[a]rtistic expression, no less than academic speech or journalism, is at the core of a democratic society’s cultural and political vitality . . . [and that] Congress recognized as much in establishing the NEA.”104 Also, the court found that Congress wanted the NEA to be “open and richly diverse, reflecting the ferment of ideas which has always made this nation strong and free.”105 Thus, the Ninth Circuit noted that “[e]ven when the government is funding speech, it may not distinguish between speakers on the basis of the speaker’s viewpoint or otherwise ‘aim at the suppression of dangerous ideas.’”106 Accordingly, the decency clause imposes a First Amendment injury on plaintiffs by impermissibly attempting to impose a viewpoint-based restriction.107

Furthermore, as the district court explained, the decency clause reaches expression which, although indecent, is not obscene. This means that the decency

20 USC § 954(d).
98. *Finley*, 795 F Supp at 1463.
99. *Finley*, 100 F3d at 680 (quoting Connelly v General Construction Co, 269 US 385 (1926)) (internal quotation modifications omitted).
100. Id.
101. Id.
102. *Finley*, 100 F3d at 674.
103. *Finley*, 795 F Supp at 1472.
104. Id at 1473 (quoted in part in *Finley*, 100 F3d at 682).
106. *Finley*, 100 F3d at 682 (quoting Regan v Taxation Without Representation, 461 US 540, 548 (1983)).
107. *Finley*, 100 F3d at 682.
clause reaches a substantial amount of protected speech. In reaching this conclusion, the district court cited the Supreme Court’s holding in FCC v Pacifica, for the proposition that “[p]rurient appeal is an element of the obscene, but the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.” While obscene speech is not protected by the First Amendment, some indecent speech is protected. Because the decency clause reaches constitutionally protected speech, the district court in Finley concluded that the decency clause is also void for overbreadth.

Thus, neither the obscenity oath nor the decency clause achieved the twin goals of (1) passing constitutional muster and (2) restricting the NEA from funding indecent art. In addition, in light of Miller, if the Bella court is correct, it is arguably impossible for an agency such as the NEA to restrict the award of grants to artists who do not produce obscene work because such a standard is unconstitutionally vague, largely because the NEA cannot make funding decisions using a jury. Finally, the last problem with the Miller test and the decency clause is one that is only made clear by an understanding of the nature of the modern and the post-modern periods in art history.

IV. The Argument for the Abolition of the NEA

A. THE NEA SHOULD BE ABOLISHED

When considering the regulation of funding for the arts in the post-modern period, the following question must be posed: is it even possible to construct a law that will simultaneously (1) allow politicians to prevent the NEA from funding art which they find indecent or otherwise objectionable, (2) meet the requirements of the constitutional mandate that laws not be vague in violation of the Fifth Amendment, (3) satisfy the First Amendment prohibition on viewpoint restrictions as well as the procedural concerns expressed by Miller, and (4) promote art as it is currently defined in the art world, or at least not condemn art to stagnate in a modernist conception of aesthetic values.

At a minimum, it will be impossible to satisfy both the desire of politicians to prevent the NEA from funding art that they find indecent and the First Amendment’s prohibition on viewpoint-restrictive legislation because of the nature of art in the current period. It is recognized that art today always expresses a point of view. Laws restricting which type of art may be funded will inevitably fail as an unconstitutional restriction on viewpoint. It may be possible to place restrictions on arts funding that are based on something besides view-

108. Finley, 795 F Supp at 1476.
110. FCC v Pacifica, 438 US at 740.
111. Id.
112. Finley, 795 F Supp at 1475.
113. Bella, 754 F Supp at 782 (citations omitted).
114. See text accompanying notes 44 and 45.
point, but the Mapplethorpe/Serrano controversy demonstrates that it is precisely
certain viewpoints that the politicians do not want to allow the NEA to pro-
mote.\textsuperscript{115} The NEA should therefore be abolished so as to end its distortion of
the arts market.

B. THE NEA DISTORTS THE ARTS MARKET

The NEA should be abolished because it distorts the arts market by channel-
ing monetary support to only those artists and art institutes that the government
approves. The NEA was created at a time when there was political credibility to
the idea that the government could create a corps of arts professionals that had
the ability to distinguish what was and was not excellent art.\textsuperscript{116} Over time,
however, the claim that art professionals, and art professionals alone, understand
what constitutes excellent art became politically, socially, and culturally unsta-
bile.\textsuperscript{117} The result of these changes was the politicization of the decisions to
fund arts through NEA grants. As discussed in Section I, this is the evil that the
NEA founders feared most.

Exhibitions of the works of Mapplethorpe and Serrano started the NEA art
debate. Ironically, artists like Mapplethorpe and Serrano are well-accepted,
indeed are acclaimed, by professional art critics.\textsuperscript{118} Since the NEA is not con-
trolled by the professional judgment of an arts elite, however, the status of these
artists in the art world is irrelevant. What matters for NEA funding is the
political acceptability of the art and the artists. Otherwise, as the
Mapplethorpe/Serrano controversy amply indicated, the NEA itself will be
threatened. Therefore, an artist like Mapplethorpe whose work promotes an
excellent and artistically challenging “gay aesthetic”\textsuperscript{119} will likely not receive
government funding because being gay, or at least promoting a homosexual life-
style, is politically unpopular. By their very nature, radical artists who challenge
the comfortable status quo will tend to be controversial and even economically
marginalized. If the NEA only funds what is politically popular, it will rarely
fund the most challenging works which question the norms and values of society.

The terrible effect of this regime comes from the signaling effect of NEA
grants. As the \textit{Bella} court noted, NEA grants signal to the public that the grant
recipient has government approval.\textsuperscript{120} As current NEA Chairman Jane Alexan-

\begin{itemize}
\item \textsuperscript{115} See text accompanying notes 30-35.
\item \textsuperscript{116} See text accompanying note 20.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} 135 Cong Rec S 12967, 12969 (1989).
\item \textsuperscript{119} The term “gay aesthetic” is not intended to convey the sense that art by gay
artists is any more monolithic than art by women, racial minorities or heterosexual white
men. The term is a reference to that which many conservatives found the most offensive
about Mapplethorpe, the homoerotic themes of some photography in his \textit{X-Portfolio}.
\item \textsuperscript{120} \textit{Bella}, 754 F Supp at 783. See also Department of the Interior and Related
Agencies Appropriations Act of 1996, HR 1977, 104th Cong, 1st Sess in 141 Cong Rec
H 7030, 7033 (July 17, 1995) (After describing Los Angeles performing arts center
Highways as “controversial,” Representative Stern noted that the left-hand corner of
der has herself stated, "Endowment grants serve as a major catalyst for leverag-
ing nonfederal support." She gave the example of the 1993 fiscal year, in which endowment grants of $120 million generated ten times that amount in matching funds. Without the NEA grants, these matching funds might not have been given to those projects. Artists who have NEA grants are more likely to receive money from private sources. In a world in which the NEA exists, the artists or arts groups that do not have the NEA stamp of approval will have much more difficulty getting funding from private sources.

The end result of NEA signaling is a pervasive government influence over the arts because those who do not have the NEA seal of approval will have a much harder time getting funding. If the government is unwilling to fund challenging art, the art market will be distorted. There will be a bias against challenging art and in favor of comfortable art that supports the status quo. This bias bodes ill for the future of "artistic excellence" in the United States if artistic excellence has anything to do with challenging the status quo. This insidious bias will exist so long as the government is giving any money at all to arts.

Recently, in an attempt to continue to function in the face of political attacks and budget cuts, the NEA has once again changed its grants award process. One of the most significant changes is a move away from funding individual artists and toward funding arts organizations. This move does not solve the problem of the effect of government signaling; it only shifts the focus of attention. When artists received individual grants, the NEA stamp of approval was placed directly on the artist himself. Now that NEA grants are going to arts organizations, the NEA stamp of approval is being placed on these arts organizations. They will be regarded as the most worthy arts organizations because they have the NEA seal of approval. The result likely will be a flow of money to these select organizations and away from other arts organizations. Finally, the approved arts organizations will decide which individual projects will get the NEA money. Thus, in the end, the NEA money is still allocated to individual arts projects. Despite the slightly more circuitous process, the end result is that individual arts projects will still receive the NEA stamp of approval. The only

Highway's brochure has "the good seal of approval from the National Endowment for the Arts." Thus, like some others, Representative Stern equates NEA funding with NEA approval. In his words, "By giving Highways one taxpayer dollar, the government and its Federal arts agency implicitly supports the Highways Arts Center. They put the NEA sealer [sic] on this flyer, so we [Congress or the Federal Government] have to endorse it.").


122. Id.

123. Bella, 754 F Supp at 783.

way to avoid having the government implicitly approve of certain artists and thus distort the arts market is by eliminating government funding altogether.

V. The Only Solution is Dissolution

As discussed above, the NEA should be dissolved because the agency’s procedures are constitutionally unworkable today given the state of America’s culture and because the NEA distorts the arts market by granting to certain selected artists the government seal of approval. Another reason to dissolve the NEA is that it is economically inefficient for the government to continue funding the arts if doing so frequently leads to litigation, which will be the case if the Mapplethorpe/Serrano controversy, the Bella case, and the Finley case are any indication.

Assume that funding a project costs $X and that the cost of litigation times the probability of litigation costs $Y. If the government continues to fund the arts in a way that exposes the government to the threat of litigation, it is spending $(X + Y) on this project while only $X is actually going to the arts.

In terms of spending money to support the arts, it makes no sense for Y to exist at all. Y exists because the government is prohibited under “constitutional condition” doctrine from allocating subsidies in ways that compromise the constitutional rights of individuals. It seems that viewpoint restrictions of the sort embodied in the decency clause are precisely the types of regulations that are the most likely to lead to litigation. It is likely that restrictions such as the decency clause will continue to be proposed because the arts is one of the many sites of the cultural war being fought in modern society.

If the government is to continue funding the arts, it should do so in a way that does not implicate the government in viewpoint restrictions. To avoid this, the government would have to delegate the decision of which artist to fund to a non-government entity like a museum or other arts organization. Such a proposed solution, however, only demonstrates the futility of the NEA’s continued existence. It is unlikely that anyone would vote to create what would amount to a federal conduit for money to go to the arts without regard to who the final recipients of the money turn out to be. If no one cared who receives the money, the Mapplethorpe/Serrano controversy would never have happened.

There are other problems with this solution even beyond the level of constitutional and agency laws. It is by no means clear which private institution

125. See Finley, 795 F Supp at 1472, affd 100 F3d 671 (declining to address unconstitutional condition question).
126. Arguably, the Smithsonian Institute is such a government institution. However, the Smithsonian itself has not been immune to criticism for supporting challenging exhibits. For example, the Smithsonian came under intense fire when it attempted to mount an exhibit that questioned America’s decision to use the atomic bomb on Japan in World War II. See James Risen, War of Words, LA Times E1 (Dec 19, 1994).
127. These are problems concomitant to any delegation of authority or discretion to a private entity. A discussion of such concerns, however, is outside the scope of this paper, especially since this proposal is really only a heuristic device.
should get the privilege of deciding to whom NEA grants should be awarded. Under the NEA process, it seems that art experts and professional critics should decide which institutions are the most meritorious, that is, which institutions are best at identifying and promoting artistic excellence. However, in a world in which art critics acclaim the very artists that people like Senator Helms decry, such decisions will not be shielded from political pressures.

This proposed NEA looks like sheer financial irresponsibility. It also does not eliminate the signaling problem discussed above. Under this new scheme, certain museums and arts groups will have the imprimatur of government approval while others will not. Such a scheme seems pointless. It is silly to collect money from taxpayers only to turn around and pay it to museums. If citizens wanted to give money to museums, they could do so themselves. Indeed, the government already provides incentives for such contributions by making them tax-deductible. The government’s further intervention in this transaction would only add administrative costs. The only conclusion to be drawn from this is that the NEA should be dismantled.

VI. Conclusion

The NEA must be abolished because it functions today in ways that at least are constitutionally suspect and may doom art to remain fixed in the modern period. When the NEA was created in 1965 during the modern period, there was some consensus that good art had no subject and accordingly expressed no point of view. Today, in the post-modern period, there is no clear consensus on what is good art or even on the very nature of art. It is clear, however, that post-modern art necessarily expresses a point of view. As a result, when politicians try to restrict the flow of government money to certain types of art, they are really restricting certain points of view—at the very least a constitutionally troubling article.

In addition, the only constitutional standard to restrict government funding based on viewpoint is the Miller obscenity standard, because other standards impermissibly discriminate against constitutionally protected speech. The Miller standard, however, is unworkable because it requires the use of a jury as the Bella court pointed out.

Finally, the NEA exerts a powerful signaling effect that puts the seal of government approval on certain projects. This seal channels other non-government monies to these projects, and thus distorts the arts market. Given the political climate, this will be a distortion toward mainstream art and away from challenging art. This system is a prescription for artistic stagnation. For these reasons, the NEA should be dissolved.