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Defending the "Decency Clause" in Finley v. National Endowment for the Arts

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COMMENT

Defending the "Decency Clause" in *Finley v. National Endowment for the Arts*

INTRODUCTION

The federal government has been financially aiding American artists, organizations, and institutions through grants awarded by the National Endowment for the Arts ("NEA") since 1965.[1] In November 1990, Congress reauthorized the NEA to continue funding the arts for three more years, but only after agreeing to adopt an amendment to the NEA's grant-making procedures.[2] The amendment required the NEA to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" when determining artistic merit and excellence.[3] This provision has become known as the "decency clause."

Soon thereafter, the constitutionality of the decency clause was contested in *Finley v. National Endowment for the Arts*.[4] In *Finley*,

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1. National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 4, 79 Stat. 845, 846 (codified as amended at 20 U.S.C. §§ 951-968 (1988 & Supp. IV 1992)).

2. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 318, 104 Stat. 1960, 1963 (codified as amended at 20 U.S.C. § 954(d) (Supp. IV 1992)); *see* 136 CONG. REC. S17,679 (daily ed. Oct. 27, 1990) (the Senate voted in favor of the amendment); 136 CONG. REC. H12,415-17 (daily ed. Oct. 27, 1990) (the House voted in favor of the amendment).

3. 20 U.S.C. § 954(d) (Supp. IV 1992).

4. 795 F. Supp. 1457 (C.D. Cal. 1992). On March 29, 1993, the Department of Justice filed an appellate brief supporting the NEA's constitutional power to impose a decency standard on the context of funded projects. *See* Amei Wallach, *Arts Partisans Angry at Clinton Administration*, L.A. TIMES, May 28, 1993, at F4. The appeal is currently pending in the Ninth Circuit Court of Appeals.

The Department of Justice has also settled several causes of action. The government has agreed to pay the four individual plaintiffs (Karen Finley, Holly Hughes, John Fleck, and Tim Miller) a total of $50,000 in damages and $202,000 in attorneys' fees. The artists will receive $6,000 each in compensatory damages based on the NEA's violation of their rights under the Privacy Act, 5 U.S.C. § 552(a) (1988 & Supp. IV 1992), when

Judge A. Wallace Tashima of the United States District Court for the Central District of California held that the decency clause violated the Due Process Clause of the Fifth Amendment[5] by failing to notify applicants adequately of the requirements for receiving NEA grants and failing to define or limit NEA discretion.[6] The court further held that the decency clause violated the First Amendment[7] by encroaching upon protected expression.[8]

This Comment will examine the reasoning behind the *Finley* court's decision that the decency requirement for government funding of the arts clearly violates the First and Fifth Amendments. Part I will discuss briefly the background of the NEA and the adoption of the decency clause. Part II will analyze the court's holding in *Finley v. National Endowment for the Arts*. Part III will criticize the *Finley* decision and rationale by arguing that the NEA, in deciding grant applications under the decency clause, is not restricting protected first amendment speech, but is only allocating subsidies to support one type of art over another. Part III will examine congressional spending power under the U.S. Constitution,[9] emphasizing that Congress need not be neutral when deciding which projects to fund. Part III will also argue that the *Finely* court's application of a criminal vagueness standard is too strict for the context of government funding. This Comment will conclude that the *Finley* court should have considered Congress' constitutional discretion on matters of federal spending and should have

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the NEA revealed details of their grant applications to the press in 1990. Each artist will also receive a payment equaling his or her 1990 grant recommendation. *National Endowment for the Arts Settles Lawsuit Brought by Performance Artists*, 15 ENT. L. REP. 3, Aug. 1993, at 28. The parties did not settle the cause of action challenging the constitutionality of the decency clause. *See id.* This Comment will address the constitutional issue.

5. The Fifth Amendment states in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

6. *Finley*, 795 F. Supp. at 1472.

7. The First Amendment states in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

8. *Finley*, 795 F. Supp. at 1476.

9. The Constitution empowers Congress to "lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises, to pay the [d]ebts and provide for the common [d]efen[s]e and general [w]elfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

acknowledged that an explicit formulation of a decency standard is impractical and unnecessary in the context of public funding of the arts.

I. THE NEA AND THE DECENCY CLAUSE

A. *Funding Art Through the NEA*

In 1965, President Johnson signed into law the National Foundation on the Arts and the Humanities Act ("Act").[10] The Act established the National Foundation on the Arts and the Humanities ("Foundation"), presently composed of the NEA, the National Endowment for the Humanities, the Federal Council on the Arts and the Humanities, and the Institute of Museum Services.[11] The purpose of the Foundation is to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States . . . [and to support] . . . institutions which preserve the cultural heritage of the United States."[12] By providing

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10. National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 4, 79 Stat. 845 (codified as amended at 20 U.S.C. §§ 951-968 (1988 & Supp. IV 1992)); *see also* Milton C. Cummings, Jr., *Government and the Arts: An Overview*, *in* PUBLIC MONEY AND THE MUSE 31, 50-52 (Stephen Benedict ed., 1991).

11. National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 4, 79 Stat. 845, 846 (codified as amended at 20 U.S.C. § 953(a) (1988)).

12. 20 U.S.C. § 953(b) (1988). The purpose of the funding program is to provide or support:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;
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> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education,

financial assistance to artists and arts organizations, the NEA promotes works and projects so that the public may better appreciate the diverse culture and heritage of the United States.[13]

The NEA receives approximately 17,000 to 18,000 applications annually, of which 4000 to 4500 are granted funding.[14] The NEA's 1993 budget is $176 million,[15] and the combined budget over its entire history totals approximately $3 billion.[16] Organizations and state arts agencies receive most of the funds, while individuals receive a small percentage of the grants.[17] Fellowships for design, theater, and visual artists, and grants for arts education and symphonies are also awarded.[18] Only about twenty of its nearly 100,000 grants have incited national controversy, including funding for the controversial exhibitions by photographers Andres Serrano and the late Robert Mapplethorpe.[19]

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understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) projects that enhance managerial and organizational skills and capabilities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

20 U.S.C. § 954(c) (1988 & Supp. IV 1992).

13. *See* 20 U.S.C. § 951(4) (Supp. IV 1992) ("Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.").

14. Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1211 n.6 (1993).

15. Jacqueline Trescott, *The Arts Agency's Spending Flurry; Last-Minute Grants Deplete Reserve Fund*, WASH. POST, Feb. 4, 1993, at C1.

16. John Koch, *Spitball Politics Distorts the NEA*, BOSTON GLOBE, Mar. 5, 1992, at 73.

17. Rick Zednick, *87-Year Old Basket-Weaver Wins Arts Fellowship*, STATES NEWS SERV., July 2, 1992, *available in* LEXIS, Nexis Library, CURRNT File.

18. Kathleen O'Steen, *East West Players, ICCC, BFA Biggest Winners in NEA Grants*, DAILY VARIETY, Nov. 6, 1992, at 62.

19. Koch, *supra* note 16, at 73. Serrano's photographic work "Piss Christ" is a collage depiction of a crucifix submerged in urine. Mapplethorpe's exhibition consisted of several photographs of homoerotic and sadomasochistic images. *See* William H.

Applications for government funding generally are submitted one fiscal year before the applicants require the funds.[20] The applicants must first describe both the subject matter and the prospective audience of the proposed art, estimate the cost of the project, specify the total amount requested from the NEA, and provide information about all sources of funding.[21] NEA staff members review the applications to determine if all the requirements have been met. Then, a Peer Advisory Panel examines the applications and gives its recommendations to the National Council on the Arts ("Council").[22] The Council gives suggestions to the Chairperson who ultimately is responsible for granting funding approval.[23]

B. *The Adoption of the Decency Clause*

After the displays of controversial projects including works by photographers Mapplethorpe and Serrano, many Americans expressed outrage to their government representatives that taxpayer money had contributed to their exhibitions.[24] In response, Congress adopted a provision that contained explicit content restrictions in the 1990 NEA fiscal funding bill.[25] The amendment provided, inter alia, that an NEA grant recipient may not "promote, disseminate, or produce [art that the NEA may consider] obscene, including but

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Honan, *Endowment Embattled Over Academic Freedom*, N.Y. TIMES, Dec. 17, 1989, at 42.

20. Stephen N. Sher, Note, *The Identical Treatment of Obscene and Indecent Speech: The 1991 NEA Appropriations Act*, 67 CHI.-KENT L. REV. 1107, 1115 (1991).

21. *See* 20 U.S.C. § 954(f)-(j) (1988 & Supp. IV 1992).

22. *See* 1979 NEA ANN. REP. 4 (1980).

23. 20 U.S.C. § 954(c) (1988 & Supp. IV 1992). The Act provides for a Chairperson who will award the grants with the advice of the National Council on the Arts. *Id.*

24. *See* 136 CONG. REC. S7591 (daily ed. June 7, 1990) (statement of Sen. Simpson) ("I am receiving calls from some constituents wanting to know just why we have set up this Endowment to do nothing but support obscenity and profanity."); *but see* 136 CONG. REC. H3805 (daily ed. June 19, 1990) (statement of Rep. Rangel) ("[H]undreds and hundreds of my constituents have written me asking me to support the NEA and oppose new censorship policies for the NEA.").

25. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989); *see also* Michael Wingfield Walker, *Artistic Freedom v. Censorship: The Aftermath of the NEA's New Funding Restrictions*, 17 WASH. U. L.Q. 937, 950 (1993); Pamela Weinstock, Note, *The National Endowment for the Arts Funding Controversy and the Miller Test: A Plea for the Reunification of Art and Society*, 72. B.U. L. REV. 803, 809, 811 (1992).

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."[26]

In 1990, responding to judicial challenges to the so-called "obscenity provision,"[27] Congress again debated the reauthorization of the NEA with intense and heated arguments.[28] The outcome of all of the debates and voting was the adoption of the decency provision on November 5, 1990.[29] The provision states 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."[30]

The language of the decency clause reflects a compromise made among members of Congress.[31] Members of Congress voiced

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26. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989). *See* Walker, *supra* note 25, at 50 (discussing the adoption of the restriction); *see* Weinstock, *supra* note 25, at 809-811 (discussing the adoption of the restriction).

27. *See, e.g.*, Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991) (holding that a requirement that NEA grant recipients certify that funds awarded would not be used to promote works prohibited under the obscenity provision was unconstitutional). See *infra* note 203 for a discussion of the case.

28. *See* 136 CONG. REC. S7591 (daily ed. June 7, 1990) (statement of Sen. Simpson) (described as "an overample supply of hysteria and histrionics and high melodrama"); 136 CONG. REC. S18,008-10 (daily ed. Oct. 24, 1990) (statement of Sen. Leahy) ("For a year and a half—since May 1989—this Congress has spent thousands and thousands of hours of staff and Member time—and more public funds then I want to calculate—on going round and round, in committees and on the floors, on the issue of the NEA, and whether to kill, cut, or alter it."); *see also* Thomas Walsh, *NEA Awaits '92 Budget Raise as "Obscenity" Debate Continues; National Endowment for the Arts*, BACK STAGE PUB., INC., Oct. 25, 1991, at 1.

29. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 318, 104 Stat. 1960, 1963 (codified as amended at 20 U.S.C. § 954(d) (Supp. IV 1992)); *see* Julie Ann Alagna, Note, *1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left With an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545, 1548-51 (1991) (discussing the adoption of the decency clause).

30. 20 U.S.C. § 954(d) (Supp. IV 1992).

31. *See* Catherine Foster, *Endowment for Arts Wins a Court Round in Obscenity Debate*, CHRISTIAN SCI. MONITOR, June 12, 1992, at 3. *Contra* Alagna, *supra* note 29, at 1551 ("[T]he NEA now will screen potential grant recipients and weed out possible indecency in the art that the agency decides to fund[;] [s]uch censoring permitted by the

distinct opinions ranging from closing down the NEA[32] to reauthorizing the NEA without content restrictions.[33] On the one hand, United States Representative Philip M. Crane (R-Ill.) proposed an amendment that would abolish the NEA altogether.[34] The conflict between an artist's right to freedom of expression and a taxpayer's right to determine how his or her money should be spent prompted the "easy" solution to abolish the NEA.[35] On the other hand, some Congress members voted in favor of reauthorizing the NEA with no content restriction because of the important work the NEA accomplishes[36] and because they believed that content restrictions would violate the First Amendment.[37]

Representative Dana T. Rohrabacher (R-Cal.) proposed language that prohibited specific activities or projects.[38] Prohibited subjects included the desecration of the flag and child pornography or projects that are "obscene; . . . that denigrate the beliefs, tenets or objects of a particular religion; or that denigrate a person or group on the basis of race, sex, handicap or national origin."[39]

[decency clause] is not a compromise at all.") (citations omitted).

32. *See* 136 CONG. REC. H9407 (daily ed. Oct. 11, 1990).

33. *See* 136 CONG. REC. H3804-07 (daily ed. June 19, 1990).

34. *See* 136 CONG. REC. H9407 (daily ed. Oct. 11, 1990).

35. *Id.* at H9427 (statement of Rep. Armey) ("the easiest way is to abolish the agency and rid ourselves of the heart of the problem").

36. *See* 136 CONG. REC. S9563 (daily ed. July 11, 1990); 136 CONG. REC. H3804 (daily ed. June 19, 1990). Rep. Edolphus Towns (D-N.Y.) stated that

> [t]here are some who contend that public funding should not be used to fund the arts. However, I think that a lesson in history may be instructive. In the Great Depression, the WPA was a part of President Roosevelt's new deal. In this country's most difficult political and economic times, there was a national policy which appreciated the magnificent potential in the contribution of artists to shore up the national spirit and move the country toward prosperity.

Id.

37. *See* 136 CONG. REC. H3805 (daily ed. June 19, 1990) (statement of Rep. Weiss) ("[R]estrictions based on political content of art challenge the integrity of the U.S. Constitution. Many constitutional scholars believe that such restrictions violate the first amendment guarantee of freedom of expression.").

38. *See* 136 CONG. REC. H9427 (daily ed. Oct. 11, 1990).

39. *Id.* H9406-07; *see also* Alagna, *supra* note 29, at 1568 n.117 (citing Richard L. Berke, *House Approves Compromise Bill to Continue Arts Endowment*, N.Y. TIMES, Oct. 12, 1990, at C3; Jill Zuckman, *Obscenity Debate—House Approves Compromise on Arts Endowment Bill*, CONG. Q., Oct. 13, 1990, at 3423).

Representative Rohrabacher was reacting to his constituents' desire not to fund projects that are "morally reprehensible."[40]

Representatives Patrick Williams (D-Mont.) and E. Thomas Coleman (R-Mo.) developed a bipartisan proposal ("Williams-Coleman compromise") which included the decency clause.[41] Their goal was to make the government more accountable to the taxpayer "without intruding on the constitutional creativity and rights of all Americans."[42] The Williams-Coleman compromise stressed the need for the NEA to distribute funding in a way that will be supported by the public and to increase public confidence in using taxpayer money.[43] The Williams-Coleman compromise was amended to the 1991 NEA fiscal funding statute[44] which was finally adopted by both Houses of Congress on October 27, 1990.[45]

II. *FINLEY V. NATIONAL ENDOWMENT FOR THE ARTS*

A. *Background of the Suit*

The controversy over the decency clause arose when four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller[46] ("individual plaintiffs"), each applied for NEA funding

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40. 136 CONG. REC. H9408 (daily ed. Oct. 11, 1990) (statement of Rep. Rohrabacher) ("[Our constituents] will be watching, and they will know that there is only one way to make the NEA responsible, and that is to vote 'yes' on the Rohrabacher amendment . . . .").

41. *Id.* at H9410. The Williams-Coleman compromise included a provision that prohibits the NEA from funding obscenity. *See id.*

42. *Id.* (statement of Rep. Coleman).

43. *Id.* (statement of Rep. Coleman) ("Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds. That is a statement of common sense, of prudence, of sensibility to the beliefs and values of those who, after all, pay the taxes to support [the NEA].").

44. Department of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, § 318, 104 Stat. 1915, 1963 (1990). It also contained provisions for the protection of natural resources on public lands, the protection of native American interest, and the development of new energy sources. *See generally* Pub. L. No. 101-512, 140 Stat. 1915 (1990).

45. 136 CONG. REC. S17,679 (daily ed. Oct. 27, 1990); 136 CONG. REC. H12,415-17 (daily ed. Oct. 27, 1990).

46. Performance artist Karen Finley is known for a stage presentation which includes stripping and smearing her body with chocolate and alfalfa sprouts, symbolizing women

under the Performance Artists Program.[47] After the Performance Artists Program Peer Review Panel ("Panel") reviewed their applications along with ninety other applications, the Panel recommended that eighteen applications be funded, including the four plaintiffs' applications.[48] On June 28, 1990, however, the NEA informed the individual plaintiffs that funding was denied for their projects, and the individual plaintiffs brought this suit, alleging the violation of their constitutional and statutory rights.[49]

The National Association of Artists' Organizations ("NAAO")[50]

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forced to wallow in excrement and sperm. Elka Worner, *Federal Judge Rules NEA Decency Clause Unconstitutional*, PROPRIETARY TO THE UNITED PRESS INT'L, June 9, 1992, *available in* LEXIS, Nexis Library, CURRNT File. The other three artists include graphic sexual material and homosexual themes in their work. *Id.* John Fleck, in his performance for *A Snowball's Chance in Hell*, reads from "a roll of toilet paper as though it were some sacred scroll [and] spills out a stream of psychotically linked snippets from the press, television and other sources." Steven Winn, *Solo Mio Festival Starts Out with "Hell"*, S.F. CHRON., Sept. 10, 1992, at E3.

47. Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1462 (C.D. Cal. 1992).

48. *Id.*

49. *Id.* Before the Council met to review the eighteen recommended NEA fellowships and grants, a syndicated newspaper column quoted from Finley's funding application, which the NEA had released to the press. *Id.* The Council met in May but deferred consideration of the Performance Artists Program fellowships until its August meeting. In June 1990, however, then-NEA Chairman John E. Frohnmayer polled members of the Council by individual telephone calls concerning the Performance Artists Program grants. *Id.* After receiving their denial, individual plaintiffs filed this suit. *Id.* They asserted that the NEA and Frohnmayer violated their constitutional and statutory rights by improperly denying their applications for NEA funds and by releasing to the public information from their application forms. *Id.* at 1460. The claims of statutory violations are beyond the scope of this Comment and will not be addressed. See *supra* note 4 and accompanying text for settlement information. This Comment will focus on plaintiffs' facial constitutional challenge of the decency clause.

Frohnmayer resigned from the NEA after this action was commenced; Anne-Imelde Radice succeeded him. *Finley*, 795 F. Supp. at 1460 n.1. On January 1993, Radice left her position and named Ana M. Steele as Senior Deputy Chairperson. On August 1993, President Clinton nominated Jane Alexander as the NEA Chairperson. Joyce Price, *Alexander's Hearing Could Serve Double Purpose; NEA's Future, Plus Nominee's Qualifications Likely Targets*, WASH. TIMES, Sept. 16, 1993, at A7. On October 8, 1993, Alexander was sworn in as Chairperson in the Library of Congress. Mark Bousian, *Alexander Sworn in as Chair of the NEA*, L.A. TIMES, Oct. 9, 1993, at F4.

50. The NAAO, founded in 1982, is a nonprofit organization "dedicated to serving, promoting, and protecting artist-driven" groups. Valerie Boyd, *Arts Atlanta Area Arts*

joined the individual plaintiffs in their claims against the NEA after Congress adopted the decency clause in November 1990.[51] The NAAO feared that the new standard would chill the scope of the artistic work of many of its members.[52] The plaintiffs sought a declaration that the decency provision, on its face, was void for vagueness in violation of the Due Process Clause of the Fifth Amendment, and that it deprived plaintiffs of their guarantee of free speech in violation of the First Amendment.[53]

B. *The* Finley *Decision*

1. Standing

Because the individual plaintiffs' applications were denied before the decency clause had been adopted, the court first had to determine the individual artists' standing in their suit.[54] Defendants argued that plaintiffs did not have standing to challenge the facial validity of the decency clause[55] because the individual plaintiffs' applications were denied approximately four months before the provision was adopted.[56] They argued that the allegations of a "chilling effect" could not support standing and that plaintiffs could not show any threatened or actual injury from the challenged provi-

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Confab Timed for Festival, ATLANTA J. & CONT., Sept. 12, 1993, at N2.

51. *Finley*, 795 F. Supp. at 1463.

52. *Id.* at 1470.

53. *Id.* at 1460. In addition, individual plaintiffs alleged that the NEA and Chair Frohnmayer violated their constitutional and statutory rights by improperly denying their applications for NEA grants and by releasing certain information from their application files to the public. *Id.* They sought declaratory and injunctive relief on their constitutional and statutory funding claims and also damages on the Privacy Act claim. See *supra* note 4 for settlement information.

54. *Finley*, 795 F. Supp. at 1469-70. To establish standing, "a plaintiff must show that (1) 'he personally has suffered some actual or threatened injury' as a result of defendants' actions; (2) the injury 'fairly can be traced to the challenged action;' and (3) the injury is 'likely to be redressed by a favorable decision.'" *Id.* at 1468 (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

55. The defendants moved for judgment on the pleadings: "(1) the NEA's funding decisions are unreviewable because they are committed to agency discretion by law; (2) venue is improper as to the Privacy Act claim; and (3) plaintiffs lack standing to challenge the facial validity of the 'decency clause' because they cannot establish the necessary injury." *Id.* at 1460. Only the third pleading will be addressed in this Comment.

56. *Id.* at 1461, 1468.

sion.[57]

The court found that plaintiffs Hughes and Miller, both of whom had received funding under the new statute, had standing because they risked forfeiting their grants if they engaged in behavior determined by the NEA to be against the decency clause.[58] In addition, the court stated that these plaintiffs faced threatened and actual harm because they must restrict their expressive conduct in order to ensure retention of their grants in the present and in the future.[59] The standing of plaintiffs Finley and Fleck was less clear because they alleged only that they had "foregone their application opportunity out of 'fear' that they would be denied funding."[60] The court, however, reasoned that it was unnecessary to determine the standing of Finley and Fleck since the other two plaintiffs had met the "injury" prong of the standing test.[61] In addition, the court found that the NAAO had standing because the organization alleged that some of its members who had received NEA grants under the new standards were "chilled" in their works' scopes and were uncertain as to how to comply with the provision.[62] The court recognized that the NAAO sought to protect the "freedom of artistic expression, an interest germane to [its] organizational purpose."[63]

2. Protection Against Vagueness Under the Fifth Amendment

Applying the Supreme Court's decision in *Connally v. General Construction Co.*,[64] the *Finley* court found that the decency clause

57. *Id.* at 1468.

58. *Id.* at 1469.

59. *Id.*

60. *Id.*

61. *Id.* (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 n.9 (1977) (other plaintiffs need not be considered for standing to maintain the suit since at least one individual plaintiff had demonstrated standing)).

62. *Id.* at 1470.

63. *Id.*

64. 269 U.S. 385 (1926). The statute in *Connally*, OKLA. COMP. STAT. § 7255 (1921), created an eight-hour day for persons employed by or on behalf of the state and provided that the employees shall not be paid less than the current rate of day wages in the locality where the work was performed. *Id.* at 388. A corresponding statute imposed a fine

failed to notify applicants adequately of what is required of them[65] because "persons 'of common intelligence must necessarily guess at [the] meaning and differ as to [the] application'" of the decency clause.[66] In *Connally*, the Supreme Court maintained that a penal statute must be explicit when informing the public of the specific conduct that is forbidden.[67] The *Finley* court, therefore, found the decency clause to be vague and held that the adopted provision was void under the Fifth Amendment's due process requirement.[68]

The court was persuaded by plaintiffs' arguments "that words such as 'decency' and 'respect' are inherently subjective."[69] The court further stated that "decency" and "respect" are "contentless in the context of American society: the very nature of our pluralistic society is that there are an infinite number of values and beliefs and, correlatively, there may be no national 'general standards of decency.'"[70] The court reasoned that because such terms have no substantive meaning, the statute was not sufficiently defined.[71]

Moreover, the court applied the Supreme Court's decision in *Grayned v. City of Rockford*[72] in identifying three offenses that the

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between fifty and five hundred dollars or imprisonment for three to six months. *Id.* The plaintiff construction company was under contract with the state of Oklahoma and was engaged in constructing certain bridges within the state. *Id.* at 389. The Oklahoma Commission of Labor complained that the rate of wages paid by the company to laborers was in violation of the statute. *Id.*

65. *Finley*, 795 F. Supp. at 1472.

66. *Id.* (quoting *Connally*, 269 U.S. at 390).

67. *Connally*, 269 U.S. at 391 (citing International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) (holding that an antitrust criminal law offers no standard of conduct)).

68. *Finley*, 795 F. Supp. at 1471-72.

69. *Id.* at 1471.

70. *Id.*

71. *Id.*

72. 408 U.S. 104, 108-09 (1972). In *Grayned*, the Supreme Court expressed that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* at 108.

The *Finley* court applied the *Grayned* case in recognizing three values which vague laws offend: "(1) they may trap the innocent by failure to provide fair warning; (2) they may fail to provide explicit and objective standards and therefore permit arbitrary and discriminatory enforcement; and (3) they may inhibit First Amendment freedoms by forcing individuals to 'steer far wider of the unlawful zone . . . than if the boundaries of

decency clause violates. The decency clause: (1) "creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone's subjective understanding of the standard;"[73] (2) does not give guidance to panelists, the Council, nor the Chairperson in administering the standard; "each apparently is expected to draw on her or his own personal views of decency or some ephemeral 'general American standard of decency;'"[74] and (3) causes the "imposition of self-censorship wider than the line drawn by the statute because the line, is, in effect, imperceptible."[75] The *Finley* court concluded that the NEA and NEA grant applicants must guess at the meaning of the decency clause and will inevitably apply the clause differently.[76] The court found the decency provision to be inconsistent with the due process requirement of the Fifth Amendment, concluding that the decency provision failed to notify adequately the applicants and NEA staff of the awarding requirements.[77]

3. Freedom of Expression Protected by the First Amendment

In *Finley*, the court recognized a protected first amendment interest in artistic expression funded by the government and held that "government funding of the arts is subject to the constraints of the First Amendment."[78] After analyzing the congressional intent in creating the NEA, the court found that "artistic expression serves many of the same values central to a democratic society and underlying the First Amendment as does scholarly expression in other

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the forbidden areas were clearly marked.'" *Finley*, 795 F. Supp. at 1471 (quoting *Grayned*, 408 U.S. 104 at 108-09).

73. *Finley*, 795 F. Supp. at 1472.

74. *Id.*

75. *Id.*; *see Grayned*, 408 U.S. at 108-09.

76. *Finley*, 795 F. Supp. at 1472.

77. *Id.*

78. *Id.* at 1475. The court noted that "expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 1476 (quoting Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989)).

fields."[79] The court found that government funding decisions for the arts require neutrality.[80]

The court recognized that artistic expression is central to this country's cultural and political life.[81] The court considered Congress' intent in supporting the arts by creating the NEA: "[T]he committee affirms that the intent of this act should be the encouragement of free inquiry and expression."[82] The court found support from Congress' statement that "[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work."[83]

The court accepted plaintiffs' analogy of government funding of the arts to government funding of public universities.[84] The court cited a statement[85] that espoused the close relationship between academic freedom and artistic expression:

> Works of the visual and performing arts are important both in their own right and because they can enhance our experience and understanding of social institutions and the human condition. Artistic expression in the classroom, studio and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities.[86]

Although recognizing that some content-based decisions are unavoidable, the court maintained that the government cannot "impose whatever restrictions it pleases on speech" in funding the arts,

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79. *Id.* at 1474; *see* 20 U.S.C. § 951 (Supp. IV 1992) (containing the "declaration of findings and purpose" of the NEA's authorizing statute).

80. *See Finley*, 795 F. Supp. at 1475.

81. *Id.* at 1473.

82. *Id.* (quoting S. REP. NO. 300, 89th Cong., 1st Sess. 3-4 (1965)).

83. *Id.* at 1474 (quoting 20 U.S.C. § 951(10) (Supp. III 1991)).

84. *Id.*

85. *Id.* The statement was made by participants in a conference sponsored by the American Association of University Professors, the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the Wolf Trap Foundation. *Id.*

86. *Id.* (quoting *Academic Freedom and Artistic Expression*, ACADEME, July-Aug. 1990, at 13).

just as it cannot impose such restrictions on speech in a public university.[87] Therefore, the court concluded that government subsidization of the arts falls under the protection of the First Amendment.[88]

Furthermore, the court found that the decency provision sought to suppress what some may consider offensive speech in this society.[89] Recognizing that indecent expression is protected by the First Amendment,[90] the court found that the decency provision "clearly reaches a substantial amount of protected speech."[91] The court held that the decency clause, which favors aiding "decent" art and denying grants to "indecent" art, "gives rise to the hazard [of] 'a substantial loss or impairment of freedoms of expression,'" thus violating the First Amendment.[92]

III. CRITICISM OF THE *FINLEY* COURT'S RATIONALE AND DECISION

The *Finley* decision is flawed for three basic reasons. First, the court failed to acknowledge that government spending is not subject to neutrality given congressional discretion therein.[93] Second, the court's finding that the government must be content-neutral in its funding of the arts is impractical because content must be judged for artistic merit.[94] Finally, the court applied a void for

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87. *Id.* at 1475.

88. *Id.*

89. *Id.* The court noted that:

> the fact that given speech is thought by many to be highly offensive, either because it espouses political, religious, racial or other doctrines which to many are most abhorrent, [] or because of its use of "indecent" words, [] does not, absent a conduct arising from such speech, constitute a ground for abridging speech.

Id. at 1475-76. (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.05[B][1], at 2-30 (1991) (citing Brandenburg v. Ohio, 395 U.S. 444 (1969))).

90. *Id.* at 1476 (citing Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

91. *Id.*

92. *Id.* (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

93. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 473-74 (1977) (holding that, when a state implements a value judgment favoring child birth over abortion by its subsidization policy, it does not deny a woman her freedom to choose an abortion).

94. *See* 20 U.S.C. § 954(d) (Supp. IV 1992) ("[T]he Chairperson shall ensure that . . . artistic excellence and artistic merit are the criteria by which applications are

vagueness standard applicable to criminal cases in its determination that the decency clause was unconstitutionally vague.[95] This criminal vagueness standard is too strict to apply in the context of government funding. The court failed to recognize that the Supreme Court has upheld statutes which, by their very nature, cannot be explicit or specific.[96]

A. *Government Neutrality Not Required in Allocating Funds*

1. Denial of funding does not infringe upon a fundamental right

The court in *Finley* held that federal funding of the arts is subject to the protection of the First Amendment.[97] In essence, the court agreed with the plaintiffs' argument that public subsidization of art should be treated similarly to public funding of the press and university activities.[98] By comparing artistic expression to that of expression in universities and other public fora,[99] the court determined that just as decisions based on subjective criteria to suppress unpopular expression are impermissible when deciding upon hiring and promoting in universities, the decision to fund particular works should not suppress certain speech.[100] The court, then, reached the decision that public art funding requires government neutrality in its granting decisions.[101]

The court in *Finley*, however, assumed that the decency clause

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judged . . . ."); *Finley*, 795 F. Supp. at 1475 (stating that "limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable"); Advocates for the Arts v. Thomson, 532 F.2d 792, 796 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976) (stating that "neutrality in a program for public funding of the arts is inconceivable").

95. *See Finley*, 795 F. Supp. at 1471-72.

96. *See, e.g.*, Miller v. California, 413 U.S. 15, 30 (1973) (reasoning that "when triers of fact are asked to decide whether "the average person, applying contemporary community standards would consider certain material 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation").

97. *Finley*, 795 F. Supp. at 1475.

98. *See id.* at 1472-75.

99. *Id.* at 1473.

100. *Id.* at 1475.

101. *Id.* at 1472.

sought the suppression of certain speech.[102] Moreover, the court's decision restricts congressional determination of what type of art to promote. The criterion of decency in determining NEA grant recipients is not an attempt by the government to suppress certain speech, but merely an expression of the government's decision to allocate funds to promote art whose artistic merit encompasses decency and respect for the values and beliefs of the American public.[103]

The court's analysis contradicts the reasoning in *Advocates for the Arts v. Thomson.* In *Advocates for the Arts*, the United States Court of Appeals for the First Circuit maintained that government "neutrality in a program for public funding of the arts is inconceivable."[104] The court pointed out that the criteria for funding certain art projects include the merit of artistic content and that the grantor cannot escape making judgments on the content of the artistic expression.[105]

The court found that the government did not intend to "'abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge'" artistic expression.[106] The court distinguished the concept of restricting speech and funding art:

> A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as "speech[,"] courts have no particular institutional com-

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102. *Id.*

103. *Id.* at 1470 (argument made by the government). *See* Advocates for the Arts v. Thomson, 532 F.2d 792, 795-96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).

104. *Advocates for the Arts*, 532 F.2d at 796.

105. *Id.*

106. *Id.* at 795 (quoting Buckley v. Valeo, 424 U.S. 1, 92 (1976)).

> petence warranting case-by-case participation in the allocation of funds.[107]

The court further reasoned that an applicant does not have any right to public support of private expression.[108] The court found no tradition of absolute neutrality in public funding of speech-related activities.[109] While acknowledging that the standard of artistic merit is important, the court found that the guidelines of artistic merit "do not lend themselves to translation into first amendment standards."[110] Therefore, the court refused to find a first amendment mandate of content-neutrality for government funding of the arts.[111]

2. NEA's Broad Discretionary Powers

The *Finley* court failed to recognize the broad discretionary powers of Congress in allocating federal funding of the arts to the NEA.[112] In *Frasier v. U.S. Department of Health and Human Services*, the United States District Court for the Northern District of New York found that, through 20 U.S.C. § 954, Congress gave the NEA Chairperson broad discretion in determining what constitutes "art excellence," "artistic merit," and "general standards of decency."[113] In *Frasier*, the plaintiff claimed that the NEA's method for denying her funding was unconstitutional.[114] The plaintiff alleged that the procedure used by the NEA in processing her application was "arbitrary and without . . . legal rationale or basis" and also

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107. *Id.* at 795-96.

108. *Id.* at 797.

109. *Id.* at 796. ("As the Supreme Court has observed, '[o]ur statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, . . . preferential postal rates and antitrust exemption for newspapers . . . .'") (quoting *Buckley*, 424 U.S. at 93 n.127 (citations omitted)). *But see* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992) (stating that the government cannot "impose whatever content restrictions it chooses" in funding the arts).

110. *Advocates for the Arts*, 532 F.2d at 797.

111. *See id.* at 796-97.

112. *See* Frasier v. United States Dep't of Health & Human Servs., 779 F. Supp. 213 (N.D.N.Y. 1991).

113. *Id.* at 220.

114. *Id.* at 215.

was without a uniform method, which resulted in discrimination.[115] The court applied the Administrative Procedure Act[116] ("APA") because "Congress waived the government's immunity from judicial review when sought by 'a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"[117] Finding that the APA provided the correct remedial process, the court found, within the APA, Congress' explicit retention of immunity regarding agencies' actions committed to agency discretion.[118]

Therefore, the *Frasier* court gave deference to the NEA's discretion in its application decisions.[119] The court stated that since Congress passed legislation which gives the court "'no meaningful standard against which to judge the agency's exercise of discretion[,]' . . . [the] court cannot—and will not—second-guess the NEA's conclusions concerning 'art excellence' and 'artistic merit.'"[120] The court concluded that judgments concerning granting of funds to the arts are clearly left to the NEA's discretion and that such judgments are not reviewable.[121] Since Congress failed to specify a rigid standard for determining the criteria for grants, the *Finley* court should have acknowledged NEA's discretion to use its professional judgment in determining artistic merit while taking into consideration the general standards of decency and respect for the American public.

B. *Spending Power of Congress Allows Congress to Support One Activity Over Another*

The Constitution empowers Congress to "lay and collect

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115. *Id.* at 219.

116. 5 U.S.C. § 1983 (1988).

117. *Frasier*, 779 F. Supp. at 219 (quoting 5 U.S.C. § 702 (1988)).

118. *Id.*; *see* 5 U.S.C. § 701(a)(2) (1988) ("This chapter applies . . . except to the extent that . . . agency action is committed to agency discretion by law . . . ."). Because "agency decision-making often involves 'a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise,' Congress retained immunity for decisions based upon agency discretion." *Frasier*, 779 F. Supp. at 219-20 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

119. *See Frasier*, 779 F. Supp. at 219-20.

120. *Id.* at 220 (quoting *Heckler*, 470 U.S. at 830).

121. *Id.*

[t]axes, [d]uties, [i]mposts, and [e]xcises, to pay the [d]ebts and provide for the common [d]efen[s]e and general [w]elfare of the United States."[122] In accordance with this power, Congress may attach certain conditions on receipt of federal funds including compliance with federal statutory and administrative directives.[123] The spending power does have several general restrictions: (1) the funds must be in pursuit of the general welfare, and the courts should defer substantially to the judgment of Congress in this regard;[124] (2) the recipients should be aware of the federal conditions enabling them to choose to participate knowingly;[125] and (3) the conditions should relate to the governmental interest in particular national programs or projects.[126]

These restrictions have been met by the NEA. First, the NEA serves the general public by appropriating funds to release creative talent while helping to create, sustain, and encourage freedom of thought and imagination.[127] Second, Congress established qualifications in a set of guidelines which explains the considerations in making funding determinations.[128] Third, the conditions on the grants relate to the national program of promoting the arts and the humanities.[129]

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122. U.S. CONST. art. I, § 8, cl. 1.

123. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (Burger, C.J., plurality).

124. Helvering v. Davis, 301 U.S. 619, 640, 645 (1937).

125. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

126. Massachusetts v. United States, 435 U.S. 444, 461 (1978).

127. *See* 20 U.S.C. § 951 (1988 & Supp. IV 1992). "To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art." 20 U.S.C. § 951(11) (Supp. IV 1992).

128. *See* 20 U.S.C. § 954 (1988 & Supp. IV 1992).

129. Congress declared that:

> (5) It is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve pub-

Although the spending power may not be used to induce recipients to engage in activities that would themselves be unconstitutional,[130] government spending is not subject to neutrality in deciding which projects to fund. For example, in *Maher v. Roe*,[131] the Supreme Court upheld a state welfare regulation which gave payments to Medicaid recipients for childbirth-related services but not for non-therapeutic abortions. Therefore, the government may "make a value judgment" in favoring one type of service over another and implement that judgment by the allocation of public funds.[132] By encouraging specific activities with subsidies, the government does not discriminate on the basis of viewpoint. It has "merely chosen to fund one activity to the exclusion of the other."[133] The Supreme Court has held that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right itself.[134]

A basic difference exists between direct government interference with a protected right and government encouragement of another activity in accordance with legislative policy.[135] Congress' intent to have decision-makers consider general standards of decency in determining artistic merit is not designed "to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'"[136] Therefore, since the government does not have an affirmative duty to allocate resources in promoting

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lic purposes the Congress defines.

(6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect of the divers beliefs and values of all persons and groups.

20 U.S.C. § 951(5)-(6) (Supp. IV 1992).

130. South Dakota v. Dole, 483 U.S. 203, 210 (1987).

131. 432 U.S. 464 (1977).

132. *Id.* at 474.

133. Rust v. Sullivan, 111 S. Ct. 1759, 1772 (1991).

134. *See* Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983) (unanimously upholding a portion of the Internal Revenue Statute that denied tax exempt status to organization contribution for lobbying activity). The statutory scheme "did not penalize persons for engaging in nonpunishable speech, the lobbying of governmental organizations for charitable goals, but only constituted a refusal by Congress to subsidize lobbying activities." 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 46 (2d ed. 1992).

135. *Maher*, 432 U.S. at 475.

136. *See Regan*, 461 U.S. at 548 (citation omitted).

artistic expression, the decision not to promote "indecent" art places no governmental obstacle in the path of an artist who chooses not to conform with the general standards of decency; but rather, by means of preferential subsidization of "decent" art, the government supports an alternative activity deemed in the public interest.[137]

In *Regan v. Taxation With Representation*, the Supreme Court has held that Congress' refusal to subsidize lobbying does not violate the First Amendment.[138] Under the Internal Revenue Code, organizations are denied grants where a "substantial part of the activities of which [an organization] is carrying on propaganda, or otherwise attempting to influence legislation." [139] In *Taxation With Representation*, the Internal Revenue Service denied the defendant tax exempt status because it seemed that a majority of the defendant's activities would be lobbying in Congress.[140]

The Supreme Court reaffirmed its holding that the First Amendment does not require Congress to subsidize lobbying.[141] The Court announced that strict scrutiny does not apply whenever Congress subsidizes some speech while refusing to subsidize other speech.[142] Recognizing that the defendant may not be able to "exercise its freedom of speech as much as it would like" without the tax exempt status, the Supreme Court held that "the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'"[143] Therefore, the defendant is free to lobby in Congress but will not be subsidized by the government for its activities.[144] Similarly, NEA applicants

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137. *See* Harris v. McRae, 448 U.S. 297, 315 (1980) (holding that restricting the availability of certain abortions under Medicaid does not violate a liberty protected by the Due Process Clause); *see also Regan*, 461 U.S. at 546 (a legislature is not required to subsidize first amendment rights through a tax exemption or tax deduction).

138. *Regan*, 461 U.S. at 545-46.

139. *Id.* at 542 (quoting 26 U.S.C. § 501(c)(3)(1988)).

140. *Id.*

141. *Id.* at 546 (citing Cammarano v. United States, 358 U.S. 498 (1959)). A tax exemption is equivalent to a cash grant of the tax amount an organization would have to pay on its income. *Id.* at 544.

142. *Id.* at 548.

143. *Id.* at 550 (quoting Harris v. McRae 448 U.S. 297, 316 (1980)).

144. *See id.* at 546 (stating that "Congress has simply chosen not to pay for [the

are free to express themselves without any funding from the government.

Critics argue that because the NEA plays a dominant role in the art community's financial affairs, the NEA's denial of funding affects "the competitive market for funding of artistic endeavors."[145] NEA grants may help artists, not only financially, but also by giving it a mark of approval of its artistic qualities.[146] The argument follows that in denying NEA funds, the government is also denying some artists an opportunity to express themselves in their art.[147] Furthermore, some artists may be "chilled" in the scope of their work in trying to conform to "the general standards of decency" provision.[148]

It must be noted, however, that the NEA, when refusing to fund thousands of applicants, is not blacklisting the denied applicants as artists with indecent work or without artistic excellence.[149] The art

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defendant's] activity").

145. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, (C.D. Cal. 1991) (citation omitted); *see also* Alagna, *supra* note 29, at 1557. Opponents of the NEA decency clause have argued that the government's standards censor artists' speech. *See, e.g.*, Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 U. KAN. L. REV. 437 (1992). A "struggling artist" could be "extremely" tempted to alter his or her creative talent to fit in the NEA's guidelines for grant decisions. *Id.* at 440. It is also recognized that many courts would find that this temptation from NEA grants "which the artist has no claim of entitlement as too minimal to be deemed coercive." *Id.* at 441. An artist, who has been denied funding by the NEA, may be jeopardized "because the NEA is recognized and respected for identifying artists who produce works of exceptional quality." *Id.*

146. *See Bella Lewitzky*, 754 F. Supp. at 783.

147. *See id.*

148. *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992); *see also* Sher, *supra* note 20, at 1136-37. In a footnote, the *Finley* court stated that an argument could have been made that the decency provision "constitutes a facially unconstitutional condition" which restricts a great proportion of non-funded expression. Since the plaintiffs failed to raise that argument, the court did not address it. *Finley*, 795 F. Supp. at 1472 n.18.

149. *See* 20 U.S.C. § 954(d) (Supp. IV 1992) ("The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the project, production, workshop, or program for which the applicant requested financial assistance is or is not obscene."). In *Finley*, the NEA argued that the phrase, "taking into consideration general standards of decency and respect for the values of the American public," is implicit in assessing artistic merit.

community should realize that the NEA is promoting one work instead of another[150] with its limited budget, instead of thinking that all art that is denied funding does not have artistic merit. Therefore, artists are free to express themselves, but not all can be expected to be given government funding. Unless there is proof that Congress is "discriminat[ing] invidiously in its subsidies in such a way as to "'aim at the suppression of dangerous ideas,'"[151] the inclusion of "the general standards of decency and respect for the diverse beliefs of the American public"[152] in determining artistic merit should be held constitutional.

C. *The Finley Court Should Have Tolerated Some Vagueness in a Public Funding Statute*

1. The Decency Clause Does Not Deprive Persons of Their Property or Liberty Under the Fifth Amendment

By striking down the decency clause as void for vagueness under the Due Process Clause, the *Finley* court imposed too strict a test for government funding for the arts by equating the decency clause with statutes for criminal infractions.[153] The court mistakenly supported its decision with cases involving criminal penalties.[154] It failed to recognize that the Supreme Court has held that

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Finley, 795 F. Supp. at 1470. The NEA's argument that the decency provision is implicit in determining artistic merit may be supported by Congress' failure to insert a corresponding provision that applicants whose works have been denied shall not mean that the works are indecent.

150. *See* Advocates for the Arts v. Thomson, 532 F.2d 792, 795-96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).

151. *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (quoting Cammarano v. United States 358 U.S. 498, 513 (1959)).

152. 20 U.S.C. § 954(d) (Supp. IV 1992).

153. *See Finley*, 795 F. Supp. at 1471-72.

154. *See id.* The void for vagueness doctrine applies to all criminal laws and laws that regulate speech or other fundamental constitutional rights. Criminal laws must give notice to the people as to what activity is made criminal so as to provide fair notice to persons before making the activity and also to restrict the authority of police officers to arrest persons for violating the law. Several rationales require special judicial strictness when reviewing laws that regulate constitutional rights. "First, the requirement that a law place persons on notice as to precisely what activity is made criminal is of special importance when the activity distinguishes between criminal activity and activity which constitutes a fundamental constitutional right . . . ." An unclear law regulating speech might deter or chill persons from engaging in speech or activity with special protection under the Constitution. A second reason for enforcing

the Constitution tolerates some degree of vagueness in statutes depending upon the nature of the statute's enactment and the relative importance of fair enforcement and fair notice.[155] Since the consequences of imprecision are less severe in civil enactments as compared to criminal statutes, greater tolerance has been given to the former.[156] Yet, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."[157] The *Finley* court held that "the decency clause seeks to suppress speech that is offensive to some in society."[158] There is no showing, however, that the decency clause seeks to suppress certain speech.[159] The government merely uses "public money to facilitate and enlarge artistic expression" and does not seek to censor, abridge, or restrict speech.[160]

In reaching its decision, the *Finley* court applied the three "evils" of a vague law as found in *Grayned v. City of Rockford*.[161] In *Grayned*, the Supreme Court considered the constitutionality of an anti-picketing and an antinoise ordinance which imposed crimi-

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the void for vagueness doctrine "is to require that there be clear guidelines to govern law enforcement. . . . Thirdly, because the First Amendment needs breathing space, the governmental regulation that is tolerated must be drawn with 'narrow specificity.'. . . Moreover there is a special danger of tolerating in the first amendment area 'the existence of a penal statute susceptible of sweeping and improper application' . . . ." ROTUNDA & NOWAK, *supra* note 134, at 36-7. The decency clause is not within a criminal statute nor a statute that regulates a fundamental constitutional right. The decency clause is within a public funding statute for the arts.

155. *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (holding that an ordinance that requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs" is not facially overbroad or vague).

156. *See id.* at 498-99 (citing Winters v. New York, 333 U.S. 507, 515 (1948) (stating that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending upon civil sanctions for enforcement").

157. *See id.* at 499.

158. *Finley*, 795 F. Supp. at 1475.

159. *See* 136 CONG. REC. H12,416 (daily ed. Oct. 27, 1990) (statement of Rep. Coleman) ("[W]e do not want to stifle creativity . . . . I hope . . . that the chairman of the NEA uses good common sense in recognizing this creativity . . . .").

160. *See* Advocates for the Arts v. Thomson, 532 F.2d 792, 795 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976) (citing Buckley v. Valeo, 424 U.S. 1, 92 (1976)).

161. *Finley*, 795 F. Supp. at 1472 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

nal prosecution and penalties.[162] The first concern under *Grayned* is that fair warning must be given.[163] The basic assumption in *Grayned* was that "man is free to steer between lawful and unlawful conduct."[164] The second concern deals with arbitrary and discriminatory enforcement. The Court feared that police officers, judges, and juries would be resolving matters on a subjective and ad hoc basis.[165] Applying *Edwards v. South Carolina*,[166] the Supreme Court expressed concern that in arresting, convicting, and punishing, the vague law would infringe rights guaranteed by the First Amendment.[167] The third concern is that a vague statute may inhibit first amendment liberties. The Court relied upon its decision in *Baggett v. Bullit*,[168] which stated that the state may not allow a possibility of prosecution, with the imposition of penalties for perjury, by requiring a state employee to take an unduly broad

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162. *Grayned*, 408 U.S. at 107-08. In this case, Grayned was convicted for his part in a demonstration in front of a high school. At the time of his arrest, Rockford's anti-picketing ordinance provided the following: "A person commits disorderly conduct when he knowingly . . . [p]ickets or demonstrates on a public way within 150 feet of any primary or secondary school building . . . ." The antinoise ordinance stated that "no person, while on public or private grounds adjacent to any building in which a school or any class thereof . . . shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session." *Id.*

163. *Id.* at 108.

164. *Id.*

165. *Id.* at 108-09.

166. 372 U.S. 229 (1963). One hundred eighty-seven petitioners peacefully assembled at the site of the State Government of South Carolina to express their grievances and were convicted of the common-law crime of breach of the peace. *Id.* at 229-30.

167. *Grayned*, 408 U.S. at 109 n.5.

168. 377 U.S. 360 (1964) (holding that the provision and oath in question were unduly vague and violated due process). Members of the faculty, staff, and students of the University of Washington brought a class action for a judgment declaring unconstitutional state statutes requiring the taking of oaths, one for teachers and the other for all state employees, as a condition of employment. *Id.* at 361-62. The statute required teachers to swear to promote respect for the flag and the institution of the United States and the State of Washington, reverence for law and order and undivided allegiance to the United States Government. *Id.* A state employee was required to swear that he or she was not a subversive person: that he or she did not advise, teach, or incite others to overthrow the constitutional form of government by revolution, force, or violence. *Id.* at 362.

oath.[169]

The standards for evaluating vagueness in *Grayned* should not be mechanically applied[170] the way the court did in *Finley*. The criminal cases which the *Finley* court applied manifest the Supreme Court's concern against vague statutes which incurred criminal prosecution and fines.[171] These criminal cases are not analogous to the *Finley* case since the NEA legislation is not a criminal statute which describes crimes and specifies punishment, but rather it is an administrative guideline for government funding of the arts. The premise that persons are "free to steer between lawful and unlawful conduct"[172] in *Grayned* does not apply in the *Finley* case because the NEA does not punish applicants who are not awarded funding.

In *Finley*, the statutory language at issue is in the context of government funding of the arts, which is not a constitutional right.[173] Although judges must use their subjective understanding of "artistic excellence and artistic merit" to decide which art projects should receive NEA grants,[174] at worst, applicants are denied funding; they are not criminally punished. The applicants for government funding will not be deprived of property or liberty under the Fifth Amendment because there is no "right" to public support of private expression.[175] Artists are free to express themselves in their works but need not be financially subsidized by the govern-

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169. *Id.* at 374.

170. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

171. *See* Connally v. General Constr. Co., 269 U.S. 385, 390, 393 (1926) (reasoning that if a vague criminal statute is enforced, it will deprive persons of their liberty and property without due process of law; the Court was concerned that persons may risk "incurring severe and cumulative penalties" from a vague criminal statute); Grayned v. City of Rockford, 408 U.S. 104, 106 (1972) (concerning an anti-picketing and an antinoise ordinance with criminal convictions and fines); *Baggett*, 377 U.S. at 366 (involving oath requirements and statutory provision incurring the possibility of prosecution imposing the penalties of perjury); Edwards v. South Carolina, 372 U.S. 229 (1963) (concerning the common law crime of breach of the peace which the state trial court imposed fines from ten to one hundred dollars and five to thirty days in jail).

172. *Grayned*, 408 U.S. at 108.

173. *See* Advocates for the Arts v. Thomson, 532 F.2d 792, 797 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).

174. 20 U.S.C. § 954(d) (Supp. IV 1992).

175. *Advocates for the Arts*, 532 F.2d at 797.

ment.

In *Frasier v. U.S. Department of Health and Human Services*, the United States District Court of the Northern District of New York held that the plaintiff did not possess a right to government funding entitled to the protection of the Due Process Clause.[176] In 1989, the plaintiff, Frasier, applied for a grant to purchase a $15,000 "computer-assisted design work-station" for a "Design Advancement Project" grant through the NEA's Design Arts Program and submitted a separate unrelated proposal to the U.S. Department of Health and Human Services ("HHS").[177] After the agencies denied her applications, Frasier brought suit claiming that the NEA's and HHS's procedures for funding were unconstitutional and illegal, violating at least thirty-nine federal statutes and regulations, two constitutional provisions, and numerous common laws.[178]

The *Frasier* court held that the plaintiff failed to state a claim for relief.[179] The court found that Frasier's "desire for funding, without more, does not rise to the level of a constitutionally protected interest."[180] In determining whether Frasier has a "legitimate claim of interest," the court had to determine if any law or rule affirmatively entitled Frasier to government funding.[181] Recognizing that both the NEA and HHS have broad discretion under their respective enabling acts, the court held that Frasier was not constitutionally entitled to government funding.[182]

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176. 779 F. Supp. 213, 222 (N.D.N.Y. 1991).

177. *Id.* at 214-15.

178. *Id.* at 215. Plaintiff erroneously invoked the due process protection under the Fourteenth Amendment instead of under the Fifth Amendment since the NEA and the HHS are federal agencies. *Id.* at 221.

179. *Id.* at 214.

180. *Id.* at 222.

181. *Id.* (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it[;] [h]e must have more than a unilateral expectation of it[;] [h]e must, instead, have a legitimate claim of entitlement to it")).

182. *Id.*

2. General language in the decency clause should be deemed constitutional when compared to language of constitutional obscenity statutes

The United States Supreme Court has consistently held that imprecision itself does not offend the Constitution as long as the language sufficiently conveys a definite warning as to the proscribed conduct "when measured by common understanding and practices."[183] Therefore, since all statutes cannot be explicit because of the nature of the subject matter, "common understanding" should be taken into consideration. For example, the general language used in obscenity statutes is similar to the general language of the decency clause, yet the obscenity language is deemed constitutional.[184] Applying this rationale in obscenity cases, the decency clause should not be void for vagueness.

In *Miller v. California*, the United States Supreme Court faced the issue of defining the state standards for identifying obscene material that may be enforced without violating the First Amendment.[185] In *Miller*, the defendant was convicted by a jury of violating a misdemeanor of "knowingly distributing obscene matter" when he advertised the sale of illustrated books containing "adult material."[186] At the time of his alleged offense, the California Penal Code defined "obscene matter" as that which:

> to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.[187]

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183. Miller v. California, 413 U.S. 15, 28 (1973) (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)).

184. *See id.* at 15; Smith v. United States, 431 U.S. 291 (1977).

185. *Miller*, 413 U.S. at 20, 36 (reaffirming that obscene material is not protected by the First Amendment).

186. *Id.* at 16.

187. *Id.* at 37 (quoting CAL. PENAL CODE § 311(a) at the time of the commission of the alleged offense). The California Penal Code has since been modified to define ob-

The Court limited a state's statutory definition of obscenity to works that "taken as whole, appeal to the prurient interest in sex . . . and which . . . do not have serious literary, artistic, political, or scientific value."[188] The Court further stated that the fact finder must determine "whether 'the average person, applying contemporary community standards' would find that the work . . . appeals to the prurient interests."[189]

The Supreme Court held the requirement that the jury evaluate allegedly obscene materials with reference to contemporary standards of California to be constitutionally adequate.[190] Recognizing that the United States is too large and too diverse to expect national standards to be articulated, the Court stated that a requirement for an abstract formulation for a jury would be unrealistic.[191] The Court was satisfied that the specific guidelines would provide "fair notice to a dealer in [obscene] materials that his public and commercial activities may bring prosecution."[192] Therefore, the Cali-

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scene matter as:

> matter taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value.

CAL. PENAL CODE § 311(a) (West Supp. 1993).

188. *Miller*, 413 U.S. at 24.

189. *Id.* (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957) (holding that obscenity is outside the protection intended for speech and for the press))). The guidelines for the fact finder must be:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

190. *Id.* at 33.

191. *Id.* at 30.

192. *Id.* at 27 (citing *Roth*, 354 U.S. at 491-92). The Court recognized that although

> [m]any decisions have recognized that the terms of obscenity statutes are not precise, . . . [when they are] applied according to the proper standard for

fornia obscenity statute passed constitutional muster.

Furthermore, in *Smith v. United States*,[193] the Supreme Court determined that community standards should not be defined by the legislature.[194] The Supreme Court had to decide "whether [a] jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be."[195] In its reasoning, the Court analogized the function of "contemporary community standards" in obscenity cases and "reasonable" in other cases.[196] The Court found that it would be inappropriate for a legislature to try to define the contemporary community standard just as it would be inappropriate for a legislature to try to define the word "reasonableness" for a jury.[197]

Furthermore, the Supreme Court stated that the possibility that persons might reach different conclusions regarding the same material does not make a statute which prohibits the mailing of obscene materials unconstitutional for vagueness.[198] Therefore, judging a particular material "in light of the jurors' understanding of contemporary community standard," rather than judging with explicit, descriptive criteria, is constitutionally valid in obscenity cases.[199] Although the Supreme Court reaffirmed a community standard for

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judging obscenity, give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.

Id. at 27-28 n.10 (internal quotation marks omitted) (citations omitted).

193. 431 U.S. 291 (1977). In *Smith*, the petitioner was indicted for violating a federal statute which prohibits the mailing of obscene materials. *Id.* at 296.

194. *Id.* at 302-03.

195. *Id.* at 302.

196. *Id.* (citing Hamling v. United States, 418 U.S. 87, 114 (1974)).

197. *Id.*

198. *Id.* at 309 (stating that prohibited conduct covered by the obscenity statute "can be ascertained with sufficient east to avoid due process pitfall") (citing Roth v. United States, 354 U.S. 476, 492 n.30 (1957); Miller v. California, 413 U.S. 15, 29 n.9 (1973)).

199. *See id.*

a juror rather than a national standard, an abstract, unascertainable national standard, as found in the decency clause, should be constitutionally valid.[200]

Following the *Finley* court's reasoning that no "general standards of decency" exist,[201] the average person would be incapable of applying the constitutionally accepted "contemporary community standards."[202] The *Finley* court's reasoning, therefore, fails because the general language of "contemporary community standards" for determining obscene matters, deemed constitutional in *Miller* and *Smith*, would also fail the *Grayned* test under the *Finley* analysis.[203]

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200. *Cf.* Pope v. Illinois, 481 U.S. 497 (1987). In *Pope*, the petitioners were charged with selling obscene magazines. *Id.* at 499. The petitioners argued that the third prong of the *Miller* test, "whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value," should be judged on an objective basis and not by reference to contemporary community standards. *Id.* (quoting Miller v. California, 413 U.S. 15, 24 (1973)). The Supreme Court reaffirmed the application of contemporary community standards to the first and second prongs of the *Miller* test (the prurient interest and patently offensive prongs). *Id.* at 500. But regarding the value question in the third prong of the *Miller* test, the Court held that the proper inquiry is "whether a reasonable person would find such value in the material." *Id.* at 500-01.

201. Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1471 (C.D. Cal. 1992) (agreeing with the plaintiffs' argument that the words "'decency' and 'respect' are inherently subjective . . . [and] are contentless in the context of American society").

202. *Miller*, 413 U.S. at 24.

203. For a discussion of the *Miller* standard and the NEA obscenity clause, see Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991). Under the NEA policies at issue in *Bella Lewitzky*, before distributing funds to approved applicants, the NEA required that approved applicants certify that they would comply with the "General Terms and Conditions for Organizational Grant Recipients" (the "certification requirement"). The certification requirement copied language from § 304 of the Department of the Interior and Related Agencies Appropriations Act of 1990:

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

Id. at 776 (quoting Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989)). The plaintiff brought suit alleging that the NEA's certification requirement violated the Fifth and First Amendments. *Id.* at 781-82.

It would be impractical, if not impossible, to describe artistic merit in any meaningful way so that it could pass the strict *Grayned* test. Therefore, the *Finley* court should not have applied the *Grayned* test to invalidate the decency clause.

The court in *Finley* feared that an NEA panelist had "no guidance in administering the [decency] standard; each apparently [was] expected to draw on her or his own personal views of decency or some ephemeral 'general American standard of decency.'"[204] Yet in an obscenity trial, the guilt or innocence of a criminal defendant is determined primarily by "individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law."[205] Furthermore, obscenity trials may result in

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The United States District Court of the Central District of California held that the NEA's certification requirement was unconstitutionally vague because the NEA determined what constituted obscenity. *Id.* at 782. The court found that even though the NEA vowed it would be using the *Miller* standard to determine obscenity, the *Miller* standard would not remedy the vagueness of the provision for two reasons. First, the NEA policy statements to apply the *Miller* standard do not legally bind the agency. *Id.* (citing Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) (stating that an agency is free to act differently from its policy statements or its interpretive rules)). Second, the NEA cannot provide the safety procedures stated in *Miller*. *Id.* (citing *Miller*, 413 U.S. at 24-25) (the safeguards include: (1) a statute must specifically define the forbidden conduct; (2) a full adversarial trial be held; and (3) a jury must apply community standards of obscenity)). The court in *Bella Lewitzky* reasoned that "the NEA is a national-level agency that, by hypothesis, is incapable of applying varying community standards for obscenity" to fulfill the third procedural safeguard in *Miller*. *Id.* at 781 (citing *Miller*, 413, U.S. at 24-25).

Presently, Congress does not fund works "that are determined to be obscene." 20 U.S.C. § 954(d) (Supp. IV 1992). Congress defined the phrase "determined to be obscene" as to mean "in a final judgment of a court of record and of competent jurisdiction in the United States." 20 U.S.C. § 952(j) (Supp. IV 1992). An obscene work is one that:

> (1) the average person, applying contemporary community standards, would find that such project, production, workshop, or program, when taken as a whole, appeals to the prurient interest;
>
> (2) . . . depict or describe sexual conduct in a patently offensive way; and
>
> (3) . . . when taken as a whole, lack serious literary, artistic, political, or scientific value.

20 U.S.C. § 952(l) (Supp. IV 1992).

In *Bella Lewitzky*, the plaintiff did not challenge the decency clause.

204. *Finley*, 795 F. Supp. at 1472.

205. *Smith*, 431 U.S. at 316.

criminal convictions and penalties, but the NEA application process, at worst, merely results in the denial of funding. Undoubtedly, subjective views must be relied upon in determining artistic merit.[206] Following the Supreme Court's rationales in *Miller* and *Smith* concerning criminal penalties, the *Finley* court, in considering government funding, should have acknowledged that explicit and specific criteria for artistic excellence that includes the general standards of decency are ineffable and, therefore, not required.

3. An artistic standard, as a practical matter, cannot be explicit

The court in *Finley* reasoned that because the words "decency" and "respect" are "inherently subjective" and "contentless" in this society, the provision must be vague.[207] The court, however, failed to recognize that "[t]he purpose of such a program [as the NEA] is to promote 'art,' the very definition of which requires an exercise of judgment from case to case."[208] In *Advocates for the Arts v. Thomson*, the United States Court of Appeals for the First Circuit held that the government's refusal to award an art grant to a literary magazine, on the basis that it had "published a poem . . . which contain[ed] language and imagery that some may find offensive," did not violate the plaintiff's first amendment or fourteenth amendment due process rights.[209]

In *Advocates for the Arts*, the plaintiffs contended that decisions for art grants should follow "'narrow standards and guidelines' that will insulate the result from the prejudices of the decision-

206. *Pope v. Illinois* is not inapposite because the Supreme Court announced an objective, national "reasonable person" standard to determine de minimus value of the material in question in the context of criminal statutes. 481 U.S. 497, 500-01 (1987). A subjective national standard, however, can be applied to determine artistic merit because the art work is being determined for artistic excellence in the context of public funding, not for de minimus value.

207. *Finley*, 795 F. Supp. at 1471.

208. Advocates for the Arts v. Thomson, 532 F.2d 792, 796 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976). The New Hampshire Commission on the Arts administered NEA funding in that state. Grants over $500 had to be approved by the governor and Council of New Hampshire.

209. *Id.* at 798.

maker."[210] The court questioned how the committee could refine or elaborate realistically the standards and guidelines of artistic and cultural merit.[211] The court reasoned that without ascertainable principles defining artistic merit, official discretion could not be constitutionally required to be defined in "objective and definite standards."[212] Therefore, the court in *Finley* should not have voided the decency clause for vagueness because artistic standards cannot possibly be explicitly defined.

CONCLUSION

Awarding government subsidies to NEA grant applicants involves allocating finite resources among a myriad of artistic projects. The whole system of judging applications requires the consideration of content when judging "artistic merit."[213] Some art projects are promoted inevitably at the expense of other art projects. In enacting the decency clause, Congress was not attempting to "control . . . the search for political truth"[214] or to suppress dangerous ideas. The First Amendment does not require that the government be neutral in its policy decision to fund "decent" art and not to fund "indecent" art. Even if the higher courts agree that art is "at the core of a democratic society's cultural and political vitality,"[215] the courts must also agree with the *Finley* decision that funding of the arts must be treated equally to funding of universities.[216] According to the spending power of Congress, the government need not be neutral in determining the allocation of subsidies.

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210. *Id.* at 796 (citation omitted).

211. *Id.* at 797.

212. *Id.* (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969)).

213. Sabrin, *supra* note 14, at 1233; Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992) (stating that "some content-based decisions are unavoidable" in allocating funds for expressive activities).

214. *FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980)).

215. *Finley*, 795 F. Supp. at 1473.

216. *See id.* at 1475. Acting within its congressional spending power, the government is supporting one activity over another and is not seeking to suppress certain expression.

The *Finley* court erred in demanding that the decency clause had to be more explicit. Obscenity statutes, incurring criminal liabilities, have been found constitutional regardless of the generality of the language used to proscribe certain expression. Jurors in obscenity trials must use their subjective understanding of community decency; similarly, the NEA must use its professional judgment in determining artistic merit, "taking into consideration the general standards of decency and respect for the diverse beliefs and values of the American public."[217] Under the decency clause, the NEA is not affirmatively denying applicants the liberty to express themselves artistically. Rather, Congress is exercising its constitutional discretion in deciding how to allocate funds in support of the arts.

J. Sarah Kim

217. 20 U.S.C. § 954(d) (Supp. IV 1992).