"One if by Land, Two if by Sea"

Arthur I. Jacobs*
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Abstract

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“One if by land, two if by sea.” Sorry, Paul! With the advent of Glasnost we may no longer need your warning. Certainly the enemies of the United States are not totally diminished, but perhaps we should look elsewhere for the enemy. As Pogo, the cartoon character, warns, “I have seen the enemy and the enemy is us.” While Eastern Europe discovers democracy and playwrights become presidents, Miss Liberty’s torch is flickering not so bright. While the fresh breath of democracy sweeps across that heretofore oppressed part of the world, the stale breath of oppression threatens our very basic way of life. This writing is an attempt by the author, with the help of others, to discuss the recent action of Congress and its threatening and shadowy effect on creative America.

The Helms amendment called for the banning of federal funding for:

1. obscene or indecent materials, including but not limited to de-
pictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or
2. materials which denigrate the objects or beliefs of the adher-
ents of a particular religion or non-religion; or
3. material which denigrates, degrades, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.¹

This amendment would have abolished Arts Endowment funding of any project that might offend anyone in any way. In short, Congress would determine what art is suitable for your community, despite the fact that fifty-eight percent of the American public believes that experts should judge what is art.² The amendment rose on the wave of controversy generated by two photography exhibits, including the work of Andres Serrano and Robert Mapplethorpe, which were funded by

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the National Endowment for the Arts (NEA). As passed by the Senate on voice vote (unrecorded with five members present) in July 1989, the amendment would prohibit spending to produce or disseminate material that is "obscene" or "denigrates" any religion or "nonreligion," or "reviles" anyone on the basis of race, creed, sex, handicap, age, or national origin. The difficulty of defining such suggestive terms as "obscene" and "nonreligion" in a way that would leave the first amendment intact is not apparent at a glance. The sweep of the proposal, which applies, for example, to all museums that receive federal funds, is enormous. It would radically rewrite the necessarily uncertain and wary relationship between the government and the arts.

In the House on September 13, 1989, Rep. Dana Rohrabacher (R-Cal.) asked that House confer on the Interior Appropriations Bill, which includes funding for NEA, be directed to accept the Helms provision. He and his supporters repeated his earlier threat to characterize a vote on the procedural question of whether to take up his motion as a vote on pornography. Such an assertion is, of course, absurd. The issue was not whether to embrace pornography, but whether to alter a procedure for subsidizing the arts, which seems reasonable to most people and which has served both the government's interest in deciding what it should pay for and the art proponents' interest in maintaining a seemingly independence.

Rep. Sidney Yates (D. III.) has a number of well-chosen words such as "incredible hodgepodge of administrative barriers," for instance, and "the start of George Orwell's age" for the proposal by which Senator Jesse Helms would shackle the NEA. Rep. Yates' words fell on willing ears. The House rejected the punitive Helms amendment to the $10.9 billion appropriation bill.

The Senate was reacting to the Endowment's partial funding of a retrospective show of Robert Maplethorpe's photographs, some of which depict sadomasochism, and its award of $15,000 to another photographer, Andres Serrano, whose work included an image of a crucifix submerged in urine. This is confrontational photography, and perhaps cruelly unsettling, but it is hardly a reason to destroy a process carefully legislated to insulate art from politics.

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4. Id.
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Are Lautrec’s depictions of prostitutes obscene? Does the way Willem de Kooning paints women denigrate, debase or revile? Should any publicly funded theater planning to produce Shakespeare first blue-pencil the play? Who is to decide what is art and what is pornography?

The only certain judge is time. In the end, the best invariably proclaims itself. In the interim the critics among us take chances and make guesses, and choices are made by peer review. But Senator Helms thinks this way is quicker and surer, and Congress will dictate.

When one combines the sweeping restrictions of the Helms amendment with the blacklisting of the Senate bill, there emerges a thinly-disguised attempt to kill the National Endowments for the Arts and the Humanities (NEH).

The terms of the Helms amendment are so encompassing as to virtually paralyze the agencies in their funding decisions. At bottom, the Endowments are directed not to provide any support for any project that might offend anybody. This obviously would gut both the arts and the humanities program, as well as force the Smithsonian to sharply curtail its programs. As the head of the National Museum of History has pointed out, its display of broadly-held scientific views of evolution would clearly offend some religious beliefs. Funding a study of the history of the state of Israel could offend some followers of Islam. A play about adultery would upset some viewers. A painting which is interpreted as telling women that their place is in the home could offend feminists. A study of the virtues of capitalism could offend a tiny handful of socialist voters. What about a community opera society mounting “Showboat” or “Torch Song Trilogy?” The “Merchant of Venice” was not particularly generous toward Jewish moneylenders; would that be off-limits because it might offend some group? A painting castigating the Ku Klux Klan for participating in lynchings would be forbidden.

According to the National Coalition Against Censorship, various groups have recently taken offense and have tried to ban the following works from publication, distribution to schools and libraries, and from receiving government funds: Anne Frank’s Diary of a Young Girl, Shakespeare’s Hamlet, Emily Bronte’s Wuthering Heights, Stephen Crane’s American classic, The Red Badge of Courage, The Autobiography of Benjamin Franklin, Oedipus Rex, Chaucer’s The Miller’s Tale, Edith Wharton’s Ethan Frome, Ernest Hemingway’s The Old Man and the Sea, and a story picturing a boy cooking. Attempts have
even been made to ban Mickey Mouse and Goldilocks. Such examples demonstrate the inevitable dangers of allowing content to become the yardstick for federal arts support, and underscore why the independence of the Arts Endowment must be safeguarded.

Simply put, the Senate restrictions, if they had passed, would force the Endowments to grind to a halt. One of our nation's most popular and successful programs, which has supported arts and humanities activities from one end of the country to the other, would be destroyed.

Common sense and history teach that virtually every work of art is going to offend someone. Indeed, one simply cannot have a democratic system in which the lowest common denominator of concern to any group is grounds for the government to refuse funding.

The Helms amendment is the very antithesis of Congress' original charter to NEA and NEH. When those endowments were created in 1965, Congress said that one of the artist's and the humanist's great value to society is the mirror of self examination which they raise so that society can become aware of its shortcomings as well as its strengths. The intent of this act show be the encouragement of free inquiry and expression. The Committee wishes to make clear that conformity for its own sake is not to be encouraged, and that no undue preference should be given to any particular style or school of thought or expression. Nor is innovation for its own sake to be favored. The standard should be artistic and humanistic excellence.

That viewpoint of Congress has carried forward to today. According to the recent Newsweek poll, only twenty-two percent of the American public polled believe that federal officials should exercise more control over art projects to ensure that they do not offend the public.

The fact is that the NEA process of granting funds is fair and effective. Significantly, this system was endorsed by the Task Force on the Arts and Humanities, appointed by President Reagan in 1981.

A few facts are relevant:

1. Between 1965 and 1988 the NEA for the Arts reviewed approximately 302,000 grant applications and funded approximately 85,000 grants.

2. The NEA's stewardship monies has been remarkably efficient and effective. As the House of Representative's Committee on Appropriations recently recognized:

   During its existence, NEA has approved approximately 85,000 grants to arts organizations and to individuals, of which less than 20 have been charged with violating public interest because of frivolity, indecency, or ethnic disparagement. In other words, less than one-tenth of one percent of the total number of grants aroused protests.2

Significantly, many of these projects were provocative, and the fact that a mere handful were matters of public concern demonstrates that the American public is quite able to handle controversial subject matter.

(3) In 1988 NEA distributed over $151 million. It considered 17,000 grant applications and made 4,600 grants to art institutions and individual artists.11

This shows, I believe, that the NEA system is working most effectively. All applications to the NEA are subject to review by an independent panel of experts who review applications and make grant recommendations. Congress says that these panels shall be composed of "individuals who have exhibited expertise and leadership in the field under review, who broadly represent diverse aesthetic or humanistic perspective, and geographical factors, and who broadly represent cultural diversity."12

In 1987, for example, there were ninety-two grant-making panels. They were made up of 678 individual artists, art administrators, state and local art agency professionals, trustees of arts organizations, patrons, and representatives of private philanthropic organizations. They came from across the country and from all disciplines. Since 1965, 3,300 people have served on these panels. Every year there is a constant renewal of these evaluation experts. Between forty percent and sixty percent of all panelists rotate off the panel and are replaced.14

The NEA panel approach is replicated in virtually every agency and department of the federal government. Such panels bring impor-

8. McGuigan, supra note 2, at 68.
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The panels bring expert judgment to determine the artistic worth of a particular application. They look for project proposals that "show excellence, are reflective of exceptional talent, and have significant literary, scholarly, cultural or artistic merit."18 However, the panels only make recommendations. The Chairman of the Endowment makes the final funding decision, with advice of the presidentially-appointed twenty-six member National Council on the Arts.19

This panel review system has been operating successfully over the last twenty-five years. Significantly, President Reagan's Task Force on the Arts and Humanities reaffirmed that the panel review system was a tested principle and concluded that NEA's mandate to consider reliance on the judgments of non-governmental professionals, private sector groups, and individuals is well served by professional review.20 Without qualification, President Reagan's Task Force endorsed the continuation of this system which leaves decisions about artistic and scholarly merit to the judgment of respected professionals in the arts and the humanities.18 It concluded that the panel review has proved to be a fair and effective system for grant-making at both Endowments.19

The process incorporates procedures not only to insure that artistically worthy projects are funded, but also that projects have community support, and in this way are "accountable" to the community. The artistic expertise of the peer review process is reinforced by the requirement that NEA grants be matched by local funding. Any federal grantee is, in fact, accountable to the local community which must secure matching funding in order to qualify for federal grants. Thus, federal money is not available without a clear indication that the local community will support a particular project. If a local arts organization receives a $30,000 programming grant, it then has to go back to the community to raise at least $30,000 in money from local or interested organizations to support that particular program. Specifically, the Institute of Contemporary Art (ICA) in Philadelphia which received a

$30,000 NEA grant, raised $180,000 privately to finance the show.21 This matching process insures that, broadly, there is support within the community for a particular program. A local arts organization cannot long endure if it cannot convince members of that local community to provide it with programming funds. Thus, there is continuing control and accountability within the funding process that confirms that NEA-funded programs are within the range of tolerance and acceptance in the local community.

If there are any questions as to the present grant-making procedures, the Senate has provided for a $100,000 study to review those procedures in the amendment which finally passed. The NEA has said that it welcomes any such study, and the arts community supports that proposal.

Although the final Helms amendment was softened somewhat by the final conference report of the 101st Congress, the specter remains. Those who offered the Senate amendments are determined to offer them again with renewed vigor.

The two critical Senate amendments—the one blacklisting of the two arts organizations involved in the Mapplethorpe and Serrano exhibits and the Helms amendment—raised serious and severe constitutional problems.

The Senate bill attempted to impose a five year ban on NEA funding for the Southern Center for Contemporary Arts (SECCA) in Winston-Salem, North Carolina, and on the Institute of Contemporary Art in the University of Pennsylvania in Philadelphia.22 This provision constituted a bill of attainder which is specifically barred by the Constitution of the United States.

An attainder is an act of legislative punishment. When Congress singles out a particular group and imposes a punishment, that action is barred by our Constitution. Under our system of government, Congress writes broad statutes of general applicability; it is the responsibility of the courts or the Executive Branch to determine whether individual organizations comply with those standards. As Justice Stevens wrote earlier this year, "The constitutional prohibitions against . . . bills of attainder reflect a valid concern about the use of the political process to punish . . . past conduct or private citizens."23 The constitutional bar

18. Id.
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20. Telephone interview with Anna Steele, deputy director of the NEA, (August 1989).
against bills of attainder was a rejection of the practice in the British Parliament whereby the legislature would directly judge the guilt and punish individuals, either through economic sanctions or more severe criminal sanctions.

Such congressional punishment is exactly what is occurring here. Of all of the thousands of grants that have been made by the NEA, only two organizations have been singled out, because they have mounted exhibitions whose contents are controversial to some legislators. There was no separate regulatory purpose stated either in the Senate Report or on the Senate floor. There can only be a punitive intent, as Senator Helms said, “Cutting off funding [for ICA and SECCA] will certainly prevent them from misusing Federal funds for the next 5 years.”23 The Senate singled out two organizations and imposed a most severe penalty—denial of NEA funding for a period of five years, so matter how qualified a particular project might be under NEA standards. This is punishment pure and simple, and under our Constitution Congress simply cannot do that.

Significantly, the Supreme Court has dealt with a situation directly parallel to this. In the early 1940s Congress determined that no federal funds could be spent for the salaries of three government employees, because some members of Congress had questions about their past beliefs, associations and loyalty. In United States v. Lovett,24 the United States Supreme Court held that this appropriations restriction, singling out particular individuals, violated the provisions of article I, section 3, clause 9 of the Constitution which forbids the enactment of a bill of attainder. The Court said that “legislative acts, no matter what their form, that apply either to name individuals or to easily ascertainable members of the group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.”25 Further, the Court found that the punishment can come through denial of federal funds. Finally, the Court said that

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Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they prohibited bills of attainder.26

This principle has been reinforced by the Supreme Court in United States v. Brown,27 which said that the Constitution prohibited the English parliamentary practice of punishing without trial “specifically designated persons or groups.”28 These same principles inexorably require the firm conclusion that the Senate blacklisting of the two arts organizations is unconstitutional.

The Helms amendment raised a host of other serious first amendment questions. At the outset, the artistic activities and works funded by NEA and the scholarship and investigation supported by the NEH most clearly fall within the protection of the first amendment. In addition, there can be no doubt that there are constitutional limits imposed on the federal government even though it is engaged in funding activities because the Constitution applies when the Government is spending tax money. It is true that many constitutional free speech cases have arisen in the context of governmental prohibitions on particular conduct; it is also clear that in federal funding the Government has somewhat greater “elbow room” in determining the general types of activities that it may wish to fund and subsidize. Nevertheless, the simple fact that funding is involved does not make the first amendment irrelevant. Thus, if NEH were to fund only works of scholarship that are supportive of a Republican Administration, there is no doubt that such content-based restrictions would be unconstitutional.

Viewed in this way, the Helms amendment raised a series of very serious constitutional concerns:

The Government cannot attach conditions on the expenditure of federal funds that would impinge unreasonably on freedom of speech. In FCC v. League of Women Voters of Calif.29 the Supreme Court ruled that a congressionally imposed ban on editorializing by public broadcasting stations which received federal funds was a ban on a whole class of speech based on its content.30 Even worse than a ban on

26. Id. at 317, 318.
27. 381 U.S. 437 (1965).
28. Id. at 447.
30. Id. at 402. In a similar manner, a series of cases have held that the discriminatory denial of tax exemptions impermissibly infringed free speech. See Big Mama
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25. Id. at 315-16.

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editorializing would be a provision that allowed for editorializing, but only if the content of editorials supported one political party. In such a case, viewpoint discrimination would be imposed on top of content-based discrimination. This is precisely the nature of the Helms amendment when it specifically prohibits negative speech about a group. Clearly the impact of the Helms amendment, which would severely limit the range of artistic expression, is unreasonably restrictive of freedom of speech. As noted above, the net effect of the Helms amendment is that federally-supported programs simply can't offend anyone. Realistically, that quite obviously devastates the range of artistic options available to the creative community.

The standards of the Helms amendment are all-encompassing and, at the same time, extraordinarily vague.93 Federal funding is denied to any materials which "denigrate the objects or beliefs" of any religious or non-religious group.94 This means that no federal funding could be used for any work of art which is critical of any group whatsoever—political, social or commercial.


31. The Supreme Court has established standards of specificity to invalidate laws which are vague. Of critical importance is the idea of notice to those subject to the law regarding its meaning. A law must be struck down if "[m]en of common intelligence must necessarily guess at its meaning." Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). Secondly, officials must have explicit guidelines to prevent arbitrary and discriminatory enforcement. Id. at 622. Thus, legislation standards are invalid where they turn on language calling for the exercise of subjective judgment, unaided by objective norms." NAACP v. Button, 371 U.S. 415, 466 (1963) (Harlan, J. dissenting). The vagueness standards are "especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning." Big Mama Rag, Inc. v. United States, 631 F.2d 1038, 1039 (D.D.C. 1980). As the Supreme Court noted in Baggett v. Bullitt, 377 U.S. 362, 372 (1964), vague laws "require [those subject to them] to 'steer far wider of the untrodden zone' ... by restricting their conduct to that which is unquestionably safe." Id. at 372.

Free speech may not be so inhibited.

32. 135 CONG. REC. E3195 (daily ed. Sept. 27, 1989) (statement of Hon. Leslie Youngs Drug Products Corp., 463 U.S. 60 (1983) refused to extend it to the receipt of mail containing unsolicited advertise-

Furthermore, it is not clear what the standard would be. Is any "denigration" adequate? Is it only what a reasonable listener would determine to be improper? What if the criticism is both true and fair, but nonetheless challenges a group? Likewise, the amendments preclude "debasing or reviling" any group.95 Again, there are no objective standards whatsoever. There is simply no way that one can determine whether an official administering the law is faithful to the congressional mandate. The result will be that virtually anything and everything can be rejected. The same can be said of the prohibition on "indecent material." The Supreme Court in FCC v. Pacifica Foundation96 distinguished "obscene" material from "indecent" but noted that "[p]urient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformity with accepted standards of morality." The Court recently held in Sable Communications v. FCC97 that "[s]exual expression which is indecent but not obscene is protected by the First Amendment" and can only be restricted in narrow circumstances where it is the only way to satisfy a compelling governmental interest. Here an outright ban on funding "indecent" materials can not meet any such standards.98

33. Id. The Supreme Court narrowly upheld a state's power to punish group libel in Beauharnais v. Illinois, 343 U.S. 250 (1952). However the Court's decision turned on the fact that there was a strong tendency for the prohibited utterances to cause violence and disorder—a condition not even included in the sweeping language of the Helms amendment. Furthermore, subsequent first amendment decisions have "so washed away the foundations of Beauharnais that it could not be considered authoritative." American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985). Beauharnais has even been undercut in the area of sexual speech. In Hudnut, the court ruled that an Indianapolis pornography ordinance was unconstitutional because its definition of "pornography" suppressed protected speech when it failed to confine itself to the definitive elements of obscenity as set forth in Miller v. California. 413 U.S. 15 (1973). The court further commented that it was not "clear that depicting women as subordinate and sexually explicit ways . . . would fit within the definition of a group libel." Id. at 331 n.3.


35. Id. at 740.


37. Id. at 2836. Although the Court in Pacifica ruled that indecency could be regulated in the broadcast medium, subsequent cases have refused to extend the ruling and have supported the narrowness of the Pacifica holding. The courts in Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), and Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983), both refused to extend Pacifica to cable television stations, and the Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) refused to extend it to the receipt of mail containing unsolicited advertise-
editorializing would be a provision that allowed for editorializing, but only if the content of editorials supported one political party. In such a case, viewpoint discrimination would be imposed on top of content-based discrimination. This is precisely the nature of the Helms amendment when it specifically prohibits negative speech about a group. Clearly the impact of the Helms amendment, which would severely limit the range of artistic expression, is unreasonably restrictive of freedom of speech. As noted above, the net effect of the Helms amendment is that federally-supported programs simply can’t offend anyone. Realistically, that quite obviously devastates the range of artistic option available to the creative community.

The standards of the Helms amendment are all-encompassing and, at the same time, extraordinarily vague. Federal funding is denied to any materials which “denigrate the objects or beliefs” of any religious or non-religious group. This means that no federal funding could be used for any work of art which is critical of any group whatsoever—political, social or commercial.


31. The Supreme Court has established standards of specificity to invalidate laws which are vague. Of critical importance is the idea of notice to those subject to a law regarding its meaning. A law must be struck down if “men of common intelligence must necessarily guess at its meaning.” Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). Secondly, officials must have explicit guidelines to prevent arbitrary and discriminatory enforcement. Id. at 622. Thus, legislation standards are invalid when they “turn on language calling for the exercise of subjective judgment, unaided by objective norms.” NAACP v. Button, 371 U.S. 415, 466 (1963) (Harlan, J., dissenting). The vagueness standards are “especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning.” Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 105 (D.D.C. 1980). As the Supreme Court noted in Baggett v. Bullitt, 377 U.S. 360, 372 (1964), vague laws “require [those subject to them] to ‘steer far wider of the untrodden zone’ . . . by restricting their conduct to that which is unquestionably safe.” Id. at 372. Free speech may not be so inhibited.


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Finally, at a very minimum, the Helms amendment imposes an indirect system of censorship and prior restraint on the publication of materials fully protected by the first amendment. The standards are so vague and subjective and the impact is so severe as to result in a wholesale chilling of free expression within our society. Such censorship by Congress is clearly "abhorrent to a society built on the tenets of freedom of speech and expression."  

It is for Congress to decide whether to have an NEA at all and, if so, how much funding to provide it. It is for Congress to establish mechanisms that permit oversight as to NEA's performance. These are unexceptional propositions. However, Congress may not pepper its grants with unconstitutional conditions. As the Supreme Court emphasized in FCC v. League of Women Voters, when funding by Congress is conditioned on the surrender of first amendment rights, the statutory scheme established by Congress is itself subjected to the strictest constitutional scrutiny. Nor may Congress reward or punish expression because of its content.  

45 Any such action by Congress would not only threaten to impoverish the free marketplace of ideas that our society cherishes, but would strike at the core of the first amendment itself. 

These are necessarily general legal observations. More important, and far more difficult, are some thoughts on the appropriate future conduct of NEA and the nature of congressional— or, if you will, taxpayer— oversight of that conduct. How can we reconcile the rights of the artist with the rights of the paying public? 

The first answer is this: If Congress is to fund the arts at all, it must take the arts as they are— sometimes less than flattering about American society, sometimes less than approving of recognized and generally held values of American life. To fund artistic expression only if it is "safe" or "responsible" art is simply to ignore the qualities of art that should lead Congress to fund it in the first place— its freshness of vision, its willingness to look anew at what the rest of us overlook or are incapable of seeing. 

Then it follows inexorably from a decision to fund in the first place that some of the funding, duly authorized by a functioning peer review process within NEA itself, will be offensive to some of our fellow citizens. How could it not be so? 

It is not, in any event, as if the entirety of the public agrees with every decision made by Congress. Virtually every congressional appropriation, the Supreme Court has observed, will to some extent involve a use of public money to which some taxpayers may object. 

Thus, when Congress decides whether to fund the Contras, to provide comprehensive medical care or to raise the salaries of federal officials, a significant minority (sometimes even a majority) of our people will disagree with what they do. This suggests that congressional action, even when it involves congressional funding, cannot and will not please all of the people all of the time. 

What is needed, I suggest, is common ground on a basic proposition: That funding will be based upon notions of quality and not of message. Of course, we may differ as to what "quality" means in a particular context but that is precisely why NEA was created in the fashion it was and directed to make just such decisions.
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At the same time as NEA directs its attention to choosing art worthy of funding, it is essential that NEA go about its task cognizant of the need to fiercely defend and enforce first amendment principles. It is simply unacceptable—no other word will serve—for NEA to fund an exhibition on AIDS and then to withdraw the funding based upon fear of adverse congressional reaction to a catalogue impolitic enough to criticize members of Congress themselves. Such a decision by NEA may, in the short term, be politically prudent. At the same time it inevitably sends precisely the wrong message to our country’s artistic community—that NEA is more concerned about keeping out of trouble with Congress than in presenting hard hitting and powerful, if sometimes disagreeable, exhibitions.

In the end, we must return to the nature of art itself. Unlike Mozart, genuine artistic works are not created to soothe us or to make us feel better about ourselves. They may do so but that is not the purpose of the creative process. That process involves a constant willingness to view anew the nature of the human condition, and the results of that process will not always be, could not always be, to everyone’s liking or consistent with everyone’s sense of propriety.

The difficult task for Congress and NEA is to recognize this and to nonetheless have the fortitude to continue its efforts towards assuring that the arts in this country remain healthy and solvent. This will take some forbearance by Congress and by an NEA understandably disinclined to be attacked or shackled or defunded by Congress. But if the arts are to be funded by Congress—and I, for one, certainly hope they continue to be—the funders should try to remember why they decided to do so in the first place.

To threaten such profoundly established rights of our people with demagogy does no service to our elected representatives or their constituency. The price of democracy, whether newly discovered or seasoned by two hundred plus years, remains diligence by its citizens. Certainly these threats to our way of life deserve no less a commitment.

Art, Obscenity and the First Amendment

Judith Bresler

The United States Supreme Court generally provides an accurate reflection of the times. In the late 1980s a political strain of conservatism found voice in such issues as abortion and discriminatory labor practices. This climate may be receptive to limitations on first amendment freedom of expression as witnessed by the recent Mapplethorpe controversy discussed later in this article. Even so, the first amendment does not constitute an unbridled license for freedom of expression. Clearly, an artist may not damage private or public property in the name of artistic expression. Injury to private property would constitute a trespass, enabling the owner to enjoin the activity and recover damages from the artist; damage to public property is usually a crime under the laws of the applicable jurisdiction. Moreover, the laws against obscenity, defamation, invasion of privacy, and speech and conduct likely to cause a breach of the peace provide limits, albeit evolving ones, within which constitutionally protected expression must fall.

Although the Supreme Court has endeavored to deal with the problem, it has never provided a concise definition of obscenity. In 1957, obscenity was held by the Supreme Court to be outside of the protection of the first amendment in Roth v. United States. In affirming a conviction of a New York publisher and distributor of books, photographs, and magazines for violating a federal obscenity statute by mailing and advertising obscene materials, the Court attempted to set a standard for defining obscenity—that is, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." A final consideration of the allegedly obscene material was whether it had


1. 354 U.S. 476 (1957). In its holding, the Court rejected the test of Regina v. Hicklin, 3 L.R. - Q.B. 360 (1868), which required a judging of the material according to the effect of an isolated excerpt on particularly susceptible persons.

2. Roth, 354 U.S. at 489.