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What's Wrong With This Picture?: The National Endowment for the Arts and the "Decency and Respect" Standard

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WHAT'S WRONG WITH THIS PICTURE?: THE NATIONAL ENDOWMENT FOR THE ARTS AND THE "DECENY AND RESPECT" STANDARD

"Certainly one could make a strange menagerie with all the professionals of art and their kindred spirits."[1]

Paul Cézanne, Artist (1839-1906)

I. INTRODUCTION

Cézanne, frustrated with a fellow painter's formalistic and seemingly unsuccessful approach to the creative process, made this statement in 1906, in criticism of the traditional art schools and critics of his day.[2]

Perhaps Cézanne would have applauded when Congress gave the National Endowment for the Arts [hereinafter "NEA"] the authority "to establish and carry out a program of . . . grants-in-aid . . . to . . . individuals of exceptional talent engaged in or concerned with the arts,"[3] in order "to support a diverse array of

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[1] MICHAEL HOOG, CÉZANNE-FATHER OF 20TH-CENTURY ART 145 (1994). In 1866, Cézanne wrote a letter to the Director of Fine Arts in response to the rejection of his paintings by the Official Salon, stating:

> I wish to appeal to the public and show pictures in spite of their being rejected [by the official Salon]. My desire does not seem to me to be extravagant, and if you were to ask all the painters in my position, they would reply without exception that they disown the [judges] and that they wish to take part in one way or another in an exhibition that should as a matter of course be open to every serious worker.

Id. at 142.

It is also of interest to note that Cézanne abandoned his legal studies in 1860 to pursue his career as an artist. *Id.* at 20-21 (stating "I would want . . . to risk all to gain all, and not hesitate any longer between two such different choices for my future, between art and the law.").

[2] *Id.* at 143.

[3] National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. § 954(c) (1994).

artistic expression"[4] and "to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry."[5]

Cézanne may have been less impressed, however, with other aspects of this Congressional mandate. Congress directed the NEA to avoid "'[c]onformity for its own sake'"[6] and to make sure that "no undue preference . . . be given to any particular style or school of thought or expression."[7] In addition, when making determinations of eligibility for grants-in-aid, the NEA Chairperson was required to take into account "artistic excellence and artistic merit," as well as "general standards of decency and respect for the diverse beliefs and values of the American public."[8] By requiring the Chairperson to consider values unrelated to artistic merit, Congress placed the statute at constitutional loggerheads with the freedom of speech doctrine.[9]

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[4] Finley v. National Endowment for the Arts, 100 F.3d 671, 682 (9th Cir. 1996), *rev'd,* 118 S. Ct. 2168 (1998) (finding that "[e]ven the most cursory reading of the NEA's enabling statute reveals this intent.").

[5] 20 U.S.C. § 951(7) (1994). This section states in pertinent part:

> The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

Id.

[6] *Finley*, 100 F.3d at 682 (quoting S. REP. NO. 89-300, at 4 (1965)).

[7] *Id.* The *Finley* court also cites Congress' reaffirmation of this intent in adopting the 1985 amendments to the NEA's enabling statute. *Id.* These amendments encourage the NEA to be "'more responsive to funding programs that represent the many traditions in our heritage and the full cultural diversity of our citizens . . .. [T]he [funded] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free.'" *Id.* (quoting H.R. REP. NO. 99-194, at 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1055, 1058)).

[8] 20 U.S.C. § 954(d)(1) (1994).

[9] U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

In *Finley v. National Endowment for the Arts*, [10] the United States Court of Appeals for the Ninth Circuit resolved this tension and held that the "'decency and respect'" provision of § 954(d)(1) [hereinafter the "Act"] was "void for vagueness." [11]

The Supreme Court reversed the Ninth Circuit's decision and held that the "decency and respect" provision of the Act did not "introduce considerations that, in practice, would effectively preclude or punish the expression of particular views" [12] because such considerations inherently "do not engender the kinds of directed viewpoint discrimination" that would be necessary to hold the Act unconstitutional on its face.[13]

Justice Souter, writing for the dissent, stated that "a statute disfavoring speech that fails to respect America's 'diverse beliefs and values' is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the American populace." [14]

It is the objective of this Comment to look at whether the "decency and respect" [15] provision of the Act violates the First and Fifth Amendment guarantees of freedom of speech and due process of law on the basis of viewpoint discrimination and

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[10] 100 F.3d 671 (9th Cir. 1996).

[11] *Id.* at 683 n.24 (finding that the government had failed to meet the strict scrutiny test as no compelling state interest had been served by the statute).

[12] Finley v. National Endowment for the Arts, 118 S. Ct. 2168, 2177 (1998).

[13] *Id.* at 2176.

[14] *Id.* at 2187 (Souter, J., dissenting).

[15] Finley v. National Endowment for the Arts, 100 F.3d 671, 680 (9th Cir. 1996) (quoting 20 U.S.C. § 954(d)(1) (1994)). The court cautioned that although the NEA decision makers have expertise in judging merit and excellence in the artistic sphere, "they have no corresponding expertise in applying such free-floating concepts as 'decency' and 'respect.'" *Id.* n.18. The court noted that there was testimony by then-NEA Chairperson Frank Hodsoll stating "'I don't see any way for a Federal panel . . . expert in the arts, not expert in community standards . . . to make determinations for the entire Nation as to what is acceptable or what is not going to be patently offensive.'" *Id.* (quoting Reauthorization of Found. on the Arts and Humanities Act of 1965: Hearings Before the Subcomm. on Select Educ. & the Subcomm. on Post-secondary Educ. of the Comm. on Educ. and Labor, 99th Cong., 1st Sess. 552 (1985)).

vagueness. The author's analysis will incorporate the reasoning behind the *Finley* decision and illustrate how the First Amendment prohibitions concerning content and viewpoint based restrictions provide alternate grounds for striking down this provision. Finally, this Comment will postulate that the Supreme Court's recent decision in *Finley v. National Endowment for the Arts*[16] appears to be a heavy-handed attempt to limit First Amendment protection in the context of government funded artistic expression.

II. DECENCY AND RESPECT: BY WHOSE STANDARD?

A. Void for Vagueness

The void for vagueness doctrine[17] imposes "special judicial strictness" when analyzing statutory language that regulates certain constitutional guarantees including the "freedoms of speech, assembly, or association," in an attempt to prevent any

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[16] 118 S. Ct. 2168 (1998).

[17] THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The concern for statutory vagueness surfaced at the beginning of our country's constitutional history. As early as 1787, Alexander Hamilton, anticipating the difficulties that might be encountered when statutory vagueness impedes constitutional guarantees, wrote:

> [T]he courts were designed to be the intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity, ought . . . to be preferred; or, in other words, the Constitution ought to preferred to the statute, the intention of the people to the intention of their agents.

Id.

statutory vagueness.[18] The doctrine requires that persons be placed "on notice as to precisely what activity is made criminal when . . . the activity distinguishes between criminal activity and an activity which constitutes a fundamental constitutional right."[19] In addition, when regulating in the area of free speech, the guidelines for enforcement must be clear and the regulation "must be drawn with narrow specificity" so as to clearly indicate the legislature's intent.[20]

Finley[21] involved a group of performing artists whose NEA grant applications had been rejected under the Act for failing to meet the requisite decency and respect standards.[22] The court determined that the "decency and respect" provision of the Act was void for vagueness under the Fifth Amendment, in addition to being impermissibly restrictive of the artists' First Amendment rights.[23]

The *Finley* court, utilizing the principles of due process, found that the statute was vague and thus void because it failed to provide fair notice and explicit standards in its application.[24] The

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[18] 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.9 (2d ed. 1992).

[19] *Id.*

[20] *Id.* (further citations omitted).

[21] 100 F.3d 671 (9th Cir. 1996).

[22] *Finley*, 100 F.3d at 674. The language of the statute, as amended in 1990, reads in pertinent part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that--
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> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . ..

20 U.S.C. § 954(d)(1) (1994).

[23] *Finley*, 100 F.3d at 683-84. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[24] *Finley*, 100 F.3d at 675.

court stated that "[t]he twin dangers of a vague law--lack of notice and arbitrary or discriminatory application--may chill the exercise of important constitutional rights."[25]

In its analysis, the court looked for guidance to the precedent established in *Grayned v. City of Rockford*.[26] In *Grayned*, the Supreme Court upheld an antinoise ordinance that prohibited persons on grounds adjacent to school buildings during school hours from willfully making noises or diversions that might disturb classes.[27] The plaintiff contended that the law was unconstitutional because it was both vague and overbroad.[28] The Court reasoned that a statute is "void for vagueness if its prohibitions are not clearly defined,"[29] since an individual must be made aware of the prohibited conduct in order to avoid it.[30] The Court stated that:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[31] A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[32]

In considering the consequence of a vague statute on First Amendment guarantees, the Court cautioned that it would "'inhibit the exercise of [individual] freedoms,'"[33] because

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[25] *Id.*

[26] 408 U.S. 104 (1972).

[27] *Id.* at 108 (further citations omitted).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* n.4 (further citations omitted).

[32] *Id.* at 108-09 n.5 (further citations omitted).

[33] *Id.* at 109 n.7 (citing Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961)). In *Cramp*, the Court struck down a Florida statute that required schoolteachers to execute a written oath disavowing any affiliation, allegiance, or influence to the Communist Party, or face immediate discharge from public service. *Cramp*, 368 U.S. at 287-88 (1961). The Court determined that the statute was unconstitutionally vague on due process

"[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[34]

The Court found, in *Grayned,* that the city of Rockford's announced purpose in the antinoise statute's preamble was "written specifically for the school context"[35] and gave "fair notice to those to whom (it) [was] directed."[36] The Court determined that the statute did not punish an unpopular position and did not contain a "broad invitation to subjective or discriminatory enforcement."[37]

The Ninth Circuit in *Finley* found that the Act did not meet the *Grayned* standard and noted that "courts apply a heightened vagueness standard to a law that could deter protected speech because of its uncertain meaning."[38] The court rejected the

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grounds. *Id.* at 287. The Court stated "'a statute which either forbids or requires that doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Id.* at 280 (quoting Connally v. General Construc. Co., 269 U.S. 385, 391 (1926)).

[34] *Id.* n.8 (citing Baggett v. Bullitt, 377 U.S. 360, 372 (1964)) (further citations omitted). The Court, in *Baggett,* declared a Washington statute, requiring state employees and teachers to take a loyalty oath or face dismissal, unconstitutionally vague. *Baggett,* 377 U.S. at 371-72. The Court held, "[w]e are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms." *Id.* at 372.

[35] *Id.* at 112.

[36] *Id.* n.21 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950)), *reh'g denied,* 339 U.S. 990 (1950).

[37] *Id.* at 113. The Court found that the City of Rockford did not purport to punish those individuals responsible for all noises or diversions. *Id.* n.23 (further citations omitted). The fleshing out of the terms noise and diversion were predicated by the ordinance's requirement that the noise or diversion be "incompatible with normal school activity;" that there be a causal relationship between the "noise or diversion" and the subsequent disruption that ensues, and that there be a willful intention to commit these acts. *Id.* at 113-14.

[38] Finley v. National Endowment for the Arts, 100 F.3d 671, 675 (9th Cir. 1996) (citing N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963) (further citations omitted)). The Court, in *N.A.A.C.P.*, noted that "standards of permissible statutory vagueness are strict in the area of free expression . . .. Because First Amendment freedoms need breathing space to survive,

NEA's argument that the vagueness of the "decency and respect" provision was not in issue[39] because it was "merely an elective standard" to be employed when judging grant applications.[40]

According to the NEA's construction of the statute, the sole criteria employed in the grant approval process was "'artistic excellence and artistic merit.'"[41] The NEA also contended that, since funding decisions were made by the Chairperson in conjunction with advisory panels who reflected general standards of "decency" and were able to "respect" the "diverse beliefs and values of the American public," Congressional concern as to "decency and respect" had already been satisfied.[42]

The court faulted the NEA's reliance on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[43] for deferring to the NEA's interpretation of the statutory mandate.[44] The *Finley* court stated that the NEA's interpretation of the Act allowing the Chairperson "to rely upon greater diversity in advisory panel membership in lieu of a change in the criteria for judging grant applications" was neither a "permissible" or "reasonable" one and thus deference was not required.[45] The issue of statutory construction in *Finley,* however, was quite distinguishable from the issue that confronted the Supreme Court in *Chevron.*

In *Chevron*, the Court addressed the issue of whether national air quality standards promulgated by the Environmental Protection Agency [hereinafter "EPA"], permitting the States a

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government may regulate in the area only with narrow specificity." N.A.A.C.P., 371 U.S. at 432-33.

[39] *Finley,* 100 F.3d at 676.

[40] *Id.*

[41] *Id.* (quoting 20 U.S.C. § 954(d)(1) (1994)).

[42] *Id.* at 676. The statute states that the Chairperson must:

> [I]ssue regulations and establish procedures . . . 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 . . ..

20 U.S.C. § 959(c)(1) (1994).

[43] 467 U.S. 837 (1984).

[44] *Finley*, 100 F.3d at 677.

[45] *Id.* (citing *Chevron*, 467 U.S. at 843-45).

somewhat universal definition of the term "'stationary source'" for certain industry groupings of pollution-emitting devices, were founded on a reasonable construction of the term.[46] The Court noted that two questions must be addressed when reviewing an agency's determination of a reasonable "construction of the statute which it administers."[47]

The first question is whether the intent of Congress is clear.[48] If the legislative intent is unambiguous then the matter is at an end.[49] However, if legislative intent is unclear, the second question for consideration is whether the agency's interpretation of the statute in the administration of its duties is one founded on a permissible construction.[50]

The Court acknowledged that if Congress has explicitly left a gap for an agency to fill, it might clarify a specific statutory provision by promulgating a regulation.[51] The Court noted that these regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[52] If the legislative delegation to any agency on a specific issue is implied rather than express a court may not insert its own

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[46] *Chevron*, 467 U.S. at 840 (further citation omitted) (stating in pertinent part "'[s]tationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.").

[47] *Chevron*, 467 U.S. at 843.

[48] *Id.* at 842. The Court stated that:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . .. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Id. at 843 n.9 (internal citations omitted).

[49] *Id.* at 842-43.

[50] *Id.* at 843.

[51] *Id.* at 843-44.

[52] *Id.* at 844.

construction of the provision for a reasonable interpretation articulated by the administrator of an agency.[53]

The *Chevron* Court, in its review of the EPA's varying interpretations of the word "source" during the administration of the statute, found the EPA to have "consistently interpreted [source] flexibly--not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena."[54] This flexibility, the Court reasoned, was justified if an agency was "to engage in informed rulemaking;"[55] particularly if Congress has not indicated its disapproval of such flexibility.[56] The Court asserted that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it [was] a reasonable choice within a gap left open by Congress, the challenge must fail."[57]

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[53] *Id. See* Immigration & Naturalization Svc. v. Jong Ha Wang, 450 U.S. 139 (1981). In *Wang*, the Supreme Court reversed the Ninth Circuit's decision regarding the reopening of a Korean family's deportation proceeding who were seeking to avoid deportation under a statute which permitted the Attorney General to suspend deportation based on, among other concerns, that extreme hardship would result if deportation was successful. *Id.* at 144-46. The Court found that the Ninth Circuit had inserted its own construction of "extreme hardship," thus usurping the legislature's delegation of authority to the Attorney General to construe "extreme hardship" as he deemed appropriate. *Id.* at 144-45. The Court stated "the [Immigration and Nationality] Act commits [the] definition . . . to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court because it may prefer another interpretation of the statute." *Id.* at 144; *see also* Train v. National Resources Defense Council, Inc., 421 U.S. 60 (1975). In *Train*, the Court reversed the Fifth Circuit's decision which had held that State of Georgia's plan for air quality control, originally endorsed by the Environmental Protection Agency [hereinafter "EPA"], should not have been accepted. *Id.* at 98-99. The Supreme Court reviewed the statutory language and found that the EPA had acted properly under its legislative mandate and that the Fifth Circuit had interjected its own interpretation contrary to Congress' intent. *Id.* at 87.

[54] *Chevron,* 467 U.S. at 863.

[55] *Id.* at 864.

[56] *Id.*

[57] *Id.* at 866.

Thus, the court in *Finley* objected to the NEA's implementation of the standards of "decency and respect" in judging grant applications when the agency instructs panel members "to bring their own definitions of these terms 'to the table' and make them 'part of the deliberative process.'"[58]

In order to rectify vagueness, the NEA suggested the Chairperson effectuate the statute in a certain manner.[59] However, the court determined that the NEA had "failed to present a narrowing construction that [was] consistent with the language and purpose of the statute"[60] and noted that it would not rewrite a statute to make it constitutional.[61] Anticipating a rejection of its suggestion, the NEA argued in the alternative that the Chairperson could apply the decency and respect standards for rejecting applications for projects that were considered

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[58] Finley v. National Endowment for the Arts, 100 F.3d 671, 678 (9th Cir. 1996) (quoting National Council on the Arts, 1990 Retreat 21 (1990)).

[59] *Id.*

[60] *Id.*

[61] *Id.* (quoting Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)). In *American Booksellers*, the Court certified two questions to the Virginia Supreme Court which had held unconstitutional a Virginia statute which prohibited commercial vendors from displaying sexually explicit materials which were harmful to children. *American Booksellers*, 484 U.S. at 386. The Court held that these vendors had standing to bring such a suit because, based on their interpretation of the statute, these individuals risked criminal prosecution without "significant and costly compliance measures." *Id.* at 392. The Court also held that the lower court's authoritative interpretation of the statute greatly aided in rendering the statute unconstitutional. *Id.* at 386; *see also* Heckler v. Matthews, 465 U.S. 728, 741 (1984) (further citations omitted) (noting "[t]he canon favoring constructions of statutes to avoid constitutional questions does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives."). In *Heckler*, the Court upheld a provision of the Social Security Act relating to the application of a pension offset, which affected nondependent men, but not nondependent women who were similarly situated. *Heckler*, 465 U.S. at 750. The Court reviewed the legislative history and language of the Act and stated that "Congress meant to resurrect, for a five year grace period, the gender based dependency test . . . to prevent the serious fiscal drain that . . . would result from payment of unreduced benefits . . .." *Id.* at 742.

obscene.[62] The judiciary, however, has been cautious in its treatment of the obscenity issue as illustrated by *Bella Lewitzky Dance Foundation v. Frohnmayer*.[63]

In *Lewitzky*, the court struck down an NEA mandate that required applicants for grants to certify that the funds would not be used to produce or promote artistic endeavors that might be determined to be obscene.[64] The court, relying on the vagueness doctrine outlined in *Grayned v. City of Rockford*,[65] ruled that the NEA's certification requirement was unconstitutionally vague because the determination of obscenity was left solely to the agency.[66]

The *Lewitzky* court also noted that the NEA was unable to "cure" the statutory vagueness by relying on the obscenity standards set forth in *Miller v. California*.[67] The court held that the NEA's reliance on *Miller* was faulty because the NEA is not legally bound to rely on its own "policy statements" and was not able to provide the necessary procedural safeguards delineated in

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[62] *Finley*, 100 F.3d at 678.

[63] 754 F. Supp. 774 (C.D. Cal. 1991).

[64] *Id.* at 783.

[65] *Id.* at 781-82; *see also supra* notes 23-29 and accompanying text.

[66] *Lewitzky*, 754 F. Supp. at 781-82.

[67] *Id.* (citing 413 U.S. 15, 24 (1973), *reh'g denied*, 414 U.S. 881 (1973)). The *Lewitzky* court stated that:

> *Miller* limited the scope of governmental regulation of obscenity to works which depict or describe sexual conduct . . . specifically defined by the applicable state law, as written or authoritatively construed, and established the following basic guidelines for determining whether depictions or descriptions of sexual conduct qualify as obscene:
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> (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 state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at 781 n.10 (internal citations quotations omitted).

Miller.[68] The safeguards referred to by the court are three in number.[69]

First, a statute must specifically define the conduct complained of so that a possible transgressor "has 'fair notice' of what he can and cannot do."[70] Second, the statute must provide for "a full adversarial trial,"[71] and "[t]hird, there must be a jury able to apply community standards for obscenity."[72] The court remained unconvinced that the NEA would be able to apply each grantee's particular community standard against that grantee's specific funding request, even if it could apply the first two procedural safeguards.[73]

In *Finley*, the court refused to extend the *Miller*[74] standard to the NEA's alternate interpretation of the reading of the Act.[75] Instead, the Court held that "Congress adopted the 'decency and respect' provision because it was broader and had a different meaning than the provision prohibiting the funding of obscene art."[76] The court noted that:

> The 'decency and respect' provision was enacted to prevent the funding of particular types of art. To that end, it places a mandatory duty on the Chairperson to ensure that grant applications are judged according to 'general standards of decency and respect for the diverse beliefs and values of the American public.' The Chairperson has no discretion to

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[68] *Id.* at 782.

[69] *Id.*

[70] *Id.* (citing Miller v. California, 413 U.S. 15, 24-25 (1973), *reh'g denied*, 414 U.S. 881 (1973)).

[71] *Id.* (citing *Miller*, 413 U.S. at 27).

[72] *Id.* (citing *Miller*, 413 U.S. at 31-35).

[73] *Id.* (quoting Whitehill v. Elkins, 389 U.S. 54, 58-59 (1967)) (noting that since the NEA is a national agency, "grantees might only 'speculat[e] at their peril'" concerning its application of local community standards").

[74] *See supra* notes 63 and accompanying text.

[75] 20 U.S.C. § 954(d)(1) (1994).

[76] Finley v. National Endowment for the Arts, 100 F.3d 671, 678 (9th Cir. 1996) (further citation omitted). The *Finley* court noted that the "'[t]he term 'determined to be obscene' means determined, in a final judgment of a court of record and of competent jurisdiction in the United States, to be obscene." *Id.* at 678 n.13 (quoting 20 U.S.C. § 952(j) (1994)).

ignore this obligation, enforce only part of it, or give it a cramped construction.[77]

The court continued to assail the "decency and respect" provision of the Act as violative of the Fifth Amendment's due process guarantees because the standard of conduct was not specified.[78] The court saw the construction of the terms "decency and respect" as an invitation to a guessing game for persons "'of common intelligence,'"[79] noting that the interpretation of these terms would vary from person to person[80] because what might be offensive to one individual might be "a work of art to another."[81]

In addition, as to what constitutes the "'diverse beliefs and values of the American public,'"[82] the court found it difficult, if not impossible, to ascertain the meaning of such a provision.[83] The court observed that, "individual members of a pluralistic society, and particularly our own, have a great variety of beliefs and values, largely unascertainable."[84]

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[77] *Id.* at 680.

[78] *Id.* (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)). In *Coates*, the Court struck down, as unconstitutionally vague, a city ordinance which required that "[i]f three or more people [met] together on a [public] sidewalk . . . they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by." *Coates*, 402 U.S. at 614. The Court held the ordinance vague because "no standard of conduct [was] specified at all." *Id.*

[79] *Finley*, 100 F.3d at 680 (quoting Connally v. General Construc. Co., 269 U.S. 385, 391 (1926) (further citation omitted)).

[80] *Id.* (citing Smith v. Goguen, 415 U.S. 566, 573 (1974)). The *Smith* Court found that a Massachusetts statute, that prohibiting the misuse of the American Flag in a "contemptuous" way, was void for vagueness under the due process clause. *Smith*, 415 U.S. at 582. The Court remarked that "the absence of any ascertainable standard [of conduct] for inclusion and exclusion is precisely what offends the Due Process Clause." *Id.* at 578.

[81] *Id.* (quoting *Smith*, 415 U.S. at 573 (further citation omitted)).

[82] *Id.* (quoting 20 U.S.C. § 954(d)(1) (1994)).

[83] *Id.*

[84] *Id.* (citing Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 513 (9th Cir. 1988)). In *Bullfrog*, the Ninth Circuit reviewed the United States Information Agency's [hereinafter "USIA"] regulations for the implementation of the Beirut Treaty, a treaty whose goal was to facilitate the international circulation of educational, scientific, and cultural audio-visual materials. *Bullfrog*, 847

The court saw this provision as encouraging dangerous applications that were arbitrary and discriminatory.[85] Although conceding that artists do not have a property right in the grants,[86] the court noted that government officials have the power to deny an application funding if:

> [The] application offends the officials' subjective beliefs and values. Inevitably, [the] NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view. Under such a grant of authority, funding may be refused because of the artist's political or social message or because the art of the artist is too controversial. This danger is especially pronounced because a vague statute effectively shields decisions from review. Where First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process.[87]

B. The First Amendment Prohibitions: An Alternative Tactic

Although it could have concluded its discussion of the constitutional deficiencies of the Act at this juncture,[88] the court continued its discussion, by examining two pivotal cases[89] which

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F.2d at 503. The court held that the qualifying criteria for submission were unconstitutionally vague as " [o]ne might . . . make some educated guesses as to the meaning of these regulations, but one could never be confident that USIA would agree." *Id.* at 513.

[85] *Id.*

[86] *Id.* at 675 n.4 (quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (citations omitted) (noting "[w]hile the artists do not have a property right in the grants, they are protected by the due process clause from arbitrary and discriminatory enforcement of vague standards that 'abut upon sensitive areas of basic First Amendment freedoms.'").

[87] *Id.* at 681.

[88] *Id.*

[89] *See* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 828 (1995) (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 92 (1972)) (noting "[i]t is axiomatic that the government may not regulate

support viewpoint neutral approaches in the area of governmental subsidies of speech. These cases, the court explained, illustrate the role of the First Amendment proscriptions against content and viewpoint discrimination, which provide a reciprocal rationale for holding the provision unconstitutional.[90]

First, the court referred to *Rosenberger v. Rector and Visitors of the University of Virginia*.[91] The Supreme Court, in *Rosenberger*, made a lengthy review of the bedrock principles that "provide the framework forbidding the State from exercising viewpoint discrimination."[92] The Court found that a university policy excluding the funding of a student publication with a decidedly Christian viewpoint, but providing funding to all other student publications, violated the Free Speech Clause.[93]

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speech based on its substantive content or the message it conveys."); *see also* Rust v. Sullivan, 500 U.S. 173 (1991).

[90] *Finley*, 100 F.3d at 681 (internal citation omitted). The *Finley* court noted that "[a]rt is protected by the First Amendment." *Id.* n.19 (citing Miller v. California, 413 U.S. 15, 34 (1973)).

[91] 515 U.S. 819 (1995).

[92] *Id.* at 829. The *Rosenberger* Court surveyed a number of courts to support its conclusion. *Id.* The Court noted government regulation may not favor one speaker over another." *Id.* (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)). The Court extended this reasoning by stating that "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Id.* (citing Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 640-42 (1994)). The Court also stated that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression," *Id.* (citing Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 115 (1991)), and explained that "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)). The Court summarized its survey by emphasizing that "[v]iewpoint discrimination is thus an egregious form of content discrimination" and "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983)).

[93] *Rosenberger*, 515 U.S. at 852 (noting that the university "discriminated on the basis of the [publication's] religious viewpoint in violation of the Free Speech Clause" since various "features of the [u]niversity's program--such as .

The Court did not accept the university's distinction between its funding policies, which relied on content, rather than viewpoint determinations,[94] and stated, "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination,"[95] relying on *Lamb's Chapel v. Center Moriches Union Free School District*[96] in its decision.[97]

In *Lamb's Chapel*,[98] the Center Moriches school district opened its facilities to the public for "social, civic, and recreational purposes."[99] The district then denied Lamb's Chapel, a community evangelical church, access to the school premises.[100] The Church sought access to the premises so that it might show a film addressing family and child-rearing issues.[101] The subject matter of the film, the Court noted, was not one that had been placed off limits by the School District to "any and all speakers."[102]

. . the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue" convinced the Court "that providing such assistance . . . would not carry the danger of impermissible use of public funds to endorse [the publication's] religious message.").

[94] *Id.* at 829-30 (citing Perry Ed. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 46 (1983)) (noting "content discrimination, which may be permissible if it preserves the purposes of [the] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

[95] *Id.* at 830-31 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)). The Court explained:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.

Id. at 835.

[96] 508 U.S. 384 (1993).

[97] *Rosenberger*, 515 U.S. at 830-31.

[98] 508 U.S. 384.

[99] *Id.* at 391 (internal quotations omitted).

[100] *Id.* at 387.

[101] *Id.* at 388-90.

[102] *Id.* at 393.

The Court concluded that there did not appear to be any indication that the Church's application to show the film, "was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective."[103] In summation, the Court held "'that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'"[104]

Next, the court in *Finley* looked to *Rust v. Sullivan*[105] as illustrative of the viewpoint-neutral posture that government funding of the arts must maintain,[106] acknowledging, however, that the presence of government subsidies "alters this framework somewhat."[107] The Supreme Court in *Rust* upheld Department of Health and Human Services regulations which curtailed the ability of Title X fund recipients to participate in activities advocating abortion as a method of family planning. [108]

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[103] *Id.* at 393-94. The Court emphatically stated that denial, for religious reasons, was invalid. *Id.* at 394 (citing Cornelius v. N.A.A.C.P. Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)). In *Cornelius*, the Court stated, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

[104] *Id.* (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

[105] 500 U.S. 173 (1991).

[106] Finley v. National Endowment for the Arts, 100 F.3d 671, 681-82 (9th Cir. 1996) (quoting *Rust*, 500 U.S. at 200) (noting "[n]eutrality may be required because the area is a 'traditional sphere of free expression'").

[107] *Id.* at 681. The court explained this proposition by stating that "[t]he government [is able to] make content-based choices 'when it is the speaker or when it enlists private entities to convey its own message.'" *Id.* (quoting Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833 (1995)).

[108] *Rust,* 500 U.S. at 177-78 (citing 42 U.S.C. § 300a-6 (1994)) (noting "[n]one of the funds appropriated under this subchapter may be used in programs where abortion is a method of family planning."). Title X of the Public Health Service Act authorized the Secretary of Health and Human Services, which at the time was Louis Sullivan, to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." *Id.* (quoting 42 U.S.C. § 300(a) (1994)). The statute required that

In a series of cases that preceded *Rust*, the Court consistently upheld the government's choice "to subsidize one protected right" without subsidizing its "analogous counterpart."[109] The Court, in deciding *Rust*, looked to three of its recent decisions in the government subsidy area, *Maher v. Roe,*[110] *Harris v. McRae,*[111] and *Regan v. Taxation with Representation,*[112] for guidance.[113]

Beginning with *Maher*, the Court acknowledged that the States are given a wider latitude in choosing among competing demands for limited public funds"[114]and the "decision to provide any one of these [health or social] services or not to provide them" is not constitutionally guaranteed.[115] The Court made note of the fact that "the providing of a particular service [does not] require, as a matter of federal constitutional law, the provision of another."[116]

The next decision, *Harris v. McRae,*[117] determined that a state was not required to reimburse patients for medically necessary abortions should federal funds be unavailable.[118] The Court held a "refusal to fund protected activit[ies], without more, cannot be equated with the imposition of a 'penalty' on that activity,"[119] and

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the funds "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." *Id.* (quoting H. R. Conf. Rep. No. 91-1667, at 8 (1970)), *reprinted in* 1970 U.S.C.C.A.N. 5068, 5081-82).

[109] *Id.* at 194 (further citations omitted).

[110] 432 U.S. 464 (1977).

[111] 448 U.S. 297 (1980).

[112] 461 U.S. 540 (1983).

[113] *Rust,* 500 U.S. at 193.

[114] *Maher*, 432 U.S. at 479 (citing Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 998-1017 (1975)).

[115] *Id.* at 481 (Burger, J. concurring). Justice Burger commented that a State is not required to finance a non-therapeutic abortion just because it has chosen to finance certain childbirth expenses. *Id.* at 482 (Burger, J., concurring).

[116] *Id.* (Burger, J. concurring) (explaining Connecticut's decision to finance certain childbirth expenses and not others was within constitutional bounds).

[117] 448 U.S. 297 (1980).

[118] *Id.* at 311.

[119] *Id.* at 316 n.19.

that, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[120]

The third decision in this series, *Regan v. Taxation with Representation*,[121] concerned Congress' decision to selectively subsidize certain tax-exempt organizations.[122] In *Regan*, the Court determined that certain organizations qualified under Section 501(c)(3) of the Internal Revenue Code of 1954[123] were not entitled to use tax-exempt contributions for lobbying purposes.[124] The Court reasoned that "[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right and thus is not subject to strict scrutiny."[125] In addition, the Court noted that it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations."[126]

Finally, in *Rust v. Sullivan*,[127] the Court explained "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[128] The Supreme Court, however, further illuminated its holding by explaining that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of fund recipients to speak outside the scope of the Government-funded project, is invariably

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[120] *Id.* at 316.

[121] 461 U.S. 540 (1983).

[122] *Id.* at 544.

[123] *Id.* at 542, n.1 (citing 26 U.S.C. § 501(c)(3) (1995)) (granting "exemption[s] to [c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which . . . is carrying on propaganda, or otherwise attempting, to influence legislation").

[124] *Id.* at 551.

[125] *Id.* at 549.

[126] *Id.* at 550. The Court explained that tax exemptions and tax deductions "are a form of subsidy that is administered through the tax system." *Id.* at 544.

[127] 500 U.S. 173 (1991)

[128] *Id.* at 194.

sufficient to justify Government control over the content of expression."[129] The Court went on to list government-subsidized forums, such as Government-owned property open to the public or a university, that would not tolerate the restriction of speech or expression.[130]

The Supreme Court, almost twenty years earlier, in *Perry v. Sinderman*,[131] held that a college professor's "lack of a contractual or tenure right to re-employment, taken alone," was sufficient to defend on First and Fourteenth Amendment grounds.[132] Because the non-renewal of the professor's contract was predicated on his criticism of the college's administrative policies,[133] the Court stated:

> [E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.[134]

THE SUPREME COURT'S DECISION

On November 26, 1997, the Supreme Court granted certiorari to *Finley v. National Endowment for the Arts*[135] to determine if the

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[129] *Id.* at 199.

[130] *Id.* at 200 (further citations omitted).

[131] 408 U.S. 593 (1972).

[132] *Id.* at 596.

[133] *Id.* at 595.

[134] *Id.* at 597 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958) (internal quotations omitted)).

[135] Finley v. National Endowment for the Arts, 100 F.3d 671 (9th Cir. 1991), *cert. granted*, 118 S. Ct. 554 (U.S. Nov. 26, 1997) (No. 97-371).

Act violates the First and Fifth Amendment guarantees because it is viewpoint-based and vague.

It was difficult to speculate on how the Court would treat this matter since the Court's jurisprudence in the area of artistic expression is "meager."[136] Although speech focusing on religious or political content has been given "the highest level of judicial scrutiny,"[137] First Amendment guarantees for artistic endeavors have developed "in a piecemeal and haphazard fashion."[138]

The Supreme Court considered this issue in a limited fashion by developing a three-prong obscenity standard set forth *in Miller v. California.*[139] The Court, in *Miller*, attempted to "delineate work that may be properly subjected to state regulation."[140]

As mentioned previously, the recent holding by a federal district court in *Bella Lewitzky Dance Foundation v. Frohnmayer,*[141] which struck down the NEA's certification requirement against producing or promoting works that may be considered obscene because they "violate[ ] . . . First Amendment rights by causing a chilling effect on . . . artistic expression,"[142] was yet another foray into articulating a First Amendment protection for artistic-based speech.[143]

Certainly, the Ninth Circuit in affirming the district court's decision in *Finley,* [144] extrapolated the *Rosenberger*[145] and *Rust*[146]

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[136] Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353, 392 (1995).

[137] *Id.* n.253 (citation omitted).

[138] *Id.* n.259 (citation omitted).

[139] 413 U.S. 15, 24 (1973), *reh'g denied*, 414 U.S. 15 (1973); *see infra* note 63 and accompanying text.

[140] Leff, *supra* note 130, at 393.

[141] 754 F. Supp. 774 (C.D. Cal. 1991).

[142] *Id.* at 783.

[143] Leff, *supra* note 130, at 398 (further citation omitted).

[144] Finley v. National Endowment for the Arts, 100 F.3d. 671, 671 (1996) (stating "[w]e affirm, essentially for the reasons stated by the district court.").

[145] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).

[146] Rust v. Sullivan, 500 U.S. 173 (1991).

holdings into the artistic arena,[147] by acknowledging the district court's 'cogent' analysis,[148] an analysis that noted that "[t]he right of artists to challenge conventional wisdom and values is the cornerstone of artistic ... freedom . . .."[149] The lower court then held that "the government funding of the arts is subject to the constraints of the First Amendment."[150]

However, the Supreme Court's consideration of the Act seemingly negated its track record of holding that "'standards of permissible statutory vagueness are strict in the area of free expression.'"[151] The Court has held that "'[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'"[152]

On June 25, 1998, the Supreme Court reversed and remanded the Ninth Circuit's holding that the "decency and respect" provision of the Act[153] was viewpoint-based and vague under the First Amendment.[154] The Court reasoned that the provision was "facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles."[155] The Court acknowledged that this provision was a bipartisan compromise seeking to satisfy the proponents calling for either the NEA's demise or, at the very least, reduction of its

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[147] *Finley*, 100 F.3d. at 681-82 (quoting *Rust*, 500 U.S. at 200) (noting "[n]eutrality may be required because the area is a 'traditional sphere of free expression'")). The Supreme Court explained that "a content-based restriction on speech is . . . presumed to be unconstitutional." *Id.* (quoting *Rosenberger*, 515 U.S. at 828).

[148] *Id.* at 682.

[149] Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992).

[150] *Id.*

[151] Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963) (further citations omitted)).

[152] *Id.*

[153] 20 U.S.C. § 954(d)(1) (1994).

[154] Finley v. National Endowment for the Arts, 118 S. Ct. 2168, 2170 (1998).

[155] *Id.* at 2172.

funding.[156] However, the Court determined that the statutory language was "merely to take 'decency and respect' into consideration," since the legislative intent was not to preclude speech but, rather, reform procedure.[157] For this reason, the Supreme Court found no real danger that the Act might "compromise First Amendment values."[158]

Justice Souter, dissenting, stated "[t]he Court's conclusions that the proviso is not viewpoint based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint based discrimination, are all patently mistaken."[159] The dissent cites *Rosenberger v. Rectors and Visitors of the University of Virginia*[160] as controlling precedent noting that the "First Amendment forbids decisions based on viewpoint popularity" and that the Government as patron does not exempt itself from this prohibition.[161]

Justice Souter acknowledged the position that "artistic excellence and artistic merit" are open standards which could lead to grants that are awarded on criteria that are less than precise.[162] The chilling effect in those instances, Justice Souter noted, is tolerable and distinguishable from the "decency and respect" standards which are decidedly viewpoint based[163] and designed to reject expressions that "[defy] our tastes, our beliefs, or our values."[164]

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[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 2185 (Souter, J., dissenting).

[160] 515 U.S. 819 (1995); *see supra* notes 85, 88-91 and accompanying text.

[161] *Id.* at 2193 (Souter, J., dissenting).

[162] *Id.* at 2196, n.17 (Souter, J., dissenting).

[163] *Id.* (Souter, J., dissenting). Justice Souter explains how artists relying on NEA grants are often matched by private donors and failure to obtain such a grant under the 'decency and respect' proviso creates a chilling effect on artistic expression either to "trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether." *Id.* at 2195 (Souter, J., dissenting).

[164] *Id.* at 2190 (Souter, J., dissenting).

CONCLUSION

When discussing the area of government funded artistic expression, one can easily fall prey to subjective myopia[165] and lose sight of the more important tenet of preserving an individual's right to freedom of speech and expression. The Supreme Court, in *City of Lakewood v. Plain Dealer Publishing Co.*,[166] struck down a city ordinance that gave the mayor unbridled authority for the placement of newspaper vending machines.[167] The Court cautioned that:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official . . .. [W]e have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker.[168]

Congress, in creating the NEA, recognized that "[c]ountless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age."[169] In homage to this history and to nurture our future prophets, Congress

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[165] Having seen Karen Finley's work and the work of Bruce Nauman, who has filed an amicus brief, I cannot subscribe to the content and presentation of their efforts. However, I would not accept the censoring of their work based on standards that have been held to be "viewpoint based and vague."

[166] 486 U.S. 750 (1988).

[167] *Id.* at 771-72.

[168] *Id.* at 763-64.

[169] Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1473 (C.D. Cal. 1992) (quoting S. REP. No. 89-300, at 3-4 (1965)).

expressly stated that the intent of the act is to [was to] encourage free inquiry and expression and to discourage conformity for its own sake.[170] The only standard that could serve, in deed honor these principles, is the standard of "**artistic and humanistic excellence.**"[171]

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[170] *Id.*

[171] *Id.* (emphasis added).

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