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Black and White Images

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INTRODUCTION

In 1989 the National Endowment for the Arts (the "NEA") caused a stir by funding two exhibitions of photographs by Robert Mapplethorpe and Andres Serrano. The pictures were vulgar and irreverent, and many people thought that the NEA should not sponsor them with tax money. Whether the NEA can actually control the content of speech that it pays for is a hard First Amendment question. I want to look at how Congress has tried to answer it. Congress seriously considered two solutions, and adopted one of them in 1990. Both rely on analogies drawn from the area of race relations. This is not as strange as it sounds. There are some parallels in the problems and the solutions, and the politics of the situation makes the race analogy especially appealing. But this is not the kind of explanation, and maybe not the result, we would get from the judicial process.

In part II of this article, I look at a proposal for controlling arts funding which Congress debated in 1989. Much of the push to impose controls came from religious groups who saw sexual perversion and blasphemy in Mapplethorpe's and Serrano's pictures. The groups argued that the public should not pay for art that ridiculed their beliefs, any more than it should pay for art that denigrated racial minorities. The moral force behind this idea is the principle of equality. And the legal rule for enforcing equality in the face of free speech demands is the doctrine of group libel. In cases like Beauharnais v. Illinois, group libel has been used to protect African-Americans against vilification in publications that ordinarily would be protected by the First Amendment. The 1989 solution sought to extend its protection from racial to religious groups.

In part III, I examine a second proposal, which was considered and adopted by Congress in 1990. Here too the proponents of reform appealed to the principle of equality—they argued that the NEA should be as sensitive to religious minorities as it would be to racial minorities. But the method for achieving equality in this case was different, and more appealing. Rather than forbid grants outright (as group libel doctrine would), the 1990 solution tried to introduce the concerns of religious groups into the grant-making process. Here the paradigm for equal treatment of groups is affirmative action: make sure the "Moral Minority" is represented among the grantors, and consider its concerns
to the doctrinal paradigm for this approach is the one found
in Board of Regents of the University of California v. Bakke\(^2\) and Metro
Broadcasting, Inc. v. FCC.\(^3\)

In part IV, I make several observations about these solutions. I suggest that
Congress, because of the kind of institution it is, has a different way of looking
at the constitutional issues involved in arts funding than the courts have. In
framing the issues, Congress is more likely to personalize—to think about the
equal treatment of groups rather than the equality of ideas. And in choosing a
solution, Congress is more likely to compromise—to choose a kind of half-way
house between censorship and laissez-faire.

II
THE 1989 SOLUTION

Robert Mapplethorpe died of AIDS at age forty-two in March 1989. Not
long before he died, the Institute for Contemporary Art at the University of
Pennsylvania (the “ICA”) organized an exhibit of his work entitled The Perfect
Moment. It comprised 175 pictures, most of them fairly innocuous shots of
flowers and celebrities. But it also included a collection (the X Portfolio) of
raunchier stuff: a picture of a man urinating in another man’s mouth, several of
men with things like bullwhips and fists stuck up their rectums, and so on. There
were also two shots of children with their genitals exposed. The ICA had a grant
from the NEA to promote the visual arts and used part of it—$30,000—to help
fund the Mapplethorpe exhibit. The show was plagued by controversy. It was
scheduled to appear in Washington in July 1989, but the Corcoran Gallery’s
director canceled at the last minute for fear of political repercussions. The show
did travel to Cincinnati, where a local grand jury indicted the Museum of
Contemporary Art and its director for pandering obscenity and for depicting
minors in a state of nudity. They were eventually acquitted. The offending
photos were also passed around the halls of Congress, where they had the effects
in which I am most interested.

Andres Serrano’s contribution to the controversy was a photograph, entitled
Piss Christ, of a plastic crucifix submerged in a beaker of the artist’s urine. The
picture was included in an exhibit put together by the Southeastern Center for
Contemporary Art in Winston-Salem, North Carolina (“SECCA”). Like the
Mapplethorpe exhibit, this one was funded in part—$15,000—by the NEA.
About four months after the show ended, in April 1989, the catalogue reached
the Reverend Donald E. Wildmon, a United Methodist minister who is the
Executive Director of the American Family Association. The Association,
according to its charter, is an organization formed “to promote decency in the
American society” and “to do all those things necessary for the promulgation
of the Judaic-Christian ethic in America.” Its newsletter, which has a circulation

\(^3\) 497 U.S. 547 (1990).
of 380,000, including 178,000 churches, said that the endowment officials responsible for funding Serrano’s exhibit should be fired. It urged its readers to write protest letters to their representatives in Congress.\(^4\)

The campaign quickly had an effect. On May 18, 1989, Senator Alphonse D’Amato (R-N.Y.) announced that he had received a rash of angry letters, cards, and phone calls about the Serrano exhibit. He introduced a letter signed by twenty-three Senators, which he forwarded to the Acting Chair of the NEA, demanding changes in the Endowment’s grant-making procedures to avoid such abuses in the future. Such works, D’Amato announced, were inconsistent with the NEA’s mission to “reflect the American heritage in its full range of cultural and ethnic diversity . . . ”\(^5\) Senator Jesse Helms (R-N.C.) followed D’Amato. He said of SECCA, “I am sorry to say that it is in my home State.” Serrano, Helms opined, “is not an artist. He is a jerk. And he is taunting the American people . . . in terms of Christianity.”\(^6\)

Another letter was sent on June 8, 1989, by 107 members of the House at the prompting of Representative Dick Armey (R-Tex.). Armey said in an interview that, although he was “not a particularly pious man,” he represented a district near Dallas “where religious conviction is very high.” The next day, Pat Robertson’s telecast on the Christian Broadcasting Network attacked Serrano’s photograph. Robertson called it “blasphemy paid for by Government” and urged his viewers to ask that the NEA’s funding be cut off.\(^7\)

A. The Appropriations Bill and the Helms Amendment

These demands were timely. The appropriations bill covering the NEA for fiscal 1990 was introduced in the House on June 29 and reported out by the Appropriations Committee that same day.\(^8\) The Committee report was made by Representative Sidney Yates (D-Ill.), chair of the subcommittee concerned with the NEA and a supporter of the Endowment. The report adverted briefly to the controversy over the Mapplethorpe and Serrano pictures. In general it praised the Endowment’s mission and its performance. It observed that the NEA had made about 85,000 grants during its lifetime; of these, fewer than 20 had been “charged with violating public interest because of frivolity, obscenity, indecency or ethnic disparagement.” The Committee’s only response to the 1989 controversy was to caution the Endowment to be more careful in funding organizations that made subgrants, as ICA and SECCA had done for the Mapplethorpe and Serrano exhibitions.\(^9\)


\(^6\) Id. at S5595 (statement of Sen. Helms).

\(^7\) Honan, supra note 4.


\(^9\) H.R. REP. No. 120, supra note 8, at 125, 127.
The appropriations bill was debated, amended, and passed by the House on July 12, 1989. The amendment cut the Endowment’s proposed budget by $45,000—the exact sum of the grants used for the Mapplethorpe and Serrano exhibits.\(^\text{10}\) It was clear that most members wanted to send a message to the NEA. The vote on the amendment was 361 to 65.\(^\text{11}\) Those who spoke in favor of the budget cut stressed that this was just a decision about how to spend federal tax dollars. It was wrong, said one member, to force the public “to subsidize artworks that offend the religion or moral sensibilities of many Americans.”\(^\text{12}\) “The people I represent in eastern Tennessee certainly do not support federal funding of pornographic or obscene or anti-Christian artwork,” said another.\(^\text{13}\) Dick Armey, who for a time led the charge against the NEA in the House, argued that a budget cut might make the Endowment a little more “sensitive, . . . respectful, and tolerant of the taste of the vast majority of the American people.”\(^\text{14}\)

None of the Endowment’s champions argued that the Mapplethorpe and Serrano pictures were good art. Some said, by way of defense, that it was often hard in the short run to tell good art from bad. It was not unheard of that a work offensive to some particular group would get critical, and even popular, acclaim in the long run. \textit{Birth of a Nation}, \textit{The Merchant of Venice}, and \textit{Huckleberry Finn} were examples cited by a number of speakers.\(^\text{15}\) Others, led by Sidney Yates, mounted a counterattack. They tried to portray budget cuts as a form of censorship promoted by an intolerant religious right. “This,” Yates said, “is justice as it is accorded in Iran. This is . . . like the justice of Ayatollah Khomeini to the claimed blasphemy in Salman Rushdie’s book[.] ‘Off with His Head,’ cried the Red Queen in Alice in Wonderland.”\(^\text{16}\) The proposed budget cut, said another, is “an ayatollah amendment.”\(^\text{17}\) In the end, though, most members were willing to agree to at least a modest cut. The violent opposition to the Mapplethorpe and Serrano grants posed a real political problem that called for some kind of response.\(^\text{18}\)

Two weeks after the House vote, the Senate Appropriations Committee reported the bill out. It went along with the $45,000 reduction, and added a provision forbidding any further grants to ICA and SECCA for five years. The Committee also called for an independent review of NEA’s procedures for

\(^{10}\) 135 CONG. REC. H3653-54 (daily ed. July 12, 1989). The $45,000 cut was proposed by Charles Stenholm (D-Tex.) as a modest alternative to more drastic cuts. \textit{Id.} at 3644. Dick Armey proposed a 10% cut. \textit{Id.} at H3642-44. Dana Rohrabacher (R-Cal.) proposed a 100% cut. \textit{Id.} at H3637-38.

\(^{11}\) \textit{Id.} at H3653.


\(^{13}\) \textit{Id.} at H3650 (statement of Rep. Duncan).

\(^{14}\) \textit{Id.} at H3643.

\(^{15}\) \textit{Id.} at H3641 (statement of Rep. Williams); \textit{id.} at H3646 (statement of Rep. Weiss); \textit{id.} at H3650 (statement of Rep. Oakar).

\(^{16}\) \textit{Id.} at H3639.


\(^{18}\) \textit{Id.} at H3645 (statement of Rep. Coleman).
awarding grants. Jesse Helms added a further amendment during the floor debate on July 26:

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.

Clauses (1) and (2) were obviously targeted at the Mapplethorpe and Serrano exhibits. Clause (3) might seem unnecessary, but it served a useful political purpose. Helms wanted to suggest that we should be willing to protect groups holding traditional religious and moral values from offense and ridicule to the same extent that we are willing to protect minorities and women:

Mr. President, there have been instances where public outrage has forced artists to remove works from public display. For instance, shortly after Mayor Harold Washington's death, a work portraying him as a transvestite was forcibly removed from a show in Chicago. Another work on display at Richmond's airport was voluntarily removed after the night crew complained about a racial epithet which had been inscribed on it. There was little real protest from the arts community in these instances.

The "arts community" applied the principle of respect selectively, and its supporters applied the rule against censorship selectively.

Congress attaches strings to federal funds all the time. Churches must follow strict federal guidelines in order to participate in federal programs for the poor and needy—even when those guidelines violate their religious tenets.

If senators want to talk about censorship, then we should talk about the real censorship going on in America. Every day the national media censor religious and conservative viewpoints while the avant garde in the art world mock art that is beautiful and uplifting—even as they extol so-called art which is shocking and depraved.

The amendment passed quickly on a voice vote.

A conference committee met in September to consider the differences in the House and Senate bills. The $45,000 cut was acceptable to all. The House

19. S. REP. NO. 85, 101st Cong., 1st Sess. 113-14 (1989). The Committee authorized $100,000 to pay for the review. It also recommended reallocating $400,000 from the visual arts program to folk arts and local programs. Id.
21. Id. at S8808.
22. Id.
23. Id. at S8809.
agreed to create an Independent Commission to study the NEA’s grant-making procedures. The Senate agreed not to disqualify ICA and SECCA from further grants. The real bone of contention was the Helms Amendment.

The House voted on September 13, 1989, to instruct its conferees “to address the concerns contained in” the Helms Amendment. Ralph Regula (R-Ohio), proponent of the motion to instruct, said that he envisioned turning over to the Independent Commission the responsibility “to review the question of what standards, procedures, and guidelines should be applied to public funding of the arts and humanities.” Some favored a more specific instruction to accept the Helms Amendment outright. Dana Rohrabacher (R-Cal.), the leader of this group, understood perfectly the political logic behind the amendment. He observed:

One wonders how many of those who are aggressively opposing the setting of these standards would be doing so, if it had been a photo of Martin Luther King or a symbol of Jewish faith that had been submerged in a bottle of urine at taxpayers expense.

The argument was rhetorically appealing in two ways. First, it was phrased as a simple appeal for equal treatment. It refrained from a direct attack on homosexuals (like Mapplethorpe) as themselves evil and unworthy of funding. There were some who emphasized the depravity of Mapplethorpe and his work, but this approach generally seemed less attractive. Second, it was made on behalf of a group (traditional Christians) to which most members claimed allegiance. Even those who favored Regula’s position felt obliged to debate the issue on Rohrabacher’s terms. “I am an evangelical Christian,” said one. “I have every reason to be particularly enraged.” In the end the House contented itself with the vague instruction to “address [Helms’s] concerns,” without saying how.

The fullest public debate on the Helms Amendment occurred in the Senate on September 28, 1989. Senator Helms, fearful of losing the battle in conference, sought to instruct the Senate conferees to insist on his proposal. His strategy was to paint traditionalist Christians as a group that deserved more respect than it was getting from the NEA and the arts community. Some wondered why he had included the vague term “non-religion” in section (2) of his amendment. He

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24. Department of Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, 103 Stat. 738, 738-42 (1989). The bill provided that the NEA should give the House and Senate Appropriations Committees 30 days notice of its intent to make any award to ICA or SECCA. Id. at 738.

25. 135 CONG. REC. H5631 (daily ed. Sept. 13, 1989). Regula is the ranking minority member of the Subcommittee on Interior of the Committee on Appropriations. That subcommittee has jurisdiction over bills concerning appropriations for the NEA.


27. Id. at H5635 (statement of Rep. Dannemeyer); H5637 (statement of Rep. Dornan).

28. Id. at H5636 (statement of Rep. Henry).

29. Id. at H5640-41 (voting favorably on Rep. Regula’s motion to instruct).
replied:

I put the term “non-religion” in at the suggestion of several constitutional scholars to protect the rights of atheists, agnostics, and others . . . . Since we hear so much about the rights of those groups and so little about the rights of millions of religious men, women, and children, I am somewhat astounded at the outcry against my including that term in my amendment.30

But non-religions are not very well-defined groups. The more interesting comparison was with racial minorities, and Helms made clear that the link between the two was intentional. Section (3) of his amendment forbade funding of “material which . . . reviles a person [or] group . . . on the basis of race, creed, sex,” etc. It was drawn, Helms said, from the statute upheld by the Supreme Court in *Beauharnais v. Illinois*. That case involved a group libel law making it a criminal offense to exhibit any “lithograph [or] sketch, which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy.”* Beauharnais circulated a leaflet talking about the “rapes, robberies, knives, guns and marijuana of the negro.” For this he was tried and convicted.31 Section (3) of the Helms Amendment took the more modest step of withholding federal funding from such materials.

Those opposing the Helms amendment had the sticky job of explaining why we should tolerate racial and ethnic as well as religious slurs for art’s sake. There were two ways of making this argument. One way was to proclaim one’s own religious convictions—a move suggesting that the speaker paid as high a price as any for the rule that he proposed. One said, “As one who holds his own religion dearly, as a Catholic, I find very, very offensive the Serrano piece of what he calls art.”32 “The crucifix happens to be a very revered symbol of my own religion.”33 Another said, “In my religion, Roman Catholicism, the crucifixion always begins with the experience of the degradation of Christ.”34 The other method of argument was to find works of art that were well respected notwithstanding occasional unflattering portrayals of the protected groups. *Huckleberry Finn,* because it has a character called Nigger Jim, was naturally high on everyone’s list.35 *The Merchant of Venice* was a close second.36 Others mentioned *The Godfather, The Color Purple* (for an unsympathetic portrayal of men),37 some nineteenth century political cartoons then on display in the Russell Building (which made fun of the Irish and of Catholics),38 and the

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32. 135 CONG. REC. S12115 (statement of Sen. Leahy).
33. *Id.*
34. *Id.* at S12122 (statement of Sen. Moynihan).
35. *Id.* at S12116 (statement of Sen. Danforth); *id.* at S12117 (statement of Sen. Gorton); *id.* at H12130 (statement of Rep. Fowler).
36. *Id.* at S12116 (statement of Sen. Danforth); *id.* at S12117 (statement of Sen. Gorton).
37. *Id.* at S12116 (statement of Sen. Danforth).
38. *Id.* at S12117 (statement of Sen. Gorton).
New Testament (which was offensive to Jews). In general, these techniques were fairly effective. William Armstrong (R-Colo.), a strong defender of the amendment, was maneuvered into arguing that the government should not fund a work like *Huckleberry Finn.* Orrin Hatch (R-Utah) tried to avoid this difficulty by arguing that the amendment would not cover Mark Twain, but he was unconvincing. Helms’s motion was tabled 62-35.

It was clear that the conferees would have to come up with some restrictions. But it was equally clear that neither the House nor the Senate was sold on Helms’s analogy between traditionalist Christians and racial minorities. The solution adopted in conference focused solely on Mapplethorpe, and gave up the attempt to deal with art like Serrano’s picture. The conference language was:

None of the funds authorized to be appropriated for [the NEA or the NEH] may be used to promote, disseminate, or produce materials which in the judgment of [the NEA or the NEH] 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.

This provision dropped clauses (2) and (3) of the Helms Amendment (and the reference to “indecent” materials in clause (1)). Its inspiration was *Miller v. California,* not *Beauharnais v. Illinois.* The only trace remaining of the group libel theory—and it may be no more than background radiation—appeared in the other part of the conference compromise. Taking up the Senate’s original suggestion for an independent review of NEA procedures, the conference bill created an Independent Commission both to study the endowment’s procedures and “to determine whether there should be standards for grant making other than” the existing ones. And it expressed the sense of Congress that “recently works have been funded which are . . . shocking by any standards.”

In point of fact, the anti-obscenity language in the final bill had no more effect on Mapplethorpe than on Serrano. Works cannot be obscene under the *Miller* test even if they appeal to people’s prurient interest and even if they are patently offensive, provided they have “serious literary, artistic, [or] political . . . value.” The consensus in artistic circles was that Mapplethorpe’s work, however vulgar, was serious art and maybe serious politics. That is probably why the Cincinnati Contemporary Art Museum and its director were acquitted for showing it. The point was not lost on either side. Sidney Yates, leader of the House conferees, essentially conceded it when the bill was reported back to the House. In the Senate Jesse Helms made one last effort to get an effective

39. *Id.* at S12129 (statement of Sen. Fowler).
40. *Id.* at S12127.
42. 413 U.S. 15 (1973).
44. *Miller,* 413 U.S. at 24.
standard. This time he suggested simply using the second prong ("offensiveness") of the Miller test. That would have reached Mapplethorpe by making artistic merit irrelevant. His motion was tabled 62-35. The enacted bill made no change in the conference proposal.

B. Group Libel

I now want to review Congress's efforts in 1989 in order to see whether the First Amendment behaves in any unique ways in the legislative process. Let me begin by explaining how the courts would look at the question Congress was trying to answer. The legal question is whether Congress can somehow (by setting standards or procedures) prevent the NEA from giving federal money to support works like Mapplethorpe's and Serrano's. The judicial answer to that question would draw on four strands of doctrine. The first is the rule against content regulation: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." The reason Mapplethorpe and Serrano caused such a stir was that Congress and the public found sadomasochism and blasphemy offensive. If we were talking about a simple criminal law forbidding such pictures, the rule against content regulation would apply with full force.

The second strand of doctrine qualifies the first. The rule against content regulation actually applies in different ways to different categories of speech. Obscenity and child pornography are two categories of speech that fall outside the protection of the First Amendment altogether. So the government may regulate them on account of their content. Speech that is offensive in the scatological sense may also be regulated in some media. You cannot say "piss" on the radio. This too is a form of content regulation but it depends, as I indicated earlier, on the medium. The government cannot forbid this kind of offensiveness in all paintings and photographs.

The third strand of doctrine qualifies the first in a different way: we have special rules for government support of speech.

If content distinctions are suspect when government acts as censor, they are the norm when government speaks or otherwise subsidizes speech. The public museum curator makes content decisions in selecting exhibits; the librarian in selecting books; the public board in selecting recipients for research grants; the public official in composing press releases.

48. And the answer that law teachers would expect their students to give on an examination.
49. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
The applicable precedents here are cases like *Rust v. Sullivan,* 53 *Regan v. Taxation with Representation of Washington,* 54 and *Buckley v. Valeo.* 55 These cases hold that, in some instances, the government can pay for speech about \( x \) and refuse to pay for speech about \( y \). This might mean that the NEA could pay for pictures of flowers and not for pictures of sadomasochism.

The fourth strand is the rule against unconstitutional conditions, which qualifies, sometimes in mysterious ways, the rule about government support of speech. A forceful statement of the rule goes like this: the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” 56 The government could not, for example, require NEA grant recipients to campaign for Bill Clinton if they wanted to be funded. The relevant precedents here are such cases as *FCC v. League of Women Voters,* 57 *Cammarano v. United States,* 58 and *Speiser v. Randall.* 59

This is where it gets sticky. It is not clear just how much the fourth rule (unconstitutional conditions) qualifies the third (government support). Surely the NEA could support performing arts and not visual arts. Surely it could give a prize for the best picture of flowers, and in such a contest it could disqualify Mapplethorpe’s self-portrait with the bullwhip because of its content. But if it is going to fund photography in general, surely it cannot disqualify all pictures that put the president in an unflattering light. The problem for standard First Amendment theory is to say where along this line Mapplethorpe’s and Serrano’s pictures fall.

I will not try to solve this problem here. I am more interested in the approach than in the solution. Notice how the judicial method focuses on the equality of ideas. Its most basic assumption is that the government must treat all ideas alike. It cannot ordinarily make moral judgments about the value of speech. 60 The difficulty lies in deciding whether the government can assign a value when it is paying the bill.

When Congress looked at the problem in 1989, it saw groups, not ideas. According to the Helms Amendment, the controversy was about the equal treatment of groups. During the early 1980s moral traditionalists and religious conservatives touted themselves as the Moral Majority. By 1989 they were willing to settle for recognition as a Moral Minority if that would give them the same political standing enjoyed by other minorities—particularly racial minorities. Those who led the fight against the NEA—Helms in the Senate,
Armey and Rohrabacher in the House—were spurred on by organizations like the American Family Association and the Christian Broadcasting Network. They described their constituents as “religious,” or sometimes more specifically as “Christian.” And they repeatedly compared this beleaguered group to racial minority groups, blacks in particular. Hence the argument that we should give crucifixes the same respect we would give Harold Washington, Martin Luther King, Jr., or the Star of David.

This focus on a group—the Moral Minority—affected the way Congress saw the First Amendment issue. The best way to justify funding limits to a judge would be to frame the issue as one of government support for low value speech. You would argue that the government was not obligated to pay for obscenity, child pornography, or pieces with offensive themes and titles (“Piss . . .”). And in the end, Congress did just that. Less than that actually. It declined Helms’s invitation to deal with offensive speech, and it did not address child pornography that is not technically obscene. The final bill forbade only the funding of obscenity. But Congress was uneasy about doing so little. That is why it created the Independent Commission to decide whether there should be other standards. And that is why it took up the issue again in 1990. Somehow the ban on obscenity seemed to miss the point.

The Helms Amendment was one way of describing what it missed. The real problem with the X Portfolio and Piss Christ was not that they were dirty or vulgar pictures with too little First Amendment value to warrant government funding. The real problem was that they ridiculed a group of people (the Moral Minority) by subjecting their beliefs to scorn. This was just as true of Mapplethorpe, who attacked Christian orthopraxy, as it was of Serrano, who attacked Christian orthodoxy. Members of the Moral Minority took these attacks personally, just as blacks in Chicago were no doubt offended by Beauharnais’s attack.

The group libel analogy was a natural one in 1989. In 1988 the University of Michigan, after some racial incidents on the campus, adopted a student code forbidding speech under certain circumstances if it “stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, [or] creed[.]” An accompanying guide explained that it would be a violation of the code to display a confederate flag on the door of one’s dormitory room. Many other universities, public and private, were taking similar actions at the same time. The issue got an enormous amount of media attention, and led to a revival in support for Beauharnais v. Illinois, a case that most people thought had died with New York Times v. Sullivan. Congress was of course

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aware of all of this. Senator Helms pointed it out in the Senate post-conference debate. The hate-speech rules, though they generally made bows to religion and “Vietnam-era veteran status,” were widely understood as an effort to shield racial minorities, women, and gays from ridicule. The people who supported such rules were natural political opponents of the Moral Minority. The Helms Amendment tried to neutralize this opposition by linking the two issues together.

The emphasis on group harm also echoed a feminist theme about the harm that pornography causes to women. According to this theory, what makes pornography evil is not that it debases the reader by making a prurient appeal. Rather, pornography is a form of sex discrimination, and the real harm it causes is the subordination of women. It eroticizes the practices of male dominance and female submission. In the mid-to-late 1980s, there was a good deal of academic and popular writing in this vein. Several cities considered, and at least one (Indianapolis) adopted, anti-pornography ordinances embodying the discrimination theory. One can even find a faint echo of the theory in the Report of the Attorney General’s Commission on Pornography released in 1986. The Helms Amendment invoked this idea not, as you might expect, in clause (1) (obscenity), but in clause (3), which forbids “material which . . . debases . . . a person [or] group . . . on the basis of . . . sex.” Once again it was likely that those who advocated the feminist view of pornography would have little sympathy for the objectives of the Moral Minority. But it was politically astute to present both groups as powerless minorities, oppressed by visual artists and asking for nothing more than a little respect.

The idea of group libel may also have been on the mind of Congress for another reason. Blacks, women, and the Moral Minority were all embroiled at this time in a controversy over the regulation of rap music. In 1989 the rap group 2 Live Crew released its album As Nasty as They Wanna Be. By the spring of 1990 it had been deemed obscene by county prosecutors in six states. Luther Campbell, a member of the band, saw this as censorship along racial lines, a view shared by some observers. Feminist commentators, on the other hand, worried that the album’s appeal lay in its reliance on the same themes that made pornography objectionable. It featured such songs as “Dick Almighty,”

66. The Indianapolis ordinance was held unconstitutional in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff’d, 475 U.S. 1001 (1986).
69. Id. at 1503 & n.199; Parachini & McDougal, supra note 4.
with lyrics like “It’ll fuck all the bitches,” and “he’ll tear the pussy open.” 70
And 2 Live Crew was not the only group to feature these themes. They were
becoming fairly common, even popular. In the third corner of this debate were
groups like the Parents Music Resource Center (“PMRC”) who worried about
the effect such music had on family values. They reasoned that a steady diet of
“irresponsible sexuality, sexual perversions, [and] violence” could not be good
for children. 71 PMRC had among its members the wives of ten senators and six
representatives. 72 It persuaded the Senate Commerce Committee to hold
hearings in 1985 on the subject of record labeling. 73 By 1989 the PMRC had
shifted its focus to rap music and urged labels for a variety of records by black
artists. 74 The PMRC was joined in these efforts by Donald Wildmon’s
American Family Association, the California group Focus on the Family, and the
Reverend Jimmy Swaggart. 75

There were, then, a variety of reasons why many people in Congress in 1989
were disposed to see the NEA’s funding practices as a matter of discrimination
against the Moral Minority. The most obvious solution to this problem was to
impose content restrictions on funding. That looks (to First Amendment
lawyers) like a case of treating ideas unequally, but to many in Congress it
looked like a case of treating groups equally. It was a matter of being as
sensitive to the beliefs of the Moral Minority as we are to racial minorities and
women.

The NEA’s detractors were not alone in picturing the problem this way. The
Endowment’s defenders were stung by the argument that the artistic community
had a double standard—one rule for racial ridicule, another for religious or
moral ridicule. Again and again they protested that this was not true; they were
willing to tolerate racial slurs as well as religious ridicule for art’s sake.
Huckleberry Finn was the example offered most often. 76 It talked about
“niggers” but it was great art. Birth of a Nation received honorable mention for
its glorification of the Ku Klux Klan. 77 The Merchant of Venice put Jews in as
bad a light as Mapplethorpe and Serrano had put Christians, and people had
been reading it for a long time. 78

70. Clark, supra note 68, at 1518 n.332.
71. Id at 1485-86.
72. Id. at 1482 n.6.
73. Hearings on Record Labelling Before the Subcomm. on Communication of the Senate Comm.
74. See Dave Marsh & Phyllis Pollack, Wanted for Attitude, VILLAGE VOICE, Oct. 10, 1989, at 33,
37.
75. Parachini & McDougal, supra note 4; Henry Schipper, Rock Censorship Debate Rages,
VARIETY, Apr. 8, 1987, at 92.
76. See supra note 35 and the following passages: 135 CONG. REC. H3641 (daily ed. July 12, 1989)
(statement of Rep. Williams); id. at H3646 (statement of Rep. Weiss); id. at H3650 (statement of Rep.
77. 135 CONG. REC. H3641 (daily ed. July 12, 1989) (statement of Rep. Williams); 135 CONG. REC.
78. See note 36 and 135 CONG. REC. H3641 (daily ed. July 12, 1989) (statement of Rep. Williams);
id. at H3646 (statement of Rep. Weiss); cf. 135 CONG. REC. S12129 (daily ed. Sept. 28, 1989) (statement
These people did see the NEA’s detractors as a distinct group, but a group of religious zealots. They repeatedly suggested that the Moral Minority was behaving like the Ayatollah Khomeini, who had imposed a death sentence on Salman Rushdie for mocking Mohammed in *The Satanic Verses.* The comparison is not particularly apt for a variety of reasons. The sanctions are obviously different. The First Amendment forbids executions, but it may allow the government to withhold financial support. There is also a difference between pornography and blasphemy: the First Amendment lets government regulate the former (sometimes) but not the latter. But the analogy is a good political tactic because it paints the Endowment’s opponents as religious extremists (and, more subtly, as un-American). If one could succeed in making the comparison stick, people would be unwilling to give their support to the Moral Minority.

The other argument that the Endowment’s defenders found persuasive was not a legal argument at all, but it may have had more influence on the outcome of the debate than any other. It was simply that the NEA had funded some 85,000 projects since its creation in 1965. Of these, few had been controversial. And the recipients could be found in every state and congressional district in the country:

[M]y state [has been] enriched by the National Endowment for the Arts, as ... have all the other 49 States.

[If we want elitism in the arts, we could just cut out all funding for the [NEA]. Then only the elite would be funded. If we want the arts to reach all the communities of the country, we should fund this program, because it does good for America.

The point of these reminders was obvious. The Moral Minority compared itself to racial groups. But a wise politician would compare them instead to the NEA’s beneficiaries. One simple way of resolving the conflict was to ask which group had more votes. Thomas Coleman (R-Mo.) put it bluntly: “we have a political problem.” Congress could not make severe cuts in the Endowment’s budget as some had suggested, because “these grants could be in your hometown, ... in your districts.” The only sensible solution was a nominal cut ($45,000) that would “make a statement” without angering the Endowment’s friends.

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82. 135 CONG. REC. H3645 (daily ed. July 12, 1989).
III

THE 1990 SOLUTION

The NEA was established in 1965 and has been reauthorized every three to five years. Its 1985 reauthorization expired in 1990. Thus, almost immediately after Congress finished with the Endowment's appropriation in October 1989, it had to return to the same questions. This time around there was enough advance warning to develop a fairly broad consensus for a different kind of solution. The 1989 solution (the Helms Amendment), eventually rejected by Congress, pictured NEA funding for Mapplethorpe and Serrano as a form of discrimination. The 1990 solution, which Congress adopted, used the language and themes of affirmative action to promote the cause of the Moral Minority in the NEA grant process.

A. The Reauthorization Legislation

The Administration's proposal for reauthorization, entitled the Arts, Humanities, and Museums Amendments of 1990, was introduced in the House on May 15, 1990. It had little to say about the Mapplethorpe-Serrano crisis. The Education and Labor Committee, to whom the bill was referred, also ignored the issue. It reported the bill out without amendments and passed the problem on to the full House.83 It was not that the problem had gone away. On the contrary, there had been hearings before the relevant House and Senate subcommittees almost monthly since passage of the appropriations bill in 1989.84 But most people hoped that the Independent Commission created by that bill would find a solution.85 The Commission filed its report on September 11, 1990.86 Exactly one month later, the House adopted the Williams-Coleman substitute for the reauthorization bill, which included most of the changes proposed by the Commission.87 The Williams-Coleman substitute was incorporated into the Department of the Interior Appropriations Bill, approved by both houses, and enacted on November 5, 1990.88

The reauthorization law made three kinds of changes in the existing system: the first bore on content, the second on process, and the third on compliance. The only direction about content in the existing authorization had been added in 1985, after an earlier controversy over funding allegedly pornographic materials. At that time 20 U.S.C. § 959(a) was amended to say that NEA panelists making funding recommendations should only put forward proposals

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85. See H.R. REP. NO. 566, supra note 83, at 3.
86. THE INDEPENDENT COMMISSION, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS (1990) [hereinafter REPORT TO CONGRESS].
that "foster excellence, are reflective of exceptional talent, and have significant literary, scholarly, cultural, or artistic merit." There was also the 1989 restriction (in the appropriations bill) on funding materials considered obscene by the NEA, but its effect expired on September 30, 1990, at the end of the fiscal year. The Independent Commission had recommended against further content controls for fear of raising First Amendment issues. Of course, the First Amendment does not protect obscenity, but the Commission thought that it was the job of the courts, not the NEA, to determine whether certain material is obscene. The Commission suggested that the Endowment limit itself to the question of artistic excellence.

The 1990 reauthorization nevertheless added two provisions bearing on content. The first required the NEA Chair to make regulations and procedures ensuring 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. The second said that:

projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under [the Act] from the National Endowment for the Arts.

The term "obscene" was defined in the act according to the standard in Miller v. California. The phrase "determined to be obscene" was defined to mean "determined, in a final judgment of a court of record and of competent jurisdiction in the United States, to be obscene."

The Endowment's defenders were pleased to have the determination and enforcement of obscenity rules turned over to the courts. This change took some of the politics out of the grant-making process, but it allowed Congress to maintain the appearance of doing something. As one representative noted, "The Williams-Coleman substitute says that the best way of dealing with wretched excess is in the courts, under the Constitution. That's bipartisan common sense,

89. See the discussion in H.R. REP. NO. 120, supra note 8, at 126.
90. The Chair of the NEA had implemented the obscenity prohibition by requiring recipients to certify, on one of the Endowment's forms, that none of the grant funds would be used to "promote, disseminate, or produce materials which in the judgment of the NEA ... may be considered obscene." The National Council on the Arts recommended in August 1990 that the Endowment eliminate this requirement. William H. Homan, Frohnmayer Is Asked To End Written Pledge, N.Y. TIMES, Aug. 4, 1990, § 6, at 13, col. 1. It was held unconstitutional in Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).
91. REPORT TO CONGRESS, supra note 86, at 83-91.
93. Id. § 954(d)(2).
94. Id. § 952(l).
95. Id. § 952(j).
and I'm for it."96 The Chair's new obligation to consider "general standards of decency" had a slightly more disruptive potential. This provision was intended to be "very broad language . . . much broader than all the obscenity language which we have been debating about."97 A Chair who held traditional moral and religious views could use this broad language to deny grants to proposals that offended those standards.98 But it was just a duty to consider, not an outright prohibition, and that made it more palatable to those who had opposed the Helms amendment.

The process changes were designed to make the grant review procedure more sensitive to the concerns of those who were offended by the Mapplethorpe and Serrano pictures. The procedure has three stages. Initial recommendations about awards are made by advisory panels. In a given year the Endowment uses about one hundred of these panels, which have anywhere from five to twenty members. The 1965 Act establishing the Endowment called them "panels of experts," and they have been colloquially known as "peer review panels," but the 1990 amendments make both terms somewhat inaccurate.99 One of the complaints about this system was that it allowed artists to recommend grants to other artists. It confided authority in "an art community whose members prefer to live in a rarefied climate, talking to each other, subject only to 'peer review' and scornful of those who translate the word 'art' into 'smut.'"100

The reauthorization legislation attempted to cure this problem by changing the membership on the advisory panels. It added this new provision: 101

The Chairperson shall issue regulations and establish procedures—
(1) to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view;
(2) to ensure that all panels include representation of lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and are not members of either artists' organizations or arts organizations[.]

Representative Coleman, one of the authors of the substitute bill, said that "the new advisory committees . . . are going to be not only made up of artists anymore, but of nonartists and people from all walks of life, . . . different ethnic

98. Effect of Last Year's Reauthorization Process on Activities of the National Endowment for the Arts: Hearing Before the Subcomm. on Government Activities and Transportation of the House Comm. on Government Operations, 102d Cong., 1st Sess. 36 (1991) (statement of Kathleen Sullivan). John Frohnmayer, who at the time was the NEA Chair, testified on June 19, 1991, that the Endowment was making no effort to enforce the decency requirement as a separate provision in the consideration of grant applications. He believed that the Endowment could do its duty under that section by including lay members on the advisory panels. The lay members would embody communal standards of decency and enforce them through their decisions on grant applications. Id. at 15-19, 31.
makeups[]. We want to put . . . pluralism in the very threshold question of the people who will determine what is . . . artistic merit."

Senator Hatch put it more bluntly: "[t]he addition of new laypersons on these panels will help ensure we do not have this type of disgusting art in the future."

The second stage of the grant-making procedure is review by the National Council on the Arts. This twenty-seven-member body was created by the same act that created the Endowment. Its functions are to advise the NEA Chair about policy and to make recommendations about grant applications. In theory, it might act as a check on the actions of the advisory panels, whose membership the Endowment's critics saw as too inbred. However, the Mapplethorpe and Serrano grants had made it past the Council as well as the advisory panels. There were a number of reasons for this, but Congress felt that one of them was the composition of the Council. There was a feeling that Council members, though they were, unlike advisory panel members, subject to a political check (presidential appointment and Senate confirmation), were drawn too much from the arts communities in New York and California, and were too committed to cosmopolitan standards of acceptability. In 1985 Congress had amended the Act to cure a different kind of discrimination. It directed the president, in making appointments, to "give due regard to equitable representation of women, minorities, and individuals with disabilities who are involved in the arts." In 1990 Congress added that "[m]embers of the Council shall be appointed so as to represent equitably all geographical areas in the United States."

In addition to changing the composition of the Council, Congress provided for public scrutiny of the Council's behavior. The Independent Commission had recommended that all Council meetings be open to the public. The 1990 Act did not go quite so far. It did require that all "policy meetings" be open. As to meetings where the Council discussed grant recommendations, the Act required the creation of written records summarizing all discussions and the disclosure of such records in a way that protected the privacy of applicants, advisory panel members, and Council members.

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107. REPORT TO CONGRESS, supra note 86, at 70.
109. Id.
The last stage of the grant review process is approval by the NEA Chair. In
the 1990 Act, Congress stated explicitly what had been implicit up to that
time—that "the Chairperson shall have final authority to approve each
application." This statement was in step with the changes in composition and
procedure for the advisory panels and the Council, and with the Chair's new
responsibility to consider decency and obscenity in making regulations. The idea
was to lodge responsibility for future mistakes at a point that was sensitive to
political pressure. As one representative stated, "these provisions put the
responsibility for important decisions squarely on the [backs] of public servants
who are held accountable for their judgment."

The reauthorization legislation also made several changes bearing on grantee
compliance. One of the difficulties with funding creative activity is that even the
grantee cannot be sure at the outset what the final product will look like.
Failure to conform in all particulars to the plan laid out in the grant application
is not necessarily evidence of bad faith. If recipients are completely free to
change their minds after they have been paid, however, the content and process
controls at the front end will have been a waste of time.
The 1990 Act addressed this problem in three ways. First, it required
grantees to submit not only detailed applications, but also interim reports
showing their progress in the funded project (and their compliance with the Act).
Second, it provided for installment payments so that grantees would have an
incentive to comply, and so that the Endowment would waste as little money as
possible on people who took a deviant turn. Third, it provided for recoupment
of funds from any recipient who used the money for a project determined by a
court to be obscene.

B. Affirmative Action

The 1989 solution (the Helms Amendment) portrayed the Moral Minority as
a racial minority ridiculed by the dominant culture. The NEA had contributed
to this harm by funding art that libeled the Moral Minority's beliefs and
practices. Helms proposed a direct solution: control the Endowment's output
by forbidding it to fund offensive art. This proposal relied on the model of
group libel found in *Beauharnais v. Illinois*. The 1990 solution also compared
the Moral Minority to a racial minority. It too saw the funding of Mapplethorpe's
and Serrano's art as harmful to the Minority. But the solution was indirect:
control the inputs into the funding process. The 1990 approach used the model
group rights found in affirmative action cases. I want to focus on two aspects
of this model. One, the "consideration" requirement, concerns the 1990 content
provisions. The other, the "diversity" requirement, concerns the 1990 process
changes.

1. The "Consideration" Requirement. I noted above that the 1990 reauthorization demands new regulations that "take[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." This is obviously an attempt to make the NEA think twice before it gives any more grants for indecent art like Mapplethorpe's, or disrespectful art like Serrano's. The straightforward solution to this problem would be to forbid such grants—to control the Endowment's output. This is what the Helms Amendment did, but it proved to be unacceptably strict. The new "consideration" requirement is more flexible. It does not say "Don't do x"; it says "Think about it." It is a control on the deliberative process rather than on its result—a control on input.

This requirement nonetheless has a bearing on the content of the art that the NEA funds. For that reason the courts, if asked for a First Amendment appraisal, would focus on the doctrinal categories discussed in part IIB: the rule of content neutrality; the exception for government funding; the limits of that exception; etc. The "consideration" requirement may be easier to defend than the Helms Amendment because it is an input and not an output control. However, the courts would approach both of them in pretty much the same way. This is exactly what the Central District of California did in Finley v. NEA, which held the "consideration" requirement unconstitutional on First Amendment grounds.112

Congress took an entirely different approach. Once again, as in 1989, it focused on groups rather than ideas. The problem, according to Congress, was that the Moral Minority was ignored in the grant process, just as racial minorities are overlooked in other benefits programs. The solution was affirmative action on their behalf. This is where the "consideration" requirement comes into play.

The idea originated in Board of Regents of the University of California v. Bakke.113 Justice Powell opined in that case that a state university could not set aside a fixed number of seats in its medical school for minorities. But the university could consider an applicant's race as a point in favor of his or her admission.114 Metro Broadcasting, Inc. v. FCC115 approved a similar scheme. The FCC, which grants radio and TV broadcast licenses, has a policy that in awarding new licenses it will consider minority ownership as one factor in an applicant's favor. This naturally results in more minorities getting licenses. The Supreme Court held in Metro Broadcasting that this was a permissible form of affirmative action.116 The NEA's organic act was amended in 1985 to add a comparable provision. It says that "[i]n selecting . . . recipients of financial assistance . . . the Chairperson shall give particular regard to artists and artistic

112. 795 F. Supp. 1457, 1476 (C.D. Cal. 1992). The court also found that the requirement was vague, and so violated the Fifth Amendment Due Process Clause.
114. Id. at 311-14.
116. Id. at 566.
groups that have traditionally been underrepresented”—a shorthand in this context for minorities, women, and the handicapped.117

Under the “consideration” requirement of the 1990 reauthorization, the Endowment is told to consider decency, not race: in judging applications it shall “consider[] general standards of decency and respect for the diverse beliefs and values of the American public[].”118 “Artistic merit” is still the overall standard by which applicants are judged, but decent art has an easier time meeting this standard because it gets a plus for being decent. “Decency” refers to the qualities that distinguish the Moral Minority from other groups, just as race is the quality that sets other minorities apart. The new clause talks about “decency and respect for the diverse beliefs and values of the American public,” but this is really only one requirement, not two. Usually, when we talk about the “divers[ity] of the American public” we have in mind the categories of race and gender. For example, Bill Clinton promised that his cabinet would represent the diversity of the U.S. citizenry. But in the topsy-turvy world of the artistic elite, the belief or value most likely to be ignored is decency itself. Real diversity means including it among our concerns.

There is, of course, an important legal difference between the two cases. The rule against race discrimination comes from the Equal Protection Clause; the rule against content discrimination comes from the First Amendment.119 It may be that the latter imposes on the government a stricter obligation to be neutral—not just in its outcomes, but also in its ways of thinking. If it does, a “consideration” requirement, though appropriate in affirmative action cases, may be illegal in free speech cases.

But we should not reject the comparison too hastily. Both Metro Broadcasting and Bakke were at bottom First Amendment cases. In each case the ultimate justification for the “consideration” requirement was that it was good for free speech. In Metro Broadcasting the FCC wanted to change the content of radio and TV broadcasting (it wanted more variety), and it considered race because it believed there was a connection between the race and the programming policy of an owner. In Bakke, at least according to Justice Powell, the real reason for considering race in admissions was to get “a robust exchange of ideas” from the student body.120 Powell thought that “[a]n otherwise qualified medical student with a particular [racial] background . . . may bring to a professional school of medicine . . . ideas that enrich the training of its student body . . . .”121 Both Metro Broadcasting and Bakke used race as a proxy for a way of thinking—in legal terms, for the content of speech. They argued that a “consideration”

119. Or rather, it comes in part from the First Amendment. It also rests on the Equal Protection Clause. See Police Dep’t of Chicago v. Mosley, 408 U.S. 92 (1972); Karst, supra, note 60, at 20.
121. Id. at 314.
requirement was permissible under the Equal Protection Clause because it was okay—indeed desirable—under the First Amendment.122

However persuasive the legal case for it, the "consideration" requirement also has an obvious political appeal. The chief reason for this is that it regulates input rather than output. A law that forbids the NEA to fund certain kinds of art looks like censorship because it limits output—it makes some forms of expression illegal because of their content. A "consideration" requirement, by contrast, leaves open all possibilities. The NEA can consider Mapplethorpe's lack of decency and make a grant to him anyway, believing that his technical merit, symbolism, political themes, etc., justify the award. Indecency detracts from artistic merit, but it is only a contributing, not a sufficient, cause of denial. It thus tends to fade into the background. "Consideration" requirements are appealing in affirmative action cases for the same reason—because they leave open all possibilities. Quotas repudiate the norm of color-blindness just as censorship repudiates the norm of content-neutrality. But a grant law that requires us only to consider race allows every individual the theoretical possibility of winning. As Justice Powell put it in Bakke:

The applicant who loses out... to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration... simply because he was not the right color... It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.123

By regulating inputs but not outputs, Congress can say in good faith that it has given something to everyone. To the Moral Minority it can say that it has struck a blow for decency and tried to assure that we fund no more trash in the future. To the arts community it can say that no artist, no matter how countercultural her work, is cut off from the funding process. The dirty work of telling people "no" is turned over to the NEA and must be done case by case in such a way that the NEA is responsible for the final judgment. Just to make sure that the public knows where to point the finger, Congress amended the Act

122. There is a second difference between considering race and considering decency that may have more legal significance: decency bears more directly on the content of speech. In Metro Broadcasting, for example, the FCC chose to influence programming by giving weight to the race of applicants. But it could have chosen a more straightforward path—it might have imposed direct controls on programming decisions. This is a closer parallel to the requirement that the NEA consider decency in awarding grants. The constitutionality of this direct approach is a more difficult question. The FCC rejected it because it had constitutional concerns. 497 U.S. 547, 584 n.36 (1990). Justice O'Connor, dissenting in Metro Broadcasting, argued that program controls were just as good as racial preferences under the First Amendment, and better under equal protection principles. Id. at 621-22 (O'Connor, J., dissenting).

Notice too this further refinement in the 1990 reauthorization: it does not make decency a decisive factor in any case, nor even assign it a definite weight. It only tells the NEA to "consider" decency. Thus, even if direct programming controls would be unconstitutional, it is not certain that a consideration requirement would also be. As I observed above, however, the Central District of California has ruled that it is. Finley v. NEA, 795 F. Supp. 1457, 1476 (C.D. Cal. 1992).

123. 438 U.S. at 318.
to say that the NEA Chair has “final authority to approve each application.” And, as previously noted, it also opened up NCA policy meetings to the public, and required written records of all discussions about grants.

2. The “Diversity” Requirement. I indicated above that I wanted to emphasize two similarities between the affirmative action and the arts funding cases. The “consideration” requirement asks administrators to think about the right outcome, in the hope that they will choose it. The “diversity” requirement selects administrators (advisory committee members, Council members) who are likely to be devoted to the right outcome, once again in the hope that they will choose it. In affirmative action cases, we want to draw administrators from the pool of racial minorities we are trying to serve. In 1990, Congress wanted administrators who would represent the Moral Minority.

This is no accidental similarity. The 1990 reauthorization begins with a new declaration of findings which observes that

the arts and humanities reflect the high place accorded by the American people to the nation’s rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.124

This sounds like the standard modern preface to a plea for more racial sensitivity and multiculturalism. In context it means something entirely different—that those in the arts should be more sensitive to the “beliefs and values” of the Moral Minority, who represent one aspect of our diversity. The changes in the grant-making process are designed to enforce this sensitivity in just the same way that changes made in 1985 did for minorities and women. In 1985, Congress tinkered with the process to increase the representation of those groups. In putting together grant advisory committees, for example, the NEA Chair was told to “appoint individuals ... who broadly represent cultural diversity.”125 The 1990 law added lay members to the advisory committees, in the hope that common people with common sense would represent the views of the Moral Minority and veto grants for blasphemy and pornography.126 The 1985 amendments also provided for “equitable representation of women, minorities, and individuals with disabilities” on the National Council on the Arts.127 The 1990 law provided for geographic diversity on the Council to give a greater voice to the U.S. middle-class.128

Though it might seem otherwise, the affirmative action plan approved in Metro Broadcasting was also designed to secure this kind of process diversity. The situations seem different because the NEA looks for diversity when it chooses people to make grants, whereas the FCC looks for diversity among its

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grantees. However, the broadcast licensees chosen by the FCC in turn decide (through programming) which artists we will see and hear over the air. They are not themselves the First Amendment speakers; they choose speakers for us. They are "fiduciaries for the public." The real difference between them and the participants at the NEA is that they can actually decide, rather than just recommend, what the public will see or hear.

One could argue that there is another difference of greater First Amendment significance between the FCC and the NEA diversity plans. The reason for increasing the role of minorities in broadcasting is to add programming variety. But the reason for including the Moral Minority in the NEA's grant-making process is to subtract a particular kind of speech which they find offensive. If this were an accurate description of our ambitions in the two situations, it would be a matter for some concern. But, once again, the closer one looks the more alike the situations seem.

Consider broadcast licensing first. It is poor arithmetic to suppose that we add and do not subtract when we give more licenses to minorities. The Metro Broadcasting Court observed that "minority-owned stations tend to . . . avoid racial and ethnic stereotypes in portraying minorities." Patricia Williams makes the same point in praise of the decision:

> a feminist Korean deejay is more likely to sanction insulting images of herself . . . . [I]t is not that white owners cannot be persuaded not to rerun old *Amos 'n' Andy* shows[.] Rather, it is . . . easier—and very likely not even necessary—to persuade Bill Cosby . . . to run programming that challenges . . . the perpetual image of blacks as foolish and deviant."

It is a good thing to get stereotypes and insults off the air, but when we do, we undoubtedly have less of that kind of speech. We have subtraction here just as we do when the NEA refuses to fund Serrano.

Nor should we blithely suppose that adding representatives of the Moral Minority to the NEA grants process will give us less variety than we had before. Congress certainly entertained the opposite assumption. It thought that the panels and the NCA were too inbred and obsessed with what was happening in New York City, and that it ought to enlarge their horizons to take in the rest of the United States.

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130. Id. at 581.

IV

CONCLUSION

THE FIRST AMENDMENT IN THE LEGISLATIVE PROCESS

It would be rash to draw from this little tempest at the NEA any sweeping conclusions about how Congress understands the First Amendment. I will content myself with two observations that may carry over to some other cases. One is about the way Congress framed the issue. The other is about the 1989 and 1990 solutions. I think that in each case Congress had a different constitutional vision than a court would, because of the kind of institution it is. In framing the issue, Congress is more likely to personalize. In choosing a solution, it is more likely to compromise.

First, as to the way Congress framed the issue. To lawyers, judges, and academics, this dispute about arts funding is a fairly tidy problem about freedom of speech and the equality of ideas. The question is whether we can treat one photograph differently than another because of its subject matter or point of view. The markers that legal professionals use in this debate are ideas and principles. In Congress the controversy was personalized. It was a question of treating people equally, not photographs or ideas. There were several reasons for this.

One was that that was how the matter was presented to Congress. The Moral Minority took the initiative in this controversy. Its objective was to limit the kinds of art that the NEA would fund. The First Amendment was of no help, and it may have been a hindrance. The First Amendment does permit limits on speech, but only rarely; it never provides an affirmative reason in favor of them. So it was tactically wise for the Moral Minority to shift the issue away from the First Amendment and toward some more helpful principle, like the equal protection of groups.

I have been speaking about the Moral Minority as though it were a kind of unincorporated association with bylaws, a headquarters, regular meetings, etc. But what I really mean is that this is the way the NEA’s opponents outside of Congress—churchgoers, traditional moralists—pictured themselves in this dispute. The chief beauty of this picture is that it appeals to a norm of equality that we all hold as strongly as we do freedom of speech. It suggests that the government should give this new Minority as much or more attention than it gives mainstream culture—just as the government should give racial minorities equal (and sometimes special) treatment. In the right light, this looks much more important than the abstract and long-term benefits of tolerating blasphemy and dirty pictures.132 The other beauty of the emphasis on group rights is that it tends to neutralize many people who would ordinarily be defenders of the Endowment. Consider the predicament it creates for liberal Democrats. Nearly all of them

sided with the NEA in this dispute.  But given their principles and their constituents, they must feel unusually uncomfortable with rules requiring us to tolerate racial slurs or verbal sexual harassment. The Moral Minority’s strategy forces them either to accept such abuse or to explain how it is different from ridicule of the religious right.

In short, then, the NEA’s opponents outside Congress had good reason to present the controversy as an issue of group rights. The group model suited members of Congress, too. The reasons I have already mentioned would appeal to members no less than to their constituents. But in Congress’s case, there is also an institutional explanation for the tendency to personalize the debate. Members of Congress naturally focus on the people behind the ideas because it is people who cast votes, write letters, and make calls; people (and groups) who make campaign contributions and hire lobbyists. A group might be defined by its adherence to a common idea (the American Family Association believes in decency and “the Judaic-Christian ethic”), but Congress is interested in the welfare of the group, not the success of the idea.

Members of Congress who supported the arts also saw the dispute in personal terms. Some compared the Endowment’s critics to Iranian Shi’ites. Others, more temperate, just called it a matter of sectarian excess within the Christian community. As one said, “I resent very much religious groups threatening me and telling me that I am not a good Christian if I do not vote for the [Helms] amendment.” These members, like the proponents of reform, focused on the people behind the ideas. This fact gives added depth to my observation about Congress’s tendency to personalize. In the case of the NEA’s opponents (people like Helms, Rohrabacher, and Armey), one might say that they spoke in terms of group rights to attract the votes of the Moral Minority. But why would the Endowment’s defenders debate the issue in these terms? I think the explanation is that both sides are accustomed to thinking that way, not just in this controversy but in others where the tables are turned. Thus, the personal point of view is one that all members share. A Senator or Representative who wants to make a persuasive case in favor of funding has to make it on that ground or it will not succeed.

My second observation concerns the 1989 and 1990 solutions. I think that they show an institutional tendency to compromise, to avoid head-on collisions, and to avoid having clear losers. The 1989 solution proposed by Senator Helms was a head-on collision, and it failed. It would have regulated the output of the NEA and thereby produced some clear losers—avant-garde artists and their supporters. We can ordinarily expect restrictions of this kind to fail because they are politically foolish. Members are bound to make enemies if they deny funds to specific classes of people.

133. Of course many other people did, too.
However, I do not think the Helms Amendment was rejected for the usual reasons. What follows is a digression that does little to advance my thesis about compromise. But neither does it undercut my thesis. What it really shows is that we cannot explain Congress's behavior in terms of two simple tendencies. Like the courts, Congress also takes the Constitution seriously even when it would rather not. I say the amendment was not rejected for the usual reasons because the people it targeted—pornographers, blasphemers, bigots—had few patrons in Congress, even covert ones. No one in the course of the debates argued that Mapplethorpe and Serrano were great artists; they argued only that they were misunderstood. There may have been a few—probably not many—who feared the loss of gay votes if they supported clause (1) (against "homo-eroticism"). A few others may have worried that clauses (2) and (3) would inhibit artists who liked to live dangerously. But I think that the real reason for rejecting output restrictions was that most members of Congress did not want to risk violating the First Amendment by imposing content controls. This is just a sense I get from the legislative record. The legal arguments on the point are not very sophisticated, but a lot of members expressed discomfort at the idea. And, as I said, the more obvious political reasons for rejecting output controls are not persuasive.

The 1990 solution had widespread support because it substituted compromise for collision. Its input restrictions—the "consideration" and "diversity" requirements—were an appealing compromise, a kind of half-way house between censorship and laissez-faire. They unquestionably gave something to the Moral Minority. The new seats on the advisory committees and the National Council on the Arts are tangible results. The "consideration" requirement does not guarantee any victories. It is, though, a reminder to the NEA that there are people out there who are worried about decency, and who have Congress's ear. But the input restrictions are also a concession to the Endowment's supporters. After two years of wrangling, the NEA could legally make the Mapplethorpe and Serrano grants all over again.

The other virtue of this compromise, from Congress's point of view, is that it shifts further responsibility for the problem to someone else. Congress tinkered with the grant-review process, but it did not determine the outcome of any case. The NEA must now do so, under the constraints imposed by the input requirements, on an individual basis. Shifting responsibility is the most effective technique for avoiding collisions and making fewer enemies. This is one important reason why we have administrative agencies: they let Congress say as much as it prudently can ("consider decency"), and then pass the buck.\footnote{135 I probably should add that the NEA Chair, to whom Congress shifted the greatest load of responsibility, has become a lightning rod for the agency. John E. Frohnmayer, who held the post for two and a half years, was forced out during the 1992 presidential election primary. One important reason was that conservative Republicans were unhappy about the sexual content of several publications funded by the Endowment under his leadership. William H. Homan, \textit{Head of Endowment for the Arts Is Forced From His Post by Bush}, N.Y. TIMES, Feb. 22, 1992, § 1, at 1, col. 4. His successor, Anne-Imelda Radice, drew conservative applause and liberal criticism for rejecting, on grounds of sexual