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Author
Flores, Craig J.

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Indecent Exposure: An Analysis of the NEA's "Decency and Respect" Provision

Craig J. Flores*

I. INTRODUCTION

Consider the following scenario: a woman appears nude upon a stage in front of several onlookers, her entire body is covered in chocolate adorned with grass and weeds. Would the average person consider this art? Would the average American want their hard earned tax dollars to fund this type of artistic display?[1] They would if they value their First Amendment right to free speech. The above scenario

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* Editor, UCLA Law Review, Volume 46. J.D. candidate, UCLA School of Law, 1999; B.A., University of California, Los Angeles, 1996. I thank Professor Michale Small for his guidance. I am also indebted to Irene Viksman, Kenneth Freeman, and Heather Moosnick for their thoughtful insight and diligent editing. A special thanks goes to my family for their continued support and ecouragement. All errors are mine.

[1] *See* James Kilpatrick, *No Right to Free Expression at Taxpayers' Expense*, THE STATE JOURNAL-REGISTER, Feb. 11, 1997, at 4-5.

> Evidently some qualified appraisers [of art] like[] the art of Karen Finley. She is variously a sculptor, painter, playwright, poet, essayist and actress. Her work has been shown at respected museums. She held a Guggenheim fellowship. I mean, she is not a topless dancer from the Kitty Kat Club. But does her resume entitle her to public funds? . . . . For all I care, Ms. Finley may strip to the buff and dance by the light of the moon. It probably would be interesting. But as Judge Kleinfeld said, don't make me pay for it.

is an example of Karen Finley's performance art, in which she expresses the oppression of women. She was subsequently denied an individual grant by the National Endowment for the Arts ("NEA") because her art was deemed indecent under the NEA's grantmaking statute. As a result, Finley and three other artists who were denied funding sued the NEA claiming that the program had violated their First Amendment right to free speech[2] because the statute required the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[3] Recently, the Ninth Circuit agreed with the "Finley Four" and struck down the "decency and respect" clause because it is unconstitutionally vague and amounts to viewpoint discrimination.[4]

For the past 10 years the NEA has been the source of political and constitutional controversy evoking both emotional and moral debates.[5] Since the NEA's controversial grant revocation from Robert Mapplethorpe's homoerotic photographs in 1989[6] and Andres Serrano's

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[2] *See* U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). Furthermore, following the controversial grants of Serrano, Mapplethorpe, and the "Finley Four" the NEA abolished all individual grants in an attempt to avoid further controversial funding. *See* Misha Berson, *Artists Are Feeling a Cold Snap in Funding*, SEATTLE TIMES, Apr. 29, 1997, at E7.

[3] The Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 103(b), 104 Stat. 1963 (codified at 20 U.S.C. § 954(d) Supp. II 1990)).

[4] Finley v. National Endowment for the Arts, 100 F.3d 671, 681 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997).

[5] *See id.* at 683-84 (holding that "decency and respect" clause to be unconstitutionally vague and constituted viewpoint discrimination); Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (finding that the NEA's "obscenity" restriction on artist applying for grants was unconstitutional); *see also* infra note 6-7 (discussing Mapplethorpe and Serrano controversial funding).

[6] Robert Mapplethorpe is a photographer who earned an NEA grant for his photographic art. However, following the controversy over his sexual and homoerotic subject matter a prominent museum cancelled a partially government-funded planned exhibit of his photographs. *See* Contemporary Arts Ctr. v. Ney, 735 F. Supp. 743 (S.D. Ohio 1990) (granting temporary restraining order prohibiting seizure of or interference with display of Mapplethorpe exhibit). *See also* Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*,

"Piss Christ," in 1990[7], Congress has sought a method to prevent the NEA from funding "indecent" and distasteful art.[8] Many citizens do not want their tax dollars spent on art that they find indecent, controversial, or against their moral values. However, throughout the ages, art that has endured the test of time, and contributed the most to the market place of ideas, was often considered by the status quo of the day to be distasteful, indecent, and against moral values. The art that was denied funding in *Finley* was art the NEA Chairperson found potentially indecent and controversial.

The Supreme Court has recently granted *Finley* certiorari and will soon decide whether the NEA grant provisions are constitutional.[9] The Court may acquiesce to the Ninth Circuit and decide that the "decency" provision is unconstitutional, which will likely result in the abolishment of the National Endowment for the Arts.[10] However, if the Supreme Court summarily reverses the Ninth Circuit and holds the "decency" provision constitutional, it will be legitimized. This deci-

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84 CAL. L. REV. 1499, 1541-43 (1996) (asserting that Mapplethorpe's censorship was lead by congressional conservatives and their condemnation of homosexual and AIDS-related themes).

[7] Serrano's "Piss Christ" is a picture of the crucifix inside a jar filled with the artist's urine.

[8] *See* Cong. Rec. H9410 (Rep. Coleman) (Oct. 11, 1990) ("Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds."). However, some theorists argue that discrimination against "offensive" and "indecent" which typically portray sexual situations is "fundamentally viewpoint-based.

[9] In October 1997, the Department of Justice filed a petition of certiorari with the U.S. Supreme Court on behalf of the National Endowment for the Arts in hopes of overturning the Ninth Circuit's decision in *Finley v. National Endowment for the Arts.* 100 F.3d 671, 681 (9th Cir. 1996), *cert. granted,* 118 S. Ct. 554 (1997). Furthermore, it is worthy to note that the Ninth Circuit rejected the suggestion for rehearing en banc. Finley v. NEA, 112 F.3d 1015 (9th Cir. 1997) (denying of petition for rehearing and rejection of suggestion for rehearing en banc).

[10] This reaction to the *Finley* case, given that the political make-up of Congress is still predominately Republican, would be similar to congressional attempts in the early part of 1990. *See also* Robert C. Post, *Subsidized Speech,* 106 YALE L.J. 151, 191 (1996) ("If courts were routinely to take advantage of . . . congressional funding priorities for the NEA, it is unlikely that Congress would long continue to support the NEA.")

sion would prevent artists from raising the constitutionality issue and force them to create only "decent" art in order to receive NEA grants. This conformity seems benign on its face. However, as this Comment will show, this conformity really amounts to government control of speech and expression that must be protected under the First Amendment.

The NEA's grantmaking problem stems from the government's subsidization of speech or expression in the form of grants to artists. The purpose of governmental subsidization for private individual's speech and expression is to "provide a voice to a relatively silent entity,"[11] thereby, promoting freedom of speech and political discourse in the "marketplace of ideas."[12] However, viewpoint-based restrictions on conditional subsidies allow the government to control speech and subsequently reduce the amount of speech it finds "undesirable." This threatens the First Amendment by placing the government in a position to decide what is and is not "desirable" speech. The First Amendment's very purpose is to ensure that government is not placed in such a position of power.

Attempts to amend the NEA grant provisions have given rise to many lawsuits assessing the unconstitutional suppression of certain types of artistic expression as viewpoint-based discrimination. Viewpoint discrimination is the most suspect action within the realm of constitutional law.[13] When the government subsidizes speech it is permitted to define the goals of that program.[14] However, with the government subsidy, it is essential to the First Amendment's protection that the government remains viewpoint neutral in its efforts to

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[11] *See* Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 567 (1996).

[12] H. MARCUSE, REPRESSIVE TOLERANCE, reprinted in N. CAPALDI, CLEAR AND PRESENT DANGER 117 (1969).

[13] *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100 (1996) ("[Viewpoint-based regulation is] censorship in a most odious form . . . .") (quoting Black, J., concurring, Cox v. Louisiana, 379 U.S. 536, 581(1965)).

[14] *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991).

support the arts.[15] "Government funding does not invariably justify government control of the content of speech."[16] This Comment proposes that the "decency and respect" provision of the NEA Grant Act,[17] Section 955(d), invariably constitutes viewpoint discrimination.

The Supreme Court should uphold the Ninth Circuit's decision in *Finley* in order to prevent any further unconstitutional restraint on artists' First Amendment freedoms. The NEA did not have viewpoint discrimination under the old statutory language of "artistic excellence and merit." These were merely objective criterion for "categorical-based"[18] subsidies that are presumptively constitutional criterion and have less potential to suppress artistic expression. However, when Congress amended the statute to include the "decency and respect provision" it crossed the constitutional gray line and made the NEA grants into viewpoint-based subsidies allowing government to skew public debate.[19]

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[15] Bollinger further argues that the government has slowly been attempting to control debate within the marketplace of ideas:

> [T]he First Amendment in this century has been one of denying the government the authority to control the marketplace of ideas through the tool of censorship. That history has been accompanied by countless expressions of how important it is for the government to "remain neutral" with respect to that marketplace, of how wary we ought to be of the government's motives whenever it seeks to control speech in the marketplace, of how slippery are concepts like "[decency]" when placed in the hands of government censors, and of the necessity of living by a rule that says we will rarely ever permit the government to control or limit speech because it disapproves of the "message" or the "content" of that speech.

Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1110 (1995).

[16] *Finley*, 100 F.3d at 681. *See also* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680-81 (1992) ("Where the government seeks to prohibit speech directly, the first amendment demands that it maintain neutrality toward content, viewpoint, and speaker identity. This neutrality mandate is designed to curb government action that threatens to skew the market-place of ideas or to indoctrinate the citizenry.").

[17] The Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 103(b), 104 Stat. 1963 (codified at 20 U.S.C. § 955(d) Supp. II 1990)).

[18] *See* Redish & Kessler, *supra* note 11, at 567.

[19] *See* Heins, *supra* note 13, at 100 ("Government action that suppresses or burdens speech on the basis of its viewpoint threatens all [First Amendment] values by skewing public debate, retarding democratic change, depriving people of ideas and

Most critics agree that art is an economic and social imperative;[20] however, there is much debate about whether government should be in the business of subsidizing art, and if so, what restrictions the government may constitutionally impose in connection with the funding of artists. Through the government's subsidization of art many constitutional problems are encountered. First, when the government conditions the public subsidy on an artist's promise to relinquish her constitutional right of free expression by not portraying a certain style of art, the government has created an "unconstitutional condition." Second, courts have been unable to construct a clear legal framework that distinguishes between permissible content regulation and impermissible viewpoint discrimination.[21]

This Comment contends that the present NEA grant scheme is unconstitutional and abridges artists' First Amendment right to free speech. Part II discusses the history of financial support of public arts in the United States and the rationale behind the National Foundation on the Arts and Humanities Act. Part II then discusses the problems the NEA has encountered as a result of funding art that pushes the barriers of "indecency," namely homo-erotic and feminist performance art. Part III discusses the doctrines behind viewpoint discrimination and unconstitutional conditions, and criticizes the Court's application of these doctrines to the facts in *Rust* and *Rosenberger*. Part III then examines *Finley's* majority and dissenting opinions and further criticizes the arguments stated in the NEA's Supreme Court petition for certiorari. Part IV analyzes the constitutional problems created by the current NEA grant provisions, including vagueness, chilling effect, prior restraint on artistic expression, and the court's lack of adequate

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artistic experiences that could contribute to their growth, and otherwise constricting human liberty.").

[20] *See* Katha Pollitt, *Honk if you Believe in Art*, SACRAMENTO BEE, Aug. 3, 1997, at F2 ("[A]rt employs a lot of people, grants for high culture and experimental projects act as 'seed money' for eventual pop-cultural blockbusters.").

[21] *See* Heins, *supra* note 13, at 101 ("[T]he Court has further confused [First Amendment decisions] by sometimes using the terms 'content' and 'viewpoint' interchangeably. It has justified this interchangeable use by explaining that prohibitions against content and viewpoint discrimination flow from the same concern—government attempts to control public debate and suppress disfavored ideas.").

legal doctrine to devise an effective solution. Additionally, Part IV discusses whether the NEA merely enriches the artistic communities of large urban cities while largely ignoring the more rural areas of the United States, or whether the program benefits all Americans by bringing art and culture to all areas. Finally, Part V criticizes previously proposed solutions to the NEA's controversial funding dilemma and proposes ways to avoid further constitutional controversy, regardless of the level of government participation. Under any solution, however, this Comment concludes that the "decency and respect" provision is unconstitutional and must be eliminated.

II. HISTORY OF ART SUBSIDIES

A. Creation of the National Endowment for the Arts

Even before the creation of the NEA in 1965, the United States was economically supportive of the arts. The first significant support of the arts began without government involvement during the Industrial Revolution. Wealthy capitalists like J.P. Morgan, Solomon Guggenheim, John Rockefeller, and William C. Ralston began to promote art by subsidizing theatre and music.[22]

Federal subsidization of the arts was initiated under Roosevelt's New Deal in an effort to provide employment following the Great Depression. Congress created the Federal Arts Project (FAP) to help relieve unemployment through artistic ventures that resulted in "approximately 1,500 murals, 18,800 sculptures, and 108,000 paintings, as well as other works of art."[23] However, in qualifying for the subsidies more weight was assigned to financial need rather than true "artistic excellence."[24] The government's next significant attempt to subsidize art did not occur until the "Great Society" under the purview of the Kennedy and Johnson administrations. The Presidents appointed a Special Assistant on the Arts[25] and Congress passed the National

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[22] Enrique R. Carrasco, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1526 (1986).

[23] *Id.* (citing L. DUBOFF, ART LAW IN A NUTSHELL 159 (1984)).

[24] *Id.* The New Deal assisted such notable artist as Mark Rothko, David Smith and Jackson Pollack. *Id.*

[25] *Id.*

Foundation of the Arts and the Humanities Act that created a twenty-six member National Council on the Arts.[26]

In creating the program, Congress stressed the importance of freedom of expression, stating that "it is necessary and appropriate for the Federal Government to help create and sustain . . . a climate encouraging freedom of thought, imagination and inquiry."[27] The U.S. Senate reaffirmed the goal of artistic freedom when it amended the statute so the only criterion by which proposals would be judged by was "artistic excellence."[28] Congress persistently expressed the fear that government may become the "czar" of national art, deciding ultimately what art is good or bad.[29] Additionally, artists expressed concern that too strong a governmental presence in an endeavor to which freedom is essential, would result in "a spirit of compromise and conservatism in art."[30] To prevent governmental influence in artistic expression, the NEA was set up in such a way that Congress's control over its annual budget was independent of its grantmaking decisions. The NEA's operating budget is periodically brought before Congress for renewal, at

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[26] National Arts and Cultural Development Act of 1964, Pub. L. No. 88-579, § 5(a), 78 Stat. 905, 905 (1964), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 1030, 1031. Thereafter transferred to the NEA. H.R. Rep. No. 618, 89th Cong., 1st Sess. 2 (1965), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3186, 3187.

[27] 20 U.S.C. 951(7); Pub. L. 89-209 (1965).

[28] S. REP. NO. 300, 89th Cong., 1st Sess. 3-4 (1965) (drafting the criterion by which the proposals would be judged the Senate stressed that "there be given the fullest attention to freedom of artistic . . . expression. One of the artist's . . . great values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths. . . . The standard should be artistic . . . excellence.").

[29] *Id.* Furthermore, the minority of the House of Representatives expressed the fear that governmental subsidization of the arts "could lead to attempts at political control of culture." H.R. REP. NO. 618, 89th Cong., 1st Sess. 21 (1965).

[30] *See* Carrasco, *supra* note 22, at n.62 ("Actor Charlton Heston, a witness at the hearings on the bill, succinctly conveyed this idea, stating: '[t]he artist's point of view, I suppose, has always been reduced to its simplest terms, 'Give me money but do not tell me what to do with it.'") *Id.* at 1528; Elizabeth E. DeGrazia, *In Search of Artistic Excellence: Structural Reform of the Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 133, 136 (1994) ("Senator Strom Thurmond, a Republican from South Carolina, sparked the attack with the charge that '[g]overnment subsidization of the arts will inevitably lead to the stifling of creativity and initiative.'").

which time Congress may abolish the NEA if it deems that it has not adequately performed its "mission of supporting the arts."[31]

With the codification of the National Foundation on the Arts and Humanities Act, Congress outlined several provisions for the NEA's federal subsidies. First, Congress established that the primary source of economic support for the arts should come from private and local "initiative"[32] and that federal subsidies were merely meant to "compliment" private funds.[33] Second, the government's objective was mainly to "[financially] encourage[ ] freedom of thought [and] imagination and to foster conditions facilitating the release of this creative talent."[34] Lastly, Congress severely limited the NEA's ability to steer or influence the grantee's work once the grant was issued.[35]

The NEA is headed by a Chairperson who is appointed by the President and approved by the Senate. The Chairperson is assisted by both the twenty-six members of the National Council on the Arts[36] and the peer review panel consisting of highly respected members of the private art community who specialize in a particular area.[37] The job of the peer review panel is to review grant applications and to identify and recommend works that meet the artistic excellence standard.[38] By appointing private citizens who serve short terms on the review panel, instead of government bureaucrats, the program's grantmaking process is insulated from political lobbying, congressional influence, or constituent pressure.

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[31] *See* DeGrazia, *supra* note 30, at n.14.

[32] 20 U.S.C. § 951(1) (1982).

[33] *Id.* at § 951(4).

[34] *Id.* at § 951(5).

[35] *See* Carrasco, *supra* note 22, at 1530 ("In the administration of [the Act] no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association.").

[36] The twenty-six members of the National Council on the Arts are appointed by the President from the private sector and approved by the Senate.

[37] *See* 20 U.S.C. § 955(b) (1982).

[38] *See* 20 U.S.C. § 959(c)(4) (Supp. 1991).

At the end of the day, however, the Chairperson is the ultimate judge in deciding which artists will receive federal art subsidies.[39] The Chairperson serves a four-year term that is staggered against the President's four-year term to prevent the President from making political appointments to please his constituents. Usually, the Chairperson confirms the recommendations that successfully make it through both the peer-review panels and the NCA. Between 1982-89, the Chairperson rejected only 35 out of 33,700 grant proposals recommended by both the panel and NCA.[40] However, as art has embraced more controversial and sexual themes, the Chairperson has recently begun to reject more grant proposals that survive both reviews.

Though some of the NEA funds are awarded to individual artists,[41] most grants are given to organizations such as theatre groups, operas, symphonies, museums and mural projects.[42] Furthermore, NEA grants are supplemented by private dollars, so that the NEA's approval of artistic quality acts as an endorsement of the private art community by suggesting that investment in the artist's work would be prudent.[43] The only specific criteria that proposals were initially judged by was "artistic . . . merit and professional excellence."[44] However, the Council also "consider[ed] projects of 'significant merit' which would otherwise be unavailable to the public for geographic or economic reasons . . . [and the council was also asked to] consider projects that would help artist[s] 'achieve wider distribution of their works.'"[45] The final congressional amendment to the criteria, before the "obscenity"

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[39] *See* 20 U.S.C. § 959(a)(4).

[40] *See* William H. Honan, *2 Who Lost Art Grants Are Up for New Ones*, N.Y. TIMES, Aug. 2, 1990, at C19.

[41] *See* Berson, *supra* note 2 (discussing the termination of individual grants following the Finley incident).

[42] *See* 20 U.S.C. § 954(c).

[43] *See* Donald W. Hawthrone, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 U. KAN. L. REV. 437, nn.19, 22.

[44] 20 U.S.C. § 954(c) (1-2) (1982).

[45] *See* Carrasco, *supra* note 22, at 1533 (quoting 20 U.S.C. § 954(c)(2-3)).

controversy occurred in 1980, said that art that reflected "American creativity and cultural diversity" should be granted funding.[46]

B. *Political Controversy and Repercussions Following the Creation of the NEA*

Beginning in the later part of the 1980's, the NEA faced the recurring problem of subsidizing art which Congress and the American people felt was "controversial," "indecent," and most importantly, "obscene." For instance, in 1986, Representative Mario Biaggi of the Bronx, demanded that the NEA pull its funding from a modernized version of *Rigoletto* because he felt it portrayed "disparaging ethnic images".[47] The play conveyed a stereotype of Italian-Americans as being gangsters and racketeers.[48] This controversy spawned one of the first proposals to restrict artistic freedom through a method of content screening to ensure that the NEA would not fund productions "containing any ethnic or racially offensive material."[49] In his attempt to quell cultural stereotypes, Rep. Biaggi implicitly opposed the fundamental goal of NEA — to support, not influence or control, artistic expression.[50]

This was the government's first serious attempt to control the content or viewpoint expressed by the artists applying for NEA grants. The government was not saying that all theatrical interpretations of

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[46] National Foundation of the Arts and Humanities Amendments of 1973, Publ. L. No. 93-133, § 2(a)(3)(C), 87 Stat. 461, 462 (1973) (codified at 20 U.S.C. § 954(c)(2), reprinted in 1973 U.S. CONG. & ADMIN. NEWS 528, 529).

[47] *See* Carrasco, *supra* note 22, at 1521, nn.5-7. This controversy resulted in Rep. Biaggi's proposal of a bill to "ensure that federal government would not fund productions containing 'any ethnic or racially offensive material' .... [He further asserted that] 'there should be [] a sensitivity. I don't think we should have censorship. But censorship and sensitivity, what separates them is a very fine line.'" *Id.* The Rigoletto incident "illustrat[ed] a breakdown in relations among the actors: the taxpaying consumers of the arts, the subsidized artist, and the largess-dispensing agency.... However, [t]he Biaggi content screening proposal ... advocates the use of an ax to address a problem best solved with a scalpel." *Id.* at 1534.

[48] *Id.*

[49] *Id.* at 1522, 1534.

[50] Even though Rep. Biaggi's amendment was never passed it expanded Congress' willingness to implement more viewpoint-based controls over the grantmaking process.

Rigoletto were to be denied funding, although this would have been a permissible-content based restriction. Rather, the government only restricted those interpretations of *Rigoletto* that promoted the viewpoint of Italians as gangsters and racketeers. Under this statute, if Francis Ford Coppola applied for an NEA film grant for the Oscar winning film *The Godfather*, he would be denied funding based on his portrayal of Italians, regardless of the films' technical or visual excellence. The same argument would apply to D.W. Griffith's *A Birth of a Nation*, which was monumental in its contributions to the film-making science, but whose story glorified the Klu Klux Klan and portrayed African-Americans as uncivilized animals. The statute would prevent both good speech and bad speech from being funded — therefore it was overbroad in its application. The problem is that regardless of whether the speech is distasteful to a large portion of society, the government, via the NEA, should not be deciding which speech or artistic message is worthy of being heard. With a standard that is not based on viewpoint, the NEA will balance the film's contribution to the art of filmmaking, both scientifically and stylistically against the message it conveys. The marketplace or audience may extract the positive contributions these works make, and remain free to reject the stereotypes portrayed therein.

The next legislative attempt to narrow the type of art the NEA could fund was proposed in 1989 by Senator Jesse Helms (R- North Carolina). He introduced an amendment to the statutory mandate prohibiting the funding of "obscene or indecent" art.[51] Helms' effort to control the type of art funded was a direct response to the NEA's controversial funding of Robert Mapplethorpe's homoerotic art and Andres Serrano's "Piss Christ."[52] To express its disapproval of the "controversial" funding, Congress withheld from the NEA's budget the amount of grant money given to sponsors of the exhibitions showing

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[51] H.R. 27788 101st Cong., 135 CONG. REC. 8806 (daily ed. July 26, 1989) (amendment number 420 to the Interior Department Appropriations bill) [hereinafter Helms amendment]. The Helms amendment was eventually barred in favor of the Fowler amendment which was less restrictive. *See* Oreskes, *Senate Votes to Bar U.S. Support of "Obscene or Indecent" Artwork*, N.Y. TIMES, July 27, 1989, at A1, col. 1.

[52] "Piss Christ" is a photograph of a crucifix immersed in a jar of the artist's urine that Senator Helms deemed "blasphemous."

Serrano and Mapplethorpe's works.[53] In proposing the amendment, Senator Helms argued that he wanted to "prevent the National Endowment for the Arts from funding . . . immoral trash in the future . . . [and that this amendment would not] prevent the production or creation of vulgar works, it merely prevents the use of federal funds to support them."[54] His provision would have effectively banned all art portraying homoerotic, anti-religious, or culturally controversial themes. Helms saw these restrictions as a common sense approach to deciding what is and is not appropriate artwork to fund with taxpayer dollars.[55]

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[53] Elizabeth Kastor, *House Trims NEA Budget as Reprimand: Drastic Cuts Rejected in Arts Funding Bill*, WASHINGTON POST, July 13, 1989, at C1.

[54] 135 CONG. REC. 8807 (daily ed. July 26, 1989) (statements of Sen. Jesse Helms). The amendment required that:

> None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce:
>
> (1) obscene or indecent materials, including but not limited to depictions of sado-masochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or
>
> (2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or
>
> (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.

H.R. 2788, 101st Cong., 135 CONG. REC. 8806 (daily ed. July 26, 1989) (amendment number 420 to the Interior Department of Appropriations Bill). If these amendments controlled what types of art are fundable:

> [O]ne can easily imagine many recognized masterpieces being condemned by a bureaucrat applying such formless standards. Courbet's Le Sommeil (1866) depicts homoeroticism; Boucher's Mars and Venus Caught by Vulcan (1754) represents "individuals engaged in sex acts"; the "sexual exploitation of children" is among the subjects of E.J. Bellocq's famous Storyville Portraits. Many major American artists of this century have shown "disrespect" for some beliefs and values of their countrymen. Andy Warhol's iconic Mao pictures, de Kooning's violent depictions of women, Georgia O'Keefe's sexually charged flowers, even totally abstract works, like Conceptual Art and Carl Andre's minimalist sculptures, which express anti-capitalist and anti-idealistic sentiments, can be interpreted with little difficulty as showing disrespect for beliefs and values of some members of he American public.

See Hawthrone, *supra* note 43, at 445.

[55] *Id.* Compare Helms view with James Lileks's who opposes common sense-type art because "[America] need[s] to challenge prevailing concepts of patriarchal trends in representational art by giving grants to women who make challenging abstract sculpture from liposuctioned cellulite." James Lileks, *Kill OSHA! Kill the*

However, Helms should have questioned whether it was the government's role to ultimately decide what type of art is in the country's best interest.[56] Helms should also have considered whether his amendment was overbroad or vague and prevented funding of art that does violate NEA standards and art that does not, despite being controversial. Helms first attempt at amending the NEA grantmaking provisions is evidence of the legislative intent to silence views of those artists with whom it does not agree. It is noteworthy that most of the art labeled "controversial" or "indecent" espouses homosexual or feminist themes. Homosexuality and feminism remain the only topics permissible to condemn as immoral on the House or Senate floor by representatives like Helms and California's Robert Dornan. This moral condemnation is even more accepted when hidden behind the questions of "what is art?" and "should the tax-payers be subsidizing it?" If any representative took the floor in order to berate any artwork simply because it promotes African-American, Latino, or Jewish themes he would be shunned as a racist or bigot rather than a representative ofr the moral majority.

Furthermore, because Helms's amendment is overbroad under its all encompassing standard, books such as *Tom Sawyer*, *Catcher in the Rye*, many of Shakespeare's plays, and films such as *The Godfather*[57] would not have received NEA literary subsidies, nor would the NEA fund libraries that carry these works. Lastly, some Senators expressed concern that Helms's overbroad amendment would have a "chilling effect" on artistic expression:

EPA! Kill the IRS! But Please Spare the NEA, AUSTIN AMERICAN-STATESMAN, July 21, 1997, at A9.

[56] See Senator Howard Metzenbaum's comments regarding the amendments—asking whether or not it is within the government's role to determine the "art standards for [the] country." 135 CONG. REC. 8808 (daily ed. July 26, 1989).

[57] *See* Georges Nahitchevansky, Note, *Free Speech and Government Funding: Does the Government Have to Fund What it Doesn't Like*, 56 BROOK. L. REV. 213, n.12 (1990). Shakespeare's *Merchant of Venice* portrays Jewish people as greedy and *Taming of the Shrew* has come under fire from feminist groups for its subordination of women. *The Godfather*, similar to *Rigoletto*, casts Italian-Americans as hoodlums and gangsters. Lastly, *Tom Sawyer* could be censored for its portrayal of race relations.

> In other words, grant recipients, fearing the loss of the funds would exercise greater editorial control over the content of [their] exhibitions or works of art in order to avoid works that might be viewed as controversial [or indecent]. As a result many works might never be seen by the public, and many artist would limit their expressions so as to avoid controversy or more importantly, avoid having to return the funds.[58]

While these concerns were justified and predictive of issues courts currently face in cases like *Finley*, the House passed the obscenity amendment which paved the way for similar legislation. The final version of the obscenity amendment was less restrictive than the original proposed by Helms. The NEA is now required to screen art proposals in accordance with the obscenity standard the Supreme Court articulated in *Miller v. California*.[59]

As with all abridgments of free speech, the restrictions set into motion the argument for a sliding scale. It is important to keep in mind the extreme end of this spectrum. The governments in Nazi Germany and Communist Russia controlled artistic expression because they believed it was in the best interest of their people. Both regimes approved only of nationalist art in the classic manner. During World War II, Germany was burning modernist paintings along with "controversial" books and people. The rationale was that the message the material conveyed was "obscene," "indecent," "immoral," and without merit. All artists who were considered devoid of any "value" to Nazi Germany were thrown in concentration camps.[60] Even though this illustrates only one extreme of the sliding scale, regimes like Nazi Ger-

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[58] *Id.* (citing Senator Jeffords 135 CONG. REC. 8808, at 12131 (daily ed. July 26, 1989)).

[59] Miller v. California, 413 U.S. 15 (1973). The amendment now reads:

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

20 U.S.C. § 954 (1989). Furthermore, any artist who's artwork was determined to be obscene was required to return their grant money. However they were permitted to appeal the decision. 20 U.S.C. § 954 (1)(1) (1990).

[60] After World War II, many believe that the United States government promoted and exported abstract expressionism as a symbol of the free thinking valued in the United States.

many and Communist Russia evolved from incidental restrictions on free thinking which slowly turned into censorship.

Shortly after the new obscenity standard went into effect, the "Finley Four" filed suit in district court claiming that the NEA denied their grant proposals for political reasons and to avoid further controversy after the Mapplethorpe and Serrano grant revocations. The four artists had been denied grants despite the fact that their proposals survived both the Council and Peer Review Panel. A leaked transcript from the NEA revealed incriminating conversations between then Chairperson Frohnmayer and the Council. The transcripts show how the Chairperson warned the Council that these four artists were not worth losing the NEA's budget and that the Council and the Chairpersons' decisions must be made in a "political world."[61] This blurring of the agency's structure is exactly what the founders intended to prevent in keeping the grantmaking process separate from the administrative process. Now, both the Chairperson and the NEA have submitted to political pressure in their grantmaking decisions in an effort to keep their jobs and the NEA alive.[62] Eventually Chairperson Frohnmayer was fired by President Bush[63] as a result of pressure from ultra-conservative politician Patrick J. Buchanan during the 1992 elections. Buchanan's position on controversial art became clear when he called the NEA a "liberal establishment" that subsidizes "filthy and blasphemous art."[64]

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[61] *See* Honan, *supra* note 40, at C13.

[62] *See* Faye Fiore, *Sidney Yates On 50 Years of Fighting for Arts Funding in America*, L.A. TIMES, Sept. 14, at M3 (in an interview with long time NEA defender, Rep. Yates states that "the NEA's [criticism] for not taking on controversial subjects . . . may be due to the congressional pressure . . . . the NEA [now needs] to provide grants and explanations for many of its actions . . . .").

[63] *See* William A. Henry III, *A Cheap and Easy Target*, TIME, Mar. 9, 1992, at 22.

[64] Judy Keen & Bill Nichols, *Buchanan Takes Aim at Arts Fund*, USA TODAY, Feb. 21, 1992, at 4A. This is an example of how politics began to control the NEA and its grantmaking scheme. Journalist Russel Lynes commented "during the congressional debate surrounding the proposed Endowment, '[t]he less the arts have to do with our political processes . . . the healthier they will be.'" *See* DeGrazia, *supra* note 30, at 151 (quoting LIVINGSTON BIDDLE, OUR GOVERNMENT AND THE ARTS 69 (1988)).

The controversy continued in April of 1990, when the American Families Association ("AFA") publicized collected photographs, depicting sexual acts, from an exhibit called the "Tongues of Flame." The AFA included the photos in a pamphlet entitled "Your Tax Dollars Helped Pay For These 'Works of Art,'" and mailed them to members of Congress, Christian leaders, radio stations, and newspapers.[65] Organizations like the AFA began to actively campaign against the NEA's subsidization of art it found "offensive" and "blasphemous."[66] In 1989, the AFA solicited contributions from American people who supported their cause and raised $5.2 million dollars.[67] Critics asserted that at its beginning the NEA funded intelligent and creative artists, but the "works of some [current] NEA grantees suggested that the agency [has] turned malformed from its immaculate conception."[68] Even some art critics believe that NEA funded art has taken a disgusting, if not immoral, turn and that the NEA is partly responsible for fueling the propagation of this "lewd" art.

Many critics ignore that the very purpose of art is to make the viewer question the status quo. What may be disgusting to one audience may be thought-provoking material for another. For this reason the power to grant funding should not ultimately reside with the NEA's Chairperson. Other critics argue that if you "[w]alk into an art museum these days [ ] you may think you have wandered into a peep show. Pornography is alive and well in art . . . ."[69]

In 1990, in an effort to subdue this "indecent" and "offensive" art, Congress passed a toned-down version of Helms's original amendment to replace the 1989 amendment. This statute requires that the NEA grants must judge all art in consideration of the "general standards of decency and respect for the diverse beliefs and values of the American public."[70] The "decency and respect" provision is the most restrictive on artistic freedom because it uses subjective judgment

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[65] Wojnarowicz v. American Family Ass'n., 745 F. Supp. 130, 133-35 (S.D.N.Y. 1990).

[66] *Id.* at 133.

[67] *Id.*

[68] Bruce Fein, *Dollars for Depravity?*, THE WASHINGTON TIMES, Nov. 19, 1996, at A14.

[69] *See* Adler, *supra* note 6, at 1526.

[70] 20 U.S.C. § 954(d) (1991).

about "decency" of art for grantmaking decisions. This amendment has allowed the NEA to blatantly avoid funding any "controversial" art.

To reinforce the NEA's compliance with the "decency" provision, Congress held its budget reauthorization meeting in 1994, to decide whether to eliminate the NEA by revoking its budget. More specifically, Congress threatened to cut the budget so drastically it would leave only enough money for closing costs. The reauthorization meeting constituted a legalized form of coercion in which Congress gave the NEA the choice to fund only non-controversial art, excluding any themes which were too homoerotic or immoral in the government's eyes. If the NEA refused to comply it would be abolished. Jane Alexander, then head of the NEA, successfully fought off conservative attempts to abolish the NEA. The program has thus far survived with a drastically reduced budget, from $99.5 million to $10 million.[71] Following the budget cut, the NEA has only awarded 489 individual grants totaling $6.67 million. These budget cuts have continued despite the fact that in 1992 there was a 37% increase in museum attendance, totaling 49.6 million visitors.[72] In 1996, 50% more Americans spent their money attending museums and art exhibitions than on sporting events.[73]

There is the argument that the increased interest in art may have directly resulted from the NEA's implementation of the "decency" restriction in its grantmaking decision. The "decency" provision has successfully filtered almost all art conveying an indecent or controversial message by refusing to grant the artist funding. This art conveys messages that would otherwise be available to people if the "decency"

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[71] *See He's Not Pals With Karen Finley?*, L.A. TIMES, July 14, 1997, at F2. Jane Alexander is now stepping down as the Chairman of the NEA. In doing so she has blamed both the conservatives in Congress and the non-profit art institutions for NEA's troubles. She complains that in an effort to retain their reputation as the ultimate definers of tasteful art, the non-profit art institutions have resisted efforts to popularize art enough to create greater participation and support for the arts. *See* Suzanne Fields, *Dark Reflection on Society We are All Partly to Blame for Culture's Decline*, THE ARIZONA REPUBLIC, Oct. 22, 1997, at B5.

[72] *See* Edward Rothstein, *State of the Arts: A Mixed Report*, THE COURIER-JOURNAL, Mar. 24, 1996, at O3D.

[73] *See* Pollit, *supra* note 20, at F2.

provision was never amended. Moreover, the chilling effect on artists caused by congressional threats of budget cuts and viewpoint-based restrictions like the "decency" provision prevents the audience from ever expressing their views toward controversial or indecent artwork because the artists never submit or create it. This is because of the artists' fear of having their grant revoked, or being explicitly rejected for a grant, prevents them from expressing any idea that may be deemed "controversial" or "indecent." What happened to the public's right to receive messages that are not obscene and are constitutionally protected speech?[74] Congressional desire to control the artist's message has forced the NEA to take a two-tiered approach to funding art. In deciding whom to fund, the NEA believes some artists' messages or topics are more acceptable and thus more constitutionally protected than others that may be considered controversial or indecent.

In July 1997, the NEA underwent another attack, and was almost abolished by Congress, before being saved by a margin of one vote. These events have brought the NEA into a political battleground where the agency has become a favorite target for restrictive legislative reform.

It may be argued that even though the NEA has aided in building the careers of successful artists, when viewed comparatively to the history of art, the NEA, which has only existed for about three decades, is relatively young. Thus, most famous artists, who collectively represent the history of art, such as Michelangelo, Beethoven, Rubens, or Louisa May Alcott, created their body of art without the aid of any formal government program.[75] One could further argue that current artists should also be able to build their careers without the aid of the NEA.

However, none of these artists subsisted on the financial success of their art alone. In fact, many of these famous artisans were commis-

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[74] *See* 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996) (holding that restrictions on truthful, nonmisleading speech are subject to strict scrutiny and regulations on such speech should be no more extensive than necessary); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) (Court found that the First Amendment forbids the state from deciding that ignorance is preferable to the free flow of information and that the audience has a right to receive information).

[75] *See* Fein, *supra* note 68, at A14.

sioned by politicians, patrons, and local governments and thus still depended on financial support from public funds. For instance, Michelangelo was a painter for the Vatican and the Medici family. Most early American art was made possible by private financiers like the Guggenheim, Rockefeller, and Ford families. Additionally, most of the pre-NEA famous artists were not financially successful during their lifetime as it was only after their death that the genius of their artwork was recognized. Thus, to keep art on the cutting edge and continually evolving into new arenas, there will always be art that the majority of people do not like or art with whose message they strongly or even vehemently disagree. "To fund artistic expression only if it is 'safe' art . . . is simply to ignore the qualities of art that should lead Congress to fund it in the first place—its freshness of vision, its willingness to look anew at what the rest of us overlook [and] are incapable of seeing."[76]

III. GOVERNMENT SUBSIDIZATION OF THE ARTS

A. Viewpoint Discrimination

The government discriminates on the basis of viewpoint when it restricts speech by preferring some messages or perspectives to others. Even when the government chooses to subsidize private speech its criteria must remain viewpoint-neutral. The government may not choose which activity to fund based on the viewpoint of the speaker. As discussed later in Part III, this is because viewpoint discrimination is the most egregious form of government censorship[77] and should only be tolerated in extraordinary circumstances.

When the government subsidizes speech two situations exist where the government may find itself under constitutional scrutiny. The first situation is when "government enlist[s] speakers to convey a particularized message." Here, government may completely restrict the speakers. The second situation is when the government "encourages

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[76] Arthur I. Jacobs, "*One if by Land, Two if by Sea*," 14 NOVA L. REV. 343, 355 (1990).

[77] *See* Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2516 (1995).

private speech." In this instance the government may only place content-based restrictions on the speech by limiting the subject matter, not the viewpoint. If the speaker meets the content-based restriction, such as "excellent artwork," it is unconstitutional for the government to choose to subsidize one artist over another on the basis of the artist's message or viewpoint.

1. The Problem With *Rust*

In *Rust v. Sullivan*,[78] the Supreme Court, in a 5-4 vote, upheld a statute prohibiting abortion counseling at family planning centers which received Title X public funds.[79] The regulations prevented doctors and nurses from "encourag[ing], promot[ing], or advocat[ing] abortion as a method of family planning [and from] provid[ing] referral[s] for abortion [to other non-Title X family planning centers]."[80] Furthermore, the statute required those clinics that insisted on advising their patients about the availability of abortion to set up "physically and financially separate" clinics from those clinics operating under Title X funding.[81] Therefore, even if a recipient proved that Title X federal funds were going exclusively toward Title-X approved activities, the statute required the recipient to "physically" separate the Title X and non-Title X facilities.[82]

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[78] 500 U.S. 173 (1991).

[79] Title X permitted the Secretary of Health and Human Services to "make grants . . . 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 . . . ." 42 U.S.C. § 300(a) (1988) (emphasis added). These acceptable methods of family planning prohibited the "use of abortion as a method of family planning or [from referring patients to outside abortions methods or clinics." 42 C.F.R. § 59.8(a)(1) (1994).

[80] 42 C.F.R. § 59.10 (1994).

[81] 42 C.F.R. § 59.9 (1994).

[82] Cole argues that the restrictions on *Rust* could be even more infringing on free speech and still not be unconstitutional:

> Under this rationale, the government could have defined the Title X program as a 24-hour-per-day, six day-per-week program, provided 10% of the funding , and required the recipient not to speak in favor of abortion at any time during the program. Such a condition would presumably not be unconstitutional under *Rust* be-

The petitioners in *Rust* argued that the statute constituted viewpoint discrimination and violated the First Amendment by prohibiting either abortion counseling or referral while "compelling the clinic or counselor to provide only information that promotes continuing a pregnancy to term."[83] The Court rejected this argument and held that the restrictions on funding did not discriminate based on viewpoint but merely defined the limits of the specific public funding to the exclusion of another viewpoint and thus did not violate the recipients' First Amendment right to free speech.[84] The Court reasoned that the "[g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[85] The Court focused on the scope and purpose of the subsidy, not the explicit endorsement or acceptance of a particular viewpoint. The specific purpose of Title X subsidies was to "foster family planning methods other than abortion."[86]

Furthermore, the Court relied on the precedent in *Harris v. McRae*[87] stating that "[a] refusal to fund protected activity without

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cause the recipient would still be free to speak about abortion with private funds on the seventh day.

See Cole, *supra* note 16, at n.39 (stating that the unconstitutional conditions in *Rust* are circular in reasoning).

[83] Rust v. Sullivan, 500 U.S. 173, 192 (1991).

[84] *Id.* at 192-95.

[85] *Id.* at 193.

[86] *See* Redish & Kessler, *supra* note 11, at 575. "It therefore would be absurd to hold unconstitutional the government's choice not to fund pro-abortion counseling." *Id.* The Court endorsed the Government's argument that:

even though [the statute] restricted the speech of the recipients of federal money, it did not violate the First Amendment, because the government should not have to [financially] support positions with which it does not agree and because these organizations could exercise their own speech in other contexts where they were not federally funded.

See Bollinger, *supra* note 15, at 1114-15 (discussing the adverse precedent of *Rust* and its application to the viewpoint discrimination discussed by the Ninth Circuit in *Finley v. National Endowment for the Arts*).

[87] 448 U.S. 297 (1980).

more, cannot be equated with the imposition of a 'penalty' on that activity."[88] Lastly, the Court found that not all government-subsidized activities were subject to the same scrutiny under the First Amendment.[89] For example, the Court refused to equate subsidization of federal family planning clinics with other traditional public fora, such as universities, where little or no restrictions on speech are tolerable.[90]

Some scholars have sharply criticized the Court's holding in *Rust* because the conditions on Title X funding censored the dissemination of particular ideas, and were therefore blatantly viewpoint-based.[91] Moreover, the Court in *Rust* applied a form of review that was too weak to the issue of viewpoint discrimination. The Court's characterization of the subsidy being more similar to a benefit than a traditional public forum allowed it to quickly dismiss any argument for applying stricter scrutiny.[92] "[C]haracterizing the subsidy as either viewpoint-neutral or skewed to favor one side of a debate — is so inherently subjective that few could agree on whether [the government] was 'aiming at the suppression of ideas' [or using government speech as a method to endorse a particular view]."[93]

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[88] *Id.* at 317.

[89] *See id.* at 322-23.

[90] *See Rust* 500 U.S. at 199-200. The Court further reasoned that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of . . . funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Id.* Another significant holding in *Rust* was the Court's announcement of its future "intention to treat nearly all benefit allocations whose distributional criteria refer to the exercise of preferred rights the same as it would treat allocations based on immutable characteristics." Gary A. Winters, *Unconstitutional Conditions as "Nonsubsidies": When is Deference Inappropriate?*, 80 GEO. L.J. 131, 134 (1991).

[91] *See* Redish & Kessler, *supra* note 11, at 577 ("The very description of the subsidy program [in *Rust*] as a means of disseminating information concerning family planning methods other than abortion inescapably reveals the viewpoint-based, selective nature of the subsidy, and makes the program unconstitutional . . . .").

[92] *See* Winters, *supra* note 90, at 152 ("*Rust* is a perfect illustration of the unsatisfactory nature of this weak form of review.").

[93] *Id.* The dissent argued that the statute went further than the government merely defining the goal of its subsidy. The dissent posited, "[I]f a client asks directly about abortion, a Title X physician or counselor is required to say . . . that the project does not consider abortion to be an appropriate method of family planning."

The basic problem with the majority's analysis in *Rust* is that if it is permissible for the government to favor one viewpoint over another without the court labeling it for what it is—viewpoint discrimination—the government's interest in future cases can always be legitimized.[94] The government may easily exclude certain "unapproved" viewpoints by simply defining those particular viewpoints as outside the purpose of the government subsidy. Thus, the constitutional proscription against viewpoint discrimination is essentially stripped of all its protective power by giving government a way to circumvent its true discriminatory legislative intent.

Lastly, the majority is also flawed in its reasoning that the statute was not viewpoint-based because the family planning centers were not prevented from counseling patients about abortions in non-government-subsidized centers. If a clinic is supported by 5% of government funding, but is economically dependent on that subsidy, the *Rust* criteria effectively prevents the clinic from counseling about abortion. Even though the clinic is allowed to separate its facility into two "subsidized" and "non-subsidized" clinics, it is not an economically viable option. Thus, the speaker, or health care provider, will conform to the government's viewpoint.

The Court's decision in *Rust* has left the government with the understanding that when public funds are used to subsidize speech it may constitutionally take sides and sustain or encourage a particular viewpoint. Furthermore, under a broader reading, the government may

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Id. (citing §59.8(b)(4)). This clearly goes beyond funding a permissible goal and crosses over into promoting or endorsing the viewpoint of pro-life or anti-abortion. Furthermore, a doctor endorsing the government's required viewpoint is more coercive to the patient than it would be outside the clinic where the protesting continues. The patient is able to discount those viewpoints and expects the government-run clinic to be viewpoint neutral. *See also* Winters, *supra* note 90, at 153 ("Government can encourage an enormous range of activities over alternative activities, and could enact the kind of speech-related subsidies at issue in *Rust* to carry out these goals. Thus, equating the legitimate power to encourage and fund an activity with lack of viewpoint discrimination cedes overwhelming discretion to government."). This results in the weakest form of judicial scrutiny—in which the government only needs to justify its restriction with a significant interest.

[94] *See id.*

statutorily "impose [broad-based] content restrictions on scientific research grants, arts funding, subsidies to documentary films, and federally-funded AIDS education"[95] without fear of being struck down as impermissibly viewpoint-biased. The more sweeping or vague the restriction, such as "decency," the more latitude the Court has given government in defining the viewpoints which do not comport with its own. *Rust* seems to stand for the proposition that "[i]f the government can bar federally-funded family planning counselors from mentioning abortion in pregnancy counseling, surely it can require artists who receive federal grants to refrain from creating indecent art."[96]

2. Does *Rosenberger* Rescue the First Amendment?

In *Rosenberger v. Rector & Visitors of the University of Virginia*,[97] the Supreme Court struck down a university regulation that prohibited religious publications from receiving any subsidies from a student activities fund.[98] The Court relied on the precedent of *Perry v. Education Association v. Perry Local Educators*[99] and *Cornelius v. NAACP*[100] which required government neutrality in situations of government benefits and subsidies. The Court stated that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," and the government is not permitted to draft statutes which allow it to use the viewpoint of the speakers as the rationale for the restrictions on speech.[101] Furthermore, when the government creates a limited public forum for a legitimate purpose, such as limiting the forum to certain groups or topics, it must respect those limits and not exclude speech under the rubric of being unreasonable "in light of the purpose served by the forum."[102] In this case, the university argued that the restric-

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[95] *See* Cole, *supra* note 16, at 676-77.

[96] *Id.* at 677.

[97] 115 S. Ct. 2510 (1995).

[98] *See id.* at 2520. Specifically, the university withheld funding from those publications which "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 2512.

[99] 460 U.S. 37 (1983).

[100] 473 U.S. 788 (1985).

[101] *See id.* at 2516.

[102] *Id.* at 2517 (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 804-806 (1985)).

tions on funding were "content based," which prevented the plaintiff from receiving subsidies. However, the Court disagreed and explained that even though the distinction between religious content and religious viewpoint is somewhat unclear the university allowed subsidization of newspapers which took a secular perspective of religion while disfavoring those "student journalistic efforts with religious editorial viewpoints."[103]

Unlike in *Rust*, the Court in *Rosenberger* stated that "ideologically driven attempts to suppress a particular point of view are [as] presumptively unconstitutional in funding, as in other contexts."[104] Thus, viewpoint neutrality is essential to the subsidy's openness to controversial ideas and political debate. The majority enforced this idea when they rejected the dissents' argument that the university's regulation was viewpoint neutral because it discriminated against "an entire class of viewpoints." The majority explained that public debate is not "bipolar" and that "[t]he complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas .... The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways."[105]

The Court's decision in *Rosenberger* is not only applicable to "religious" speech. It applies equally to "controversial," "political," or "indecent" speech. Any time the government encourages speech on a particular topic by offering a benefit or subsidy, including artistic expression, and excludes those viewpoints that may be considered "controversial" or "indecent," it skews political debate.[106] Exclusion or censorship of "controversial" or "indecent" ideas threatens First Amendment freedoms by preventing political discussion of disfavored speech. "Speech that is controversial, that 'induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger,' is precisely the speech most in need of constitutional

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[103] *Id.*

[104] *Rosenberger* 115 S. Ct. 2510, 2517 (1995).

[105] *See* Heins, *supra* note 13, at 121 (quoting *Rosenberger* 115 S. Ct. at 2518). The Court in *Rosenberger* explained that if racism is the topic of debate, "then the exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Rosenberger*, 115 S. Ct. at 2518.

[106] *See* Heins, *supra* note 13, at 121-122.

protection."[107] Thus, the Court in *Rosenberger* curtailed the application of *Rust* where the government subsidizes and encourages speech on a particular topic such as art. *Rosenberger* leaves the public with the understanding that any time the government defines a benefit program which encourages a certain type of speech to the exclusion of certain ideas which may be considered "political," "controversial," or "indecent," it has impermissibly discriminated on the basis of viewpoint. Since *Rosenberger*, other circuits have followed this line of reasoning.[108]

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[107] *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 476 (1989)).

[108] For instance, in Gay Lesbian Bisexual Alliance ("GLBA") v. Pryor, 110 F.3d 1543 (11th Cir.1997), a gay and lesbian student organization sued the University of Southern Alabama when a state statute excluded them from receiving public funds. The statute at issue prohibited the spending of public funds on any group that promoted a lifestyle that supports sodomy or sexual misconduct. The Eleventh Circuit held that the statute violated the students free speech rights and that Alabama engaged in viewpoint discrimination. *Id.* at 1548-49. The court reasoned that *Rosenberger* made it clear that "a university might limit the funds it makes available for student activities to those involving Shakespearean literature . . . . [H]owever, the university could not deny funding to critical interpretations of Shakespeare." *Id.* at 1549. As applied to the facts in this case the university prevented GLBA from being considered for funding on the "assumption that GLBA fosters or promotes a violation of the sodomy or sexual misconduct laws. The statute discriminates against one particular viewpoint because state funding of groups which foster or promote compliance with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination." *Id.* The court also reinforced *Rosenberger's* analysis as being on-point with regards to viewpoint discrimination and public forum. *Id.* at 1550. This may also be an implicit rejection of the analysis in *Rust*.

B. Unconstitutional Conditions Doctrine

When the government offers a subsidy conditioned on the speaker's agreement to relinquish their First Amendment right to speak about certain topics or views, a coercive element enters into the situation. In the coercive situation, the government has the added power to grant or deny a subsidy. With this greater power, they control the speaker's motivation for the speech by dangling monetary sustenance in front of them in return for a waiver of their constitutional rights. This creates a problem of "unconstitutional conditions," an issue that has confused courts and theorists for over a hundred years.[109] Some skeptics argue that the above situation is not coercive. The speaker has no property interest in the subsidy, and by choosing to assert her constitutional right to free speech instead of accepting the subsidy she is in no worse a position than if the government had never offered the subsidy.[110] This argument misses the catastrophic effect the exchange can have on political discourse and debate.

The Court in *Rust* defined an unconstitutional condition as a "condition on the recipient of When the government offers a subsidy conditioned on the speaker's agreemthe [government] subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[111] The Court has taken advantage of

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[109] Andres A. Epstein, *The Supreme Court, 1987 Term—Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 (1988). *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Federal Communications Comm'n. v. League of Women Voters, 468 U.S. 364 (1984); Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983); Harris v. McRae, 448 U.S. 297 (1980) (voting with majority); Speiser v. Randall 357 U.S. 513 (1958) (governments denial of a special property tax exemption to veterans refusing to take a loyalty oath). *See also* Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 374-76 (1995) (The Supreme Court wrongly recognized as early as 1841 "that if the government has the greater power to deny a benefit completely, or forbid an activity entirely it [is not] unconstitutional to deny that benefit in part."). Brooks argues that unconstitutional conditions should be subject to the courts strictest form of scrutiny. *Id.*

[110] *See* Redish & Kessler, *supra* note 11, at 549.

[111] Rust v. Sullivan, 500 U.S. 173, 197 (1991).

Rust's definition of unconstitutional conditions by contracting and expanding the purposes of the government subsidy depending on the viewpoint of the speaker.[112] This contracting or expanding of the subsidy's purpose has given the government tremendous latitude in picking and choosing which speech deserves to be heard by buying the speaker's silence on a particular subject matter or viewpoint. Depending on the type of forum this may be tolerable in extraordinary circumstances; however, when the government offers a subsidy and encourages speech in a forum that has traditionally been a venue for free and controversial expression, it is unconstitutional to require artists to keep their views on particular subject matters silent in order to qualify for the subsidy.

1. Three Cases Set the Framework For Ambiguity

The classic unconstitutional conditions doctrine example is illustrated in *Speiser v. Randall*,[113] where a statute denied veterans a property tax exemption if they refused to sign a declaration agreeing not to advocate the forcible overthrow of the U.S. Government. In other words, the subsidy at issue, tax-exempt status, was conditioned on the veterans' waiver of their First Amendment rights. The Court stated that "[t]o deny an exemption to claimants who engage in speech is in effect to penalize them for the same speech."[114] The *Speiser* court expressed "anger" over the government's effort to coerce citizens.[115] However, the problem with the Court's analysis in *Speiser* and other cases that have a coercive element in the subsidy is that "the Court does not tell us when inducement becomes unconstitutional coer-

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[112] *See, e.g.*, U.S. v. Kokinda, 497 U.S. 720 (1990); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985). These are cases in which the government defines the speaker's messages as being outside the limited purpose of the subsidized program.

[113] 357 U.S. 513 (1958).

[114] *Id.* at 518. Furthermore, Justice Black stated in his concurring opinion, "I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this nation was founded." *Id.* at 531 (J. Black, concurring).

[115] *See* Winters, *supra* note 90, at 143-44.

cion."[116] After *Speiser*, the standard for unconstitutional conditions was as unclear for lawmakers as it was for courts.

Then, in *Regan v. Taxation With Representation* ("TWR"),[117] the Court found that the *Spieser* model did not fit and that unconstitutional conditions did not exist. In *TWR*, the government conditioned a federal tax exemption for contributors to non-profit corporations on their agreement to waive their right to lobby the government.[118] Similar to the statute in *Rust*, which did not prevent family planning centers from speaking about abortion in an entirely separate non-subsidized facility, the plaintiffs in *TWR* were allowed to lobby under the condition that they keep separate books for tax-exempt and non-tax-exempt activities. In addition, the plaintiffs were to create a separate non-tax-exempt affiliate for lobbying purpose. However, as discussed in Part II(A), the problem with both of these options is that the cost to the speaker is often too great in order to both qualify for the subsidy and to exercise their First Amendment rights.

The Court maintains that a plaintiff does not have a property interest in the funds that are necessary for the speaker to fully exercise her First Amendment rights.[119] However, in the context of art subsidies, it is unnecessary for the artist to show a property interest in an NEA grant when the denial of the subsidy is based on the speaker's viewpoint. Furthermore, if the right-privilege distinction were valid, this Comment might not be written if the government were permitted to condition law students' receipt of federal funds on their agreement to only write positive Comments about government statutes and policy.[120] "After all, there is no right to a Stafford or Perkins loan; it is a privilege."[121] Lastly, the Court in *TWR* construed congressional inten-

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[116] *Id.* at 144. Winters asserts that the coercion analysis is unhelpful in unconstitutional conditions analysis because of the "difficulty of adequately defining coercion and when it reaches intolerable levels, [and] considering the multitude of situations in which beneficiaries are induced [in order] to alter their exercise of preferred liberties." *Id.* at 145.

[117] 461 U.S. 540, 549 (1983).

[118] *Id.*

[119] *Id.* at 550.

[120] See, Michael J. Elston, *Artists and Unconstitutional Conditions*, 56 LAW & CONTEMP. PROBS. 327, 341 (1993).

[121] *Id.*

tions as not coercing plaintiffs into relinquishing their First Amendment rights, but only preventing the use of public funds for lobbying.[122] *TWR* showed that the Court will look at both the legislative history of the statute, to assess whether Congress intended to restrict the affected groups First Amendments rights, as well as at the economic feasibility of separate facilities.[123]

Finally in *Federal Communications Commission. v. League of Women Voters*[124] ("*FCC*") the Court decided that forcing an entity to use private funds to segregate their activities in order to exercise their First Amendment rights was unconstitutional.[125] The Court found the government imposed an unconstitutional condition by prohibiting editorializing by public broadcasters who received federal funds. *FCC* is distinguishable from *TWR* because in *TWR* it was at least economically and structurally feasible for the plaintiffs to set up a separate tax-exempt lobbying affiliate with minimal administrative burden. In *FCC*, however, it was economically and structurally improbable to create two broadcast stations because the structure of the public broadcasting subsidy prevented *all* editorializing even if the station only received one percent of their income from federal subsidies. Thus, where it is improbable and overly burdensome to require a separate affiliate for *true* expression of free speech, the Court appeared to hold that this is an unconstitutional condition.

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[122] *Regan*, 461 U.S. at 545. The Court further stated that "[i]t is not irrational for Congress to decide that tax exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying." *Id.* at 550.

[123] Blackmun reinforces the majority's holding and cautioned Congress that "[s]hould the IRS attempt to limit the control these organizations exercise over the lobbying of their [non-subsidized] affiliates, the First Amendment problems would be insurmountable . . . . [s]uch restrictions would extend far beyond Congress' mere refusal to subsidize lobbying." *Id.* at 553 (Blackmun, J. concurring).

[124] 468 U.S. 364 (1984).

[125] *Id.*

2. The Reoccurring Problem of *Rust*

The Supreme Court essentially endorsed the "separate affiliate"[126] argument in *Rust* and used it to rationalize the restrictions set forth in Title X funding. The Court reasoned that when restrictions on speech lie within the confines of a government-funded program and the restriction does not prevent the speaker from operating unrestricted on their own time, then unconstitutional conditions do not exist.[127] Since the Court avoided a true discussion of unconstitutional conditions, the economic feasibility of creating a separate affiliate was not even considered. *Rust* appears to stand for the proposition that the government can use its economic power to skew political debate and to influence the way citizens exercise their constitutional rights without feeling wrath from the courts.

C. Finley v. National Endowment for the Arts

As discussed, Karen Finley and four other performance artists filed suit in federal district court against the NEA claiming that denial of their grant proposals violated their right to free speech and that the "decency and respect" provision of the NEA amendment was unconstitutional. Finley is a solo performance artist whose art has involved her stripping herself naked and smearing her body with chocolate to express the subordination of women in society. Despite the fact that the Performance Artists Peer Review Panel unanimously approved all four artists in *Finley*, the NEA refused to grant them funding.[128] The artists claimed that in 20 U.S.C. § 954(d)(1), the "decency and respect" provision was "impermissibly vague and imposed [viewpoint-based] restrictions on protected speech"[129] The statute required that grant applications be judged "taking into consideration general stan-

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[126] *See* Winters *supra* note 90, at 153 ("The separate affiliate doctrine essentially embodies the principle that recipients of a subsidy may not be forced to give up exercises of rights that are funded through wholly private sources. The subsidy must be narrowly tailored so that it is not withheld from those who would qualify but do not meet the subsidy characteristic when they use private funds.").

[127] *See* Rust v. Sullivan, 500 U.S. 173, 196-199 (1991).

[128] Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1462 (C.D. Cal. 1992), *aff'd,* 100 F.3d 671 (9th Cir. 1996), *cert. granted,* 118 S. Ct. 554 (1997).

[129] *Id.* at 674.

dards of decency and respect for the diverse beliefs and values of the American public."[130] In denying the NEA's motion for summary judgment the district court stated that, contrary to the NEA's reliance on *Rust*,[131] *Rust* does not allow the government to condition the receipt of NEA grants on the artist agreement to waive their First Amendment right to free speech or expression.[132] Instead, District Judge Tashima categorized art as a "traditional sphere of free expression"[133] for which *Rust* requires heightened scrutiny.[134] The federal district court then proceeded to strike down the "decency clause" as overbroad, stating that the only permissible content-based restriction is "artistic merit."[135]

The Ninth Circuit affirmed the district court's decision in a 2-1 vote, restating that viewpoint neutrality is essential to the forum of art because it is a "traditional sphere of free expression"[136] and has long been "one of many protected forms of speech."[137] Furthermore, the court struck down the "decency and respect" provision stating that the provision constituted viewpoint discrimination[138] and was vague. This resulted in a "chilling effect"[139] on artistic expression. The court chose to apply the broad interpretation of viewpoint discrimination in *Rosenberger*,[140] finding that the "decency and respect" provision violated the neutrality that is required in the NEA's funding of artistic expression.[141] When the government funds speech it is prohibited from exercising "control [over] the content of [the funded] speech."[142] Addi-

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130 *See* 20 U.S.C. § 954(d)(1) (1994).

131 *See* Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 413, 418-19 (1997) (noting that "[t]he NEA had argued [in the district court case of *Finley*] that *Rust* had cabined the 'unconstitutional conditions' doctrine to such an extent that federal arts grants were now immune from [Finley's] challenges.").

132 *Finley*, 795 F. Supp. at 1473 (quoting *Rust*, 500 U.S. at 200)

133 *Finley*, 795 F. Supp. at 1464.

134 *Id.* at 1473 (quoting *Rust*, 500 U.S. at 200).

135 *See id.* at 1475-76.

136 *Finley*, 100 F.3d at 681.

137 *Id.* at 675.

138 *See id.* at 683-84.

139 *See id.* at 675.

140 *See supra* Part II(A).

141 *See id.* at 683.

142 *Finley*, 100 F.3d at 681.

tionally, the Court was not persuaded by the NEA's argument that artists do not have a property interest in the NEA grants. Nor was it convinced that, due to the limited nature of the grants, the "decency" clause is necessary to aid the decision-making process.[143] The Ninth Circuit reasoned that even though 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" when First Amendment freedoms are at stake.[144] Furthermore, in response to the NEA scarcity argument, the court adopted the *Rosenberger* rationale, stating that "the scarcity of a government benefit does not render it immune from constitutional limitations."[145]

The NEA also argued that the "decency" provision was not unconstitutional because the Chairperson was not *required* to use the provision in judging the art.[146] However, the court disagreed and found that Congress did not simply intend for the Chairperson to "tak[e] into consideration" the "decency and respect" clause in evaluation of grant proposals.[147] Rather, the court interpreted the clause as a mandatory criterion along with "artistic merit" and "artistic excellence" with which all grant proposals must be judged.[148] The "decency and respect" provision was amended to 20 U.S.C. § 955(d) in order to solve the problem of funding "controversial" or "indecent" artwork.[149] Thus, Congress would not have effectively solved the controversy by merely urging that the Chairperson "tak[e] into consideration" the new provisions.[150]

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[143] *See id.* at 674-77.

[144] *Id.* at 675.

[145] *Id.* at 675 (citing Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 835-7 (1995)).

[146] *Id.* at 676.

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

[148] *Id.* Furthermore, the court stated that the Chairperson does not have discretion in the amount of weight given to the "decency and respect clause," and that "[the clause] actually restricts the Chairperson's discretion by requiring him or her to judge applications according to standards of `decency and respect.'" *Id.*

[149] *Id.* at 677.

[150] *Id.*

> The dispute was not over whether NEA should be free to fund indecent or disrespectful art, but over the way in which the new limitation would be imposed: whether Congress should specify categories of art that could not be funded or in-

In finding that the "decency and respect" provision was void for vagueness, the court explained that a vague statute created a "danger of arbitrary and discriminatory application."[151] Because the provision does not specifically define a standard of conduct, it violates artists' due process rights by requiring them to guess at what "decency" and "respect mean."[152] The court stated that "[t]hese terms are inherently ambiguous, varying in meaning from individual to individual," and that society is too large to ascertain the content of the phrase "diverse beliefs and values of the American public."[153] The provisions' vagueness creates a situation where the decision to fund a particular artist lies with the "subjective beliefs and values" of the judge and whether or not the artist's view comports with that of the judge.[154] This subjectivity creates an environment where "funding may be refused because of the artist's political or social message or because the art or the artist is too controversial . . . Where First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process."[155] The U.S. Supreme Court has granted certiorari to *Finley,* and the fundamental issues brought to the spotlight in this case and the effect it will have on the First Amendment will be decided in Summer of 1998.

1. The Government's Argument

The government's certiorari petition maintains that the Ninth Circuit's decision in *Finley* prevents Congress from making legislative decisions regarding expenditures of public funds that are properly

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struct NEA to consider general standards of "decency and respect" in judging the artistic merit of a grant application. Congress settled on the latter approach.

Id. Additionally, the court reasoned that in drafting the provision Congress specifically wanted to avoid the vagueness problem created by the Federal Communication Commission's definition of an "indecent communication." *Id.* at 678-79.

151 *Finley*, 100 F.3d at 679-81.

152 *Id.* at 680.

153 *Id.*

154 *Id.* at 680-81.

155 *Id*

within its powers granted by the Constitution.[156] The government further claims that the Chairperson has much more latitude in the grant decision than the Ninth Circuit reasoned and that ultimately the Chairperson is not required to reject all grant proposals which do not meet the "decency and respect provision."[157]

The petition states that not all government funding of the arts needs to be viewpoint neutral to be constitutional.[158] The petition argues that the "decency and respect" provision can be construed as "aesthetic concepts" or guidelines for artists applying for grants.[159] In this context, the provision merely regulates "mode or form" and not the content of the expression the artist is attempting to convey.[160]

The government argues that the Ninth Circuit misapplied the Court's reasoning in *Rust* and *Rosenberger* to the NEA grant program because it relies on legislative aesthetic criterion as a basis for awarding financial assistance to artists. The government argued that in *Rust* the Court reasoned that when a government sets aside public funding for a particular program it has the right to impose limits as to the purpose of the program.[161] The government similarly reasons that the NEA was set up to fund art and is ultimately forced to make content-based decisions because it has a limited amount of grants to award to a

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[156] Department of Justice's Petition For a Writ of Certiorari at 15, Finley v. NEA, 100 F.3d 671 (9th Cir. 1996) 66 U.S.L.W. 3171 (No. 97-371) (Aug. 29, 1997).

[157] *See id.* at 17-18, *Finley* (No.97-371). However, it must be noted that the Chairperson's tremendous discretion may result in viewpoint discrimination in which he may conveniently justify the rejection or grant of a fellowship under the pretext of meeting Section 955(d)(1):

> Even worse, sympathetic judges may ignore the government's blatantly viewpoint-based judgments by recharacterizing the state's reasons for regulating works of art . . . When this conclusion, however, is coupled with claims that the work is sufficiently "controversial," "Offensive," [] "inappropriate" [or does not adequately comport with the standards of decency and respect] to merit [a fellowship] courts should cast a suspicious eye.

See Mach, *supra* note 131, at 413-14.

[158] *See* Department of Justice's Petition at 18, *Finley* (No. 97-371).

[159] *Id.*

[160] *Id.*

[161] *Id.*

potentially unlimited amount of artist.[162] The government concludes that these "content-based" decisions are permissible under the First Amendment according to *Rust*[163] under which "Congress may fund the artistic activities that it believes should be encouraged in the broader public interest through the application of aesthetic and related criteria for awarding grants."[164] Thus, the government is asking the Court to apply lesser scrutiny as in *Rust*.

The government's petition distinguishes the situation in *Rosenberger* from the NEA grant scheme because government subsidization of art does not create a public forum and the Ninth Circuit's application of *Rosenberger* is impermissibly broad.[165] The government reasons that public subsidization of student-run publications creates a type of public forum where viewpoint discrimination is intolerable, whereas NEA positive subsidies[166] that are not awarded do not create a public forum.[167] The government further argues that the Court in *Rosenberger* addressed a particular problem in a specific funding situation. The petition distinguishes the NEA's denial of grants from the situation in *Rosenberger* because the student newspaper in *Rosenberger* was specifically denied funds based upon its promotion of religious beliefs.

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[162] *See id.* at 19. It is questionable whether these content-based decisions were as frequent or permissible before the early 1990's when the NEA's budget was significantly greater.

[163] *See id.* at 20 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)) ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous government programs constitutionally suspect.").

[164] *Id.* at 21.

[165] *See id.* at 22-24.

[166] *See* Redish & Kessler, *supra* note 11, at 559:

> It is tempting to argue that the government does not abridge freedom of speech when it funds expression in a positive, rather than a negative, manner. . . . [traditionally] positive subsidies do not reduce the sum total of expression . . . .[However t]he government's decision to subsidize an [artist] can nevertheless amount to an abridgment of speech because such a decision may artificially skew a public debate by inducing some who otherwise would have taken a contrary position (or would have chosen not to speak at all) to support the government's views. Such a result undermines both the communitarian and the autonomy values conceivably underlying the First Amendment.

[167] Department of Justice's Petition at 22-23, *Finley* (No. 97-371).

The NEA, however, denied Finley and other artists grants because they did not meet the standards of "decency and diverse values and beliefs," a threshold criterion now included in "artistic excellence and merit."[168] The government asserts that the NEA does not "single out" any specific artistic expression or interpretation in its refusal to fund a grant proposal.[169] Lastly, unlike the public forum created by subsidization of student groups in *Rosenberger*, the NEA grants are awarded through a highly selective process that funds "specific artistic categories."[170]

IV. ANALYSIS OF THE PROBLEMS CREATED BY THE CURRENT NEA GRANT PROVISION

A. Vagueness & Overbreadth

A statute is vague when the average person of ordinary intelligence is uncertain of the meaning of certain provisions within the statute. A statute is overbroad when it may be interpreted to apply in more situations than the legislator originally intended, resulting in inconsistent or arbitrary application. Vagueness and overbreadth are unconstitutional limits on free speech because they violate a citizen's due process right by failing to give notice of how to conform speech to the statute. The NEA's "decency and respect" provision creates this same danger and is, therefore, unconstitutionally vague and overbroad.

The "decency and respect" provision is vague because it leaves artists unaware of the type of art that is acceptable to be funded. It is completely unintelligible what "decent" and "respectable" mean in the context of art. The question of how to define art is not one that is easily answered, but standards of decency and respect are too subjective criteria to be useful to artists. Throughout the centuries many artists and works of art have been plagued by accusations of indecency, only to be acclaimed by future generations as genius and quite "decent" and

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168 *See id.* at 22.

169 *Id.*

170 *See id.* at 22-23.

"respectable."[171] Thus, art that may in fact be "decent" and "respectful," and thus fundable, may be left unexecuted because of the artist's fear and lack of understanding of what those terms mean as applied to her artwork.

Contrary to the dissenting argument in *Finley*, which stated that the "decency and respect" clause is no more vague than the original standards of "artistic merit and excellence,"[172] the "decency" provision attaches a tone of moral disdain to the Panel's evaluations of art that the old provisions did not.[173] Furthermore, it has been argued that "decency" is a political term, like that of "family-values," which allows government to impose viewpoint-based judgments in order to suppress unpopular expression.[174] In the context of the NEA grantmaking provisions, the legislators never attempted to define what "decent" meant, whereas in other contexts, such as the FCC indecency statutes, the legislature defined "indecency."[175] This shows Congress's lack of pre-

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[171] Examples of so-called "indecent" art are: (1) "The Origin of Man"; (2) many of Picasso's works; (3) Feminist art of the 60's and 70's which, it can be argued, because of its extreme nature has shocked and shamed the world into acceptance of a greater role for women in society.

[172] Finley v. National Endowment for the Arts, 100 F.3d 671 (9th Cir. 1996) (Klienfeld, J., dissenting), *cert. granted,* 118 S. Ct. 554 (1997).

[173] Furthermore, unlike the artistic excellence requirement, the "decency" provision has been determined to be an unconstitutional criterion for judging grant proposals in other circuits, as well as in the Ninth. *See* Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976), *cert. denied,* 429 U.S. 894 (1976).

[174] *See* DeGrazia, *supra* note 30, at 167; Bollinger, *supra* note 15, at 1111-12 (analyzing the limits of government power to control the NEA when the subsidize its existence).

[175] Several cases allow a two-tier approach to protecting first Amendment speech. Speech at the core of the First Amendment receives full constitutional protection such as true political speech or criticism of government. Whereas speech that receives less protection is at the periphery of the First Amendment, such as "offensive" and "indecent speech." *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). "Offensive" and "indecent" speech receive less protection because they are of little social value and thus their restrictions are usually aimed at secondary effects (e.g. protection of children). *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978). However, unlike the NEA's "decency and respect" provision, in cases such as *FCC v. Pacifica Foundation* and *Sable Communications, Inc. v. FCC*, Congress at least attempted to define what "decency" meant and thus avoided vagueness problems.

cision in reasonably tailoring the restriction on funding art. The word "decent" is inherently subjective and ideas about what is "decent" vary across the nation as much as they have across the centuries. Cultural upbringing, familial rearing, and personal taste, among other things, form one's beliefs of decency and respectability. Some people in parts of the nation believe that any paintings or portrayals of humans in the nude are indecent, whereas other people have a higher tolerance for nudity and only find homoerotic portrayals to be indecent. Still others may be offended by suggestive portrayals of clothed individuals.[176] It is for this reason that the *Miller* test expressly rejected utilizing a national obscenity standard in favor of a community standards measure. Yet, the legislators ignored the *Miller* mandate, and took it upon the national government to be the arbiters of good taste. In direct opposition of *Miller*, the vague and overbroad decency and respect provision creates a national "decency" standard.

"Artistic excellence" does not evoke vagueness problems under the First Amendment because any selection process involving assessment of quality requires professional judgment. "Artistic excellence" is a permissible content-based regulation that sets a threshold for the quality of art funded.[177] It connotes professional standards of quality, such as time spent on detail, lighting, furthering technique, style, and use of color or texture. Art experts use objective criteria regarding technical and artistic excellence, as opposed to subjective moral judgments about art's content or viewpoint. Additionally, it has been argued that the term "artistic excellence" can grow with artistic means of expression and "embrace new forms of art as they develop."[178] To the contrary, the "decency and respect" provision enables the government to silence the political debate which "controversial" art promotes.

In response to the controversy generated by the Mapplethorpe exhibition and the Serrano photograph, the NEA has applied the decency

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[176] A 1996 Calvin Klein ad campaign portraying clothed teens in sexually provocative poses stirred up a national controversy regarding its prurient content.

[177] *See* DeGrazia, *supra* note 30, at 151. "The injection of criteria for arts selection in the grantmaking process other than that of artistic excellence are at best invitations and at worst commands for the NEA to discriminate in its grantmaking process against an artist that produces or is likely to produce works that are controversial." *Id.*

[178] *Id.* at 168.

provision too vigorously. It has excluded works that would not be deemed legally obscene or indecent, but the views expressed in the art leave Congress weary of voter retribution. Again, this allows Congress to use government subsidies to circumvent the First Amendment's protection against viewpoint-based discrimination.

B. Chilling Effect

When the vagueness and overbreadth of the "decency" clause is combined with the increased deterrent of being denied a grant and reducing the chance of private funding, a chilling effect on artistic expression occurs. Artists will be likely to self-censor any work of art which may be deemed "indecent." This gives the government the far-reaching power of squelching expression before its inception. It is impractical to suggest that an artist may separate his artistic work into "decent" and "indecent." Furthermore, because the definition of what type of art is "indecent" is so inherently subjective, as discussed above, an artist who photographs her naked body adorned with mud might not see the expression as "indecent." However, a more conservative individual who believes that the only time people should be naked is in the privacy of their own home, would definitely find this expression "indecent." Because the NEA's peer review panel is now composed of lay people, instead of professionals from the private art community, an artist like Finley, struggling to receive a grant from the NEA may never even participate in potentially controversial expression for fear of being judged "indecent."

An artist whose work is denied a grant because it is deemed "indecent" or controversial may be subjected to further repercussions:

> [G]overnment patronage has become an imprimatur of quality. Museums and collectors favor NEA grant recipients, not because they agree with the viewpoint orientation required by law, but because the NEA is recognized and respected for identifying artists who produce works of exceptional quality. Artists ineligible for NEA funding because of the views their works express may, therefore, find their expressive opportunities more limited than [if] government never supplemented private

support, regardless of whether the artists even apply for NEA grants.[179]

Thus, because NEA grants act as catalysts for an artist's career, a rejection, or more severely, a revocation of an NEA grant can financially and creatively ruin an artist's career.[180] The effect then is to prevent artists from making cutting-edge art for fear that the government will find it "indecent" and ruin their, reputation, career, and possible livelihood.[181]

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[179] *See* Hawthrone, *supra* note 42, at 441. Hawthrone further asserts that "[p]rivate funds that, but for government funding, would have been available to the creator of disfavored artworks can become unavailable by virtue of the expansive reach of the NEA's regulations." *See id.* at 443.

[180] This is supported by Hawthrone's assertion that:

> [t]he NEA plays a crucial role in soliciting private funds for arts institutions. It is extremely difficult for an arts institution to obtain private support in the absence of government's seed money or "stamp of approval," especially if the institution is competing for scarce private charitable resources with other institutions that receive governmental support. Facing such competition, a museum will most likely either be discouraged from pursuing its course of exhibiting disfavored [or controversial] art works or find its resources—and therefore its expressive opportunities—severely limited relative to both its peers and what its own position would be in an art world without governmental intervention.

Id. at 447-48.

[181] The counter-argument is that artists like Mapplethorpe, Serrano, and Finley have become infamous media and free speech icons as a result of the NEA's rejection of their work. However, this is a faulty argument in that there are no available records to account for the numerous (possibly thousands) of artists whose careers have been ruined or unrealized because of the NEA's rejection of their grant proposal.

The government's rationale that artists are not being suppressed from expressing these indecent or controversial ideas because they may do so without government subsidies is also impractical and unrealistic. An artist cannot be expected to divide himself "into a Dr. Jekyll who produces acceptable art when using federal funds, and a Mr. Hyde whose creativity [rages] freely while using private funds."[182] Because of the "decency and respect" provision is vague as to what type of art may be funded, it "unquestionably silences some speakers whose messages would [otherwise] be entitled to constitutional protection."[183]

1. NEA Chairperson Has Unbridled Grantmaking Discretion

Because the Chairperson has unbridled discretion in his application of the "decency and respect" provision, the grantmaking process is prone to arbitrary decisions based on external factors beyond the artist's control. Similar to statutory licensing ordinances, when the person granting the permits or licenses has unbridled discretion without adequate procedural safeguards, the statute is arguably unconstitutional as a prior restraint.[184] The speaker's message lacks adequate protection and risks being silenced before any evaluations on his message can be formed. This is tantamount to censorship.

Even though the NEA's Panel and the National Council on the Arts have votes, and make their recommendations to the Chairperson, he or she ultimately retains the power to refuse to fund the art for reasons unrelated to artistic excellence or decency.[185] Additionally, the Chairperson is an appointed position which in recent years has been subjected to external political pressure from Congress which threatened to cut the NEA's budget if it persisted in funding controversial

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[182] *See* DeGrazia, *supra* note 30, at 169.

[183] Reno. v. American Civil Liberties Union, 117 S. Ct. 2329, 2346 (1997).

[184] *See* Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992) (the ordinance gave unbridled discretion to the administrator in deciding how much to charge); *see also* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (municipal ordinance placed no limits on Mayor's ability to grant permits for newspaper vending machines).

[185] The only procedural safeguard is the artist's right to appeal the decisions in which they still bear the burden of proving to the Chairperson that their work is "decent" and meets all statutory requirements.

art. This political pressure is evidenced by Chairperson's warning to the Council and Panel that their endorsement of the Finley Four might result in the termination of the NEA's budget.[186] The Chairperson then used his unbridled discretion to deny the artists' grants regardless of the Council's and Panel's endorsement. In this instance, the equal access principles that are integral to a content-based subsidy offered to artists have been undermined, and the choice to deny access to the subsidy because of the speaker's message was made by one person.

The Chairperson is not entirely to blame because she is simply trying to keep the NEA afloat. It is Congress that has given the NEA the subjective, overbroad, and vague criteria. The NEA Chairperson has ultimate discretion in determining grants, and she must shoulder all responsibility in front of Congress. Perhaps one way to strengthen the NEA and protect free speech is to give more credibility to the artistic decisions of the Peer Review Panel and the Council. The Chairperson's unmatched power would not be as capricious and there may develop strength in favor of truly free artistic expression if, for instance, the Panel and council could override the Chairperson's decision with a majority vote. This would ensure that the grantmaking standards were not being applied in an arbitrary manner. Furthermore, an overriding vote measure would ensure that Panel members, if they are highly respected professionals in the art community, are receiving the deference they deserve in deciding what is both excellent and "decent" art. Without at least this type of safeguard the Chairperson is still left with unfettered discretion, to face Congress alone, and to attempt to guess what Congress meant by the vague and ambiguous terms "decent" and "respectable."

The provision should be struck down because the "decency" provision is vague, the NEA Chairperson wields unbridled discretion in ultimately awarding grants, and the grantmaking process lacks sufficient institutional safeguards. The only valid governmental interest in creating the "decency" provision is that taxpayers would not be required to fund art or expression which they find offensive or indecent. If the governmental interest applied to a more limited subject matter or nonpublic fora it might be compelling. However, art has long been a traditional forum of free expression that appeals to both emotional and

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[186] *See supra* Part II(B) text and accompanying note 57.

political ideologies. The interest in keeping art free from restrictive political thought far outweigh any secondary interest in allowing the taxpayers or one particular audience to decide what expression is acceptable enough to be funded and which is not. This arbitrary funding power could result in a "Heckler's Veto,"[187] by allowing the taxpayers to silence artists by denying them funding simply because they disagree with the artist's views.

C. *NEA Grantmaking Statute Imposes Unconstitutional Conditions*

As the grantmaking process now stands, any artist who hopes to qualify for an NEA grant must give up her constitutional right to freely express herself. Through the grantmaking decision process, the NEA retains unwarranted power over the artist. Not only does the NEA retain the power of the purse in determining how much subsidization the artist's idea receives, but the greater and more permanent power to make or break the artist's career. As previously discussed, NEA grants act as a springboard for artists' careers through the significantly increased chance for private funding. This private funding may never be realized if the artist chooses to embrace his First Amendment right to free speech when applying for a grant. The counter-argument is that artists are always free to express themselves in every offensive way known to man as long as it is without federal funding. However, as previously argued, the NEA has become such a substantial source of funding for artists that denial of a grant greatly reduces an artist's exposure and ultimately burdens the artist's ability to contribute her idea or viewpoint to the marketplace altogether.

When deciding whether a provision creates an unconstitutional condition it is necessary to closely scrutinize legislative intent in drafting the statute.[188] Two factors reveal the legislative intent: (1) whether the statute is aimed at restricting a group's First Amendment

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[187] *See* Feiner v. New York, 340 U.S. 315 (1951) (speaker was silenced when he made a political speech to a racially-mixed crowd because the police were afraid they would be unable to control the crowd). *See also* Cox v. Louisiana, 379 U.S. 536 (1965) (conviction of speaker for disorderly conduct reversed because the Court determined that police could have controlled the crowd).

[188] *See supra* Part III(B) (*TWR* shows that the Court will look at both congressional intention and whether the provision is aimed at restricting free speech.).

rights; and (2) whether dividing the speech into subsidized and unsubsidized speech is economically and practically feasible. In the case of NEA grants, the legislative history discussed in Part II shows how Congress repeatedly tried to gain more control over the message an artist conveys when she receives federal money. All the proposed amendments to the NEA's grantmaking statute prior to the "decency and respect" provision came as direct result of congressmen and their constituents being offended by controversial messages of NEA funded artists. Without first determining whether the NEA statute was constitutional, as was their duty, the Congressmen drafted statutes that violated artists' First Amendment rights in an effort ensure their elected positions. The amendments prevented the NEA from funding controversial artists and reduced the sum total amount of speech in the marketplace that is believed to be controversial or offensive. The problem with Biaggi's proposed amendment in 1986, and Helms's amendment in 1989, was that the amendments were too revealing of the legislator's true intent — silencing offensive or controversial views with which they disapproved. Thus, the "decency and respect" provision was passed in 1990 because it better concealed congressional intent to control artists' speech.

With respect to the second prong of legislative intent, it is impractical to expect an artist to divide his or her expression into works that are fundable and "decent," and "indecent" works that are non-fundable. As discussed in Part IV(B), unlike a lobbying group's ability to separate their lobbying into tax exempt and non-tax exempt activities, artists' speech is more creative and cannot be separated into messages that are "decent" and "indecent" artwork. Oftentimes both themes run parallel within the same work of art and are only discernible by the subjective viewer. For this separation to take place an artist must evaluate and censor his artwork in his mind prior to creation and decide whether a particular work of art *might* convey an "indecent" message and would not be worthy of federal funds.

The level of governmental control over artistic expression might be acceptable if it were proportionate to the amount of funding the artist received. However, this is not the case. The NEA requires all artists to meet the "decency and respect" provision in order to receive any amount of federal funding. Thus, the Court's reasoning in *FCC v.*

League of Women Voters is applicable to NEA grantmaking provisions. Recall that in *FCC* the Court found that it was unconstitutional to force a person to build and finance an entirely separate broadcast affiliate solely to exercise their right to editorialize if they received one taxpayer dollar to subsidized the broadcast station. Applying this reasoning to the NEA grantmaking provisions, it is unconstitutional to require any artist receiving one dollar of federal funding to conform all artistic expression touched by the federal money to be subjectively "decent" and "respectable." Because artists are unable to separate their creative mind into "decent" fundable and "indecent" nonfundable spheres, the government usurps the artist's constitutional rights by restricting artistic expression protected by First Amendment.

D. Viewpoint Discrimination

Whether the "decency and respect" provision imposes viewpoint based restrictions on artistic expression is dependent on whether NEA-funded artists are more similar to employees at a federally funded family planning clinic or a student-run newspaper at a public university. In the United States, at least, art has historically been a free forum of expression. In creating the NEA, Congress intended to encourage artistic freedom of thought, imagination, and political inquiry. Therefore, artistic expression appears to be more similar to the unrestricted and potentially controversial viewpoints of students rather than the predetermined speech at a family planning clinic which does not counsel on abortion. The Supreme Court cannot address the issue of restrictions on subsidized art without applying the viewpoint discrimination rationale in *Rosenberger*. However, the Court's holding in *Rust*, that it is not viewpoint discrimination for the government to fund a particular view without it being necessary to fund the opposite view, must be distinguished from the NEA paradox in order for art to remain a free forum of expression.

1. Making *Rust* an Exception

The Court in *Rust* explicitly limited its decision and stated that its holding was not applicable to universities or public fora which are traditional forums of free expression that encourage multiple view-

points.[189] The question then becomes whether art is a traditional forum of free expression and thus excluded from the holding in *Rust*. Because art is inherently diverse in viewpoints and fosters political, intellectual and controversial ideas, it is taught in high schools and universities to broaden students' minds. Students of art gain new perspectives on their world by having their perceived notion of what is "decent" and "respectable" challenged.

Imagine you are a freshman at UCLA and attending your first lecture of "Survey on Modern Art," a General Education requirement. The art history class is publicly funded and taught by Professor Albert Boime,[190] one of the most respected art historians in the country. The lecture hall is filled with approximately 300 students and commences with a slide presentation. The first slide is a black and white photograph by Robert Mapplethorpe named, "Man in Polyester Suit." The photograph shows a man crossing the street. He is fully clothed except for his fully erect penis hanging out his zipper. After the initial shock wears off and a few students leave, the uneasy laughter subsides and the next slide appears. This slide is a self-portrait of Mapplethorpe, bent-over, garbed in leather chaps with a bullfighter's whip inserted in his anus. This photo is most likely "indecent" and "disrespectful" by the NEA standards. Professor Boime randomly calls on student after student and asks, "what do you think?" and "how is this art?"

Because art is a tool used to educate students at government subsidized universities about the importance of freedom of expression and challenging the norm, art itself must be unrestricted in its ability to communicate its message to the audience, regardless of whether it is subsidized. If government is permitted to restrict the message before it is received by its audience, it artificially skews public debate. This, in turn, reduces the message's impact on other potential speakers in the audience and inadvertently dissuades them from challenging current political and social norms.

Rust is also distinguishable from *Finley* because the NEA subsidy was created to encourage speakers to share multiple viewpoints on

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[189] Rust v. Sullivan, 500 U.S. 173, 200 (1991).

[190] Albert Boime is an art history professor at the University of California, Los Angeles and has published numerous works on both modern and postmodern art.

multiple issues. This created a forum for artistic and public expression to contribute to the marketplace of ideas. In contrast, the government in *Rust* did not encourage or create a forum in which multiple viewpoints were desired. The government created a restricted forum solely for the purpose of fostering viewpoints other than abortion. In *Rust*, the government sought doctors and medical staff whose speech was limited to non-abortion related alternatives.[191] In *Finley*, artists were sought for their creativity in addressing all issues of society — good and bad, "indecent" and "decent," "respectful" and "disrespectful." The *Rust* subsidy by definition created an identifiable closed forum to which it was clear how admittance was gained. The speakers were fully aware and able to conform their speech to the specified topics such as, contraception, abstinence, adoption, and carrying a child to term. The NEA subsidy by definition encouraged an open or at least semi-open forum. However, when the government added a subjective and vague standard for entry, through the "decency" and "respect" clause, many speakers were excluded from the subsidy based on their views. These views are the same views they were encouraged to contribute. The two subsidies are distinguishable based on the goals they aimed to achieve and the means chosen to achieve those goals. Therefore, it would not be inconsistent for the Court to find that "decency" provision is viewpoint-based whereas the Title X subsidy in *Rust* was not.

One problem with the majority's decision that the subsidy in *Rust* was not viewpoint-based is that they did not consider how burdensome the restrictions were on the speaker to exercise their First Amendment rights.[192] The Court never considered whether it was economically or

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[191] *Rust* may be explained under the First Amendment doctrine of "government speech" in which the government offers a subsidy to a private speaker to express a particular viewpoint. In government speech situations the audience is able to discount that the speaker is the government and not the individual speaking. When these type of subsidies are questioned they are subject to rational review and are valid as long as the funding is rationally related the government's goal. *See generally* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 611 (1980); Mark Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

[192] It may be argued that the Court's decision in *Rust* was severely flawed, and given that the government offered subsidies to all other forms of information re-

effectively realistic to create a financially and administratively separate family planning clinic solely for the purpose of exercising the doctors' and staffs' constitutional right to counsel patients about abortion. Unlike *Rust*, the Court in *FCC v. League of Women Voters* took into consideration the economic and administrative burden when interest-balancing and found the burden on free speech was too great. A possible reason the Court seemed to allow a viewpoint-based restriction in *Rust* was because the case involved the highly charged issue of abortion. For policy reasons, among others, the Court may have wanted to avoid re-opening the floodgates to constitutional litigation on abortion. It may also be argued that the Title X subsidy forced the government to violate its mandatory viewpoint neutral stance. In order for a government doctor to be content and viewpoint-neutral in counseling pregnant women she must provide the patient with all family planning options, including *both* childbirth and abortion. Even though the *Rust* decision may seem flawed, it is still valid law. Thus, *Finley* must be *excluded* from Rust's applicability in order to be upheld.

2. Under *Rosenberger* the "Decency and Respect" Provision is Viewpoint Discrimination

The facts in *Rosenberger* that led the Court to find viewpoint discrimination in the university's policies are readily analogous to the "decency and respect" provision of the NEA's grantmaking statute. In *Rosenberger*, the subsidy at issue, a student activities fund, was made available to all student newspapers without a religious view. The Court held that the university discriminated based on viewpoint because by not funding religious newspapers it was choosing a secular perspective over a religious one. Under the "decency and respect" provision the NEA is forced to choose "decent" or "respectable" artistic viewpoints over the subjectively judged "indecent" or "disrespect-

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garding family planning besides abortion, the statute was, in fact, viewpoint-based. "The very description of the subsidy program as a means of disseminating information concerning family planning methods other than abortion inescapably reveals the viewpoint-based, selective nature of the subsidy, and makes the program unconstitutional . . . ." Redish & Kessler, *supra* note 11, at 576-77.

ful" artistic viewpoints. Similar to the restriction in *Rosenberger*, the "decency" provision is viewpoint-based because the NEA originally offered the subsidy to works of art which reflect "artistic merit and excellence." The subsidy encouraged multiple viewpoints and perspectives, even those which are subjectively "indecent" or "offensive," and thus opened a broadly defined limited forum for art subsidization.[193]

Therefore, the "decency and respect" amendment is arguably targeted[194] at those expressions or viewpoints that are subjectively offensive or indecent to a particular audience. *Rosenberger* holds that viewpoint discrimination "against speech [or artistic expression] because of its message is presumptively unconstitutional, even in . . . forums created by the [government]."[195] Because the NEA grants act as a forum limited to all artwork which reflects artistic merit and excellence, discriminating against messages within the limited forum by denying artwork subjectively determined to be "indecent" or "disrespectful" is censorship. Under the "decency and respect" provision only those works of art which criticize the government in a "decent" and "respectful" manner may be funded. Under this provision, it is conceivable that a painting of a man tearing-up an American flag could be funded. However, a painting of the same man, *spiting or urinating* on the same flag would be denied access to the forum to convey his message. This is viewpoint discrimination because the former artwork conveys the same message as the latter—it is only the viewpoint that proscribes the latter from being funded.

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[193] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2517 (1995) (holding that when a university makes funds available to encourage student expression, the university creates a limited public forum. "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not `reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint.")

[194] *See supra* Part II(B). The congressional targeting is evidenced by the first Helms' amendment that focused particularly on sexual or homosexual viewpoints. "When 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." Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997).

[195] *Gay Lesbian Bisexual Alliance,* 110 F.3d at 1549 (citing Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2516 (1995)).

Art that is disliked because of its indecency or viewpoint does not need to be censored by an amendment to the grantmaking provision in order to be disapproved of or silenced. If the artwork is so disdainful to a large majority of taxpayers and to the judges of artistic merit, it will be silenced by the lack of financial interest it suffers after it has been subsidized. After artwork has been subsidized by a NEA grant, private funding takes over the subsidization process. If the work truly is too terrible, indecent, or lacking in merit, no private entities will show interest, and the artist will eventually receive the message that her expression contributes little to the marketplace of ideas. The government may argue that the decency provision is viewpoint neutral because it prevents an entire class of indecent viewpoints from being funded. However, this argument was explicitly rejected in *Rosenberger* in that the marketplace of ideas would be easily skewed by the absence of such indecent viewpoints.

3. The Political Lines Drawn in *Rust* and *Rosenberger*

The difficulty with analogizing the NEA's grantmaking scheme to either *Rosenberger* or *Rust* is that in both decisions the Supreme Court was skirting around politically charged issues. *Rust* dealt with the controversial issue of abortion, and *Rosenberger* concerned religion. The Court's decision in *Rust* was politically consistent with its previous decisions that burdened or highly restricted a woman's right to abortion.[196] It may also be argued that Justice Kennedy and his supporters believe that the Supreme Court and most intellectuals have been hostile toward religion. Thus, in *Rosenberger*, the Court may be arguably straining to find viewpoint discrimination in the university's policies in order to support religion at the expense of possibly violating the Establishment Clause. As discussed previously, the artists who were denied funding by the NEA in *Finley* were performance artists

[196] *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (holding that a state may prohibit all use of public facilities and publicly-employed staff in abortions); Harris v. McRae, 448 U.S. 297 (1980) (upholding state's right to refuse to fund medically-necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (holding that Connecticut could constitutionally refuse to give federal financing for non-therapeutic abortions, even though it provided federal funding for the expense of ordinary childbirth).

exploring the topics of homosexuality and feminism. In a perfect jurisprudence system defending the First Amendment the Court should never be convinced by their particular political stance on a controversial topic. This is why the judicial system is supposedly insulated from political and financial pressures — so that the justices may analyze the legal merits of a case and avoid political bias. However, even the Justices are susceptible to moral pressure. The fact that in *Rust* the Court came down against abortion, whereas in *Rosenberger* the Court decided in favor of religion is likely not a coincidence. The fact that *Finley* deals with homosexual and extreme feminist thought probably will not help its valid constitutional cause. But, if the Justices do not succumb to this pressure, they will rightly find the NEA's "decency and respect" provision is a violation of the First Amendment.

E. The Added Persuasion of Reno v. American Civil Liberties Union

In *Reno v. American Civil Liberties Union*[197] the Supreme Court unanimously struck down a congressional statute which attempted to make all Internet communications "decent," unoffensive, and non-obscene. Similar to the "decency and respect" provision in the NEA grantmaking statute, Congress used the subjective criteria of "offensiveness" and "indecency" to restrict free speech on the Internet. Unlike commercial speech or indecent speech in the presence of children, artwork like cyberspace is a traditional forum of free expression and has no history of lesser protection under the First Amendment. In *Reno*, the Court stated that, "[although] society may find speech offensive [it] is not a sufficient reason for suppressing it." As discussed in Part II(B), "offensiveness" was the precise concern of the legislature when they amended the "decency and respect" provision to the NEA grantmaking statute. Helms and his constituents comprised the "offended" audience, and responded to the NEA's funding of artists they found offensive and indecent. Thus, they amended the grantmaking statute to suppress all speech that might offend them, even though the speech may be perfectly non-offensive and decent to others. Additionally, the NEA grantmaking statute prohibits funding "obscene"

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[197] 117 S. Ct. 2329 (1997).

material under the *Miller* test,[198] which in *Reno* the Court said was a permissible regulation. In *Reno*, the Court drew the regulatory line in front of "indecent" material, as should have the legislature in formulating the amendment to the NEA's grantmaking statute.[199] In *Sable Communications of California, Inc. v. FCC* the Court held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[200] Furthermore, unlike the monopoly or scarcity of broadcast frequencies in television or radio which the Supreme Court used as its rationale to qualify the level of First Amendment scrutiny applied in the FCC cases, no scarcity of fora exists in art.[201]

F. The Deception of Government Subsidization of Art

Allowing the government to subsidize speech permits the government to "artificially skew the debate on a particular issue and thereby artificially shape public attitudes."[202] Government subsidization of art deceives the public into believing that the art is chosen because it is the best representation of artistic expression. In fact, under the current "decency and respect" standard, the art is chosen simply because a group of politicians is not offended by its message. In the abstract, the idea of government subsidization of a private individual's artistic expression is an altruistic and benign thought. However, government programs do not occur in a vacuum, and the recent politicalization of the NEA and the grantmaking statute has put the government in the position of determining what expressions of art deserve to have an im-

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[198] The test in *Miller v. California*, 413 U.S. 15 (1973), is:

> (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. at 24 (internal quotation marks omitted).

[199] Furthermore, the Court in *Reno* found that the Communications Decency Act was vague because of the term "indecent."

[200] 492 U.S. 115, 126 (1989).

[201] Furthermore, since the focus of the "decency and respect" provision is to prevent the funding of "lewd" or "indecent" artwork, the statute is presumptively at odds with the First Amendment.

[202] *See* Redish & Kessler, *supra* note 11, at 562.

pact in the marketplace of ideas.[203] The subsidization itself promotes specific individuals' art and, in effect, facilitates and encourages their expression. Because the government is awarding the grant to a third person via the NEA, there is more danger of the government manipulating public attitudes about art and skewing public debate. Furthermore, the government does this while disguising their censorship and control behind the false rationale that an artist is simply not meeting the NEA's criteria.

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[203] *Id.* Redish and Kessler are two legal theorists who provide convincing arguments why government subsidization of speech is restrictive. They assert that simply because a government subsidy does not "physically prevent expression does not mean that such [subsidies] fail to 'abridge' the free speech right." *Id.* at 56. The theorists further argue that:

> [t]he government's decision to subsidize an entity can nevertheless amount to an abridgement of speech because such a decision may artificially skew a public debate by inducing some who otherwise would have taken a contrary position (or would have chosen not to speak at all) to support the government's views. Such a result undermines both the communitarian and the autonomy values conceivably underlying the First Amendment.

Id. at 559. Lastly, Redish and Kessler argue that government subsidization of an activity, such as art, should be deemed unconstitutional when a statute requires an applicant to meet specific criteria such that when the "hazards of the government-sponsored communication outweigh its benefits, the government improperly undermines First Amendment values . . . ." *Id.* at 564.

At first glance, the government does not appear to violate the First Amendment when it denies a grant proposal.[204] The advocates of the "decency and respect" provision point out that the government is ambivalent as to whether the speaker voices their views at all. In other words, the argument is that the artist may forego applying for the grant, and then their art will not be subject to whatever restrictions they feel are oppressive.[205] However, many art mediums, such as installation art and the performing arts, would become even less available to large audiences without governmental support. This is because these types of art are labor-intensive and would thus need to charge an even higher ticket price. Museums, galleries, and artists need government subsidies to make up the difference for charging a price the public can pay. This, in turn, allows the art form to be exposed to a greater audience and not become centralized in the elite of society.[206] Thus, government subsidies give more artists a wider platform to express themselves while simultaneously expanding society's exposure to new ideas and ways of thinking.

One problem with flushing out the true intent behind government subsidies is that the government may often "seek to disguise what are in reality viewpoint-based subsidies behind the mask of permissible categorical subsidies."[207] In this way, the government may subsidize only the speech with which it agrees. The "mask of permissible subsidy" has caused confusion among courts in distinguishing between viewpoint-based and content-neutral restrictions. It may be argued that the "decency and respect" provision is a viewpoint-based restriction hidden behind the mask of the categorical subsidization of art in general. The NEA may argue that the "decency and respect" clause merely helps them choose amongst the abundance of well-qualified grant proposals and is therefore a proper tool. However, in truth and

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[204] *Id.* at 559. This analysis might be totally the opposite when considering the Mapplethorpe and Serrano situations, in which the NEA revoked the subsidy from a particular expression protected by the First Amendment.

[205] *See id.* at 553.

[206] See DeGrazia, *supra* note 30, at 152.

[207] *See* Redish & Kessler, *supra* note 11, at 570.

in practice, the "decency and respect" clause allows the NEA to exclude any art that may be deemed controversial.

As the Mapplethorpe, Serrano, and Finley Four incidents show, "controversial" art in today's society typically involves sexual or homosexual themes or extreme feminist viewpoints. These are issues or views of which the country's more conservative representatives and their constituents disapprove as a result of America's puritanical influences. Thus, when stripped of all its deception, the "decency and respect" provision allows the more conservative constituencies to prevent sexual, homoerotic, or other similar controversial ideas from being funded.

To make this point more clear, imagine, for example, if the Helms Amendment either explicitly stated or was interpreted by the NEA to mean that artists with liberal views on welfare or socialized medicine could not be funded by NEA grants. Then, to underscore this fact, the Republican Congress was able to muster enough votes to withhold that portion of funding from the NEA budget which went to such artists' views or constantly threatened to abolish the NEA if such views were in fact funded. Perhaps this hypothetical Congress even went so far as to come one vote short of abolishing the NEA in order to ensure compliance. Recall that our Congress did exactly this when they drastically slashed the NEA's budget and forced the NEA to require all museums to return government funds that went toward "indecent" or "offensive" exhibits. However, if the speech that Helms and his constituency were trying to suppress was welfare or national health care advocacy, the restrictions would clearly be rejected by the courts as impermissible viewpoint-based discrimination.[208] Free speech is free speech. Welfare and health care are just as important to protect, and are just as protected by the Constitution, as voices addressing sexuality and feminism. The only limit that should be placed on such speech is the legal limitation imposed by obscenity, not offensiveness, decency, or respectability. The NEA is already bound by the laws on obscenity, and the legislators are not even trying to use this legal means against the Finley Four. Thus, looking at the Helms Amendment from this

[208] Like everything else, this too is debatable. However, it is very likely that the Supreme Court would not allow these partisan restrictions, so the analogy still holds true.

analogous but slightly different perspective, the absurdity and danger the amendment poses to free speech in the marketplace of ideas becomes quite clear. Even indecent and unrespectable speech is constitutionally protected[209] and cannot be discriminated against based on viewpoint.

V. APPROACHES TO SOLVING THE NEA'S CONSTITUTIONAL DILEMMA

A. Artistic Excellence — The Better Standard

If the NEA grantmaking standard remained as originally drafted the NEA could protect itself from government retribution by justifying every grant with objective standards of "artistic excellence." Under the criteria of "artistic excellence," the NEA merely made broad general categorical-based subsidies. Once the agency attempted to appease Congress by specifying that the type of art that is to be awarded grants must be "decent," they differentiated the content of the grant proposals on the basis of viewpoint. As a result, it is logical to conclude that "considerations of 'decency' are inherently unrelated to the quality of the art"[210] and counterintuitive to the idea of "free expression." It is reasonable to believe that a person could find a work of art to be artistically excellent and at the same time indecent. Mapplethorpe's work can arguably be assessed in this manner. His black and white photographs portraying nude interracial or same-sex couples reflect his undeniable expertise with lighting, the camera, texture, and his ability to evoke emotion and communicate silently with the viewer.

The initial premise of the NEA was to subsidize art on the basis of artistic excellence, to which notions of "decency" are unrelated. Under the current statutory scheme that requires the Council to consider "decency," if one grant proposal is "decent" but less artistically excellent than another "indecent" but artistically excellent grant proposal, the art deemed "indecent," even though superior in quality, will not be

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[209] *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("[s]exual expression which is indecent but not obscene is protected by the First Amendment . . . .").

[210] *See* Redish & Kessler, *supra* note 11, at 580.

allowed to communicate its message.[211] "[I]n such a situation a court could properly conclude, as a matter of law, that Congress's concern is not with issues of artistic quality, but with wholly extraneous normative moral, social, and lifestyle judgments."[212] The "decency" clause extends far beyond permissible constitutional categorical-based, content-neutral subsidies and actually skews public debate by subsidizing and promoting only those artworks which are "decent" and not necessarily of the highest artistic quality. Therefore, the better standard, and the only standard Congress has created which is truly workable and viewpoint-neutral, is that of "artistic excellence."

1. Government Retains Viewpoint-Neutral Control Over Art

This entire debate does not conclude that the NEA is incapable of providing grants without violating the Constitution. On the contrary, viewpoint-neutral decisions to fund particular categories or subjects of expression are within the confines of the First Amendment.[213] The NEA could provide viewpoint-neutral subsidies by awarding grants to particular categories of art, such as performance art, film, and musicals, without assessing the "moral" appropriateness of the message or subject matter. The criteria would be based on objective aesthetic values. However, when the government chooses to fund speakers on the basis of their viewpoint, it violates the First Amendment under the guise of neutrality.[214] It is vital to First Amendment values "to draw a

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[211] Redish and Kessler argue that "if a particular applicant is denied [funding] on the grounds that his art is gross or [indecent or] offensive, it would be effectively impossible for a reviewing court to conclude, for constitutional purposes, that such a judgment was substantially unrelated to the work's artistic quality." *Id.*

[212] *Id.*

[213] Categorical subsidies involve government speech and the right to hire a speaker to give a speech that expresses one particular viewpoint on one particular issue. Furthermore, when these types of subsidies are questioned they are subject to rational review and, as long as the funding is rationally related to the governments goal (of funding particular type of speech), then the funding will pass review. However, it is notable that regardless of the constitutionality of the subsidization, both viewpoint-based and categorical-based regulation reduce the "sum total of expression" contributed to public debate. *Id.* at 569.

[214] Redish and Kessler deem this form of government subsidy presumptively unconstitutional because the government dramatically skews public debate and under-

line that allows government to subsidize speech in a categorical manner but simultaneously denies it the power to subsidize on the basis of viewpoint."[215]

B. Abolishment of the NEA to Prevent Government Interference

Libertarians have always held First Amendment freedoms in high regard and found that *any* government involvement in these freedoms should be rejected. They argue that this is the only true way to prevent government from censoring ideas that may be "controversial." Even though the NEA's controversy may be solved by abolishing the program, its void would leave the country artistically and culturally empty.

Elizabeth DeGrazia, a law professor who supports reforming the grantmaking statute, argues that "[g]ranted, the government's funding of art should be removed from political processes, however, it does not necessarily follow that the only way to ensure this is for the NEA to be abolished."[216] As has been discussed throughout this Comment, under the former "artistic merit and excellence" standards the NEA played an integral part in expanding the marketplace of ideas. To simply destroy the NEA would be to "throw out the baby with the bath-water." In other words, despite the controversy that plagues the NEA, it continues to do important work by funding even non-controversial programs in small rural areas that otherwise could not exist.[217] Thus, it should

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mines the Fist Amendment by funding only those viewpoints it agrees with or desires to promote within a particular category. *Id.* at 568. The theorists also ask the question:

> [W]hy [does] efficient representative government somehow requires the opportunity to control the flow of debate among private [speakers] through the selective use of viewpoint-based subsidies. At least as a general matter, government should be able to operate effectively without the need to "deputize" private parties to foster government views and positions.

Id. at 569-70.

[215] *Id.*

[216] See DeGrazia, *supra* note 30, at 151.

[217] It is possible that rural cities do spawn many talented artists worthy of NEA funding; however, those artists may leave the city because their artistic expression is neither condoned nor appreciated. Furthermore, controversial artists like Finley,

be clear from this Comment that the problems with the NEA can be resolved without terminating all the good work done by the agency.[218]

C. *Privatization of Funding Art*

Most of the individual artists and museums the NEA funds are located in urban centers like New York or Los Angeles. It has been suggested that the NEA has become a national think tank for Hollywood and the entertainment industry. One solution to the constitutional problem presented by the "decency" provision is to abolish the NEA and force Hollywood and the entertainment industry to fund its own expression.[219] Hollywood is probably very capable of funding an NEA-like program by, among other ways, placing a special tax on entertainment-related companies, which would go directly to the art program. One major Hollywood blockbuster grosses as much as $200 million nationally and even more world-wide. The NEA's budget before the cuts was approximately $90 million, an amount which could be compensated by the entertainment industry as a whole according to share of market participation. Furthermore, it could be a no-loss situation if these companies could receive a tax refund for the amount of money they contributed to the program.

Mapplethorpe, and Serrano constitute a small percentage of the artists awarded grants by the NEA. "The majority of the NEA budget does not fund cranks who live to bring a blush to the cheeks of the hated bourgeoisie." *See* Lileks, *supra* note 55, at A9.

[218] Another proposed solution is to abolish the NEA and send its budget directly to the states so they may fund art as they see fit. In the past, Congress "voted down a proposal that would do away with the NEA and instead send $80 million directly to the states for arts and arts education." *He's Not Pals With Karen Finley?*, L.A. TIMES, July 14, 1997 at F2.

[219] Because the majority of conservative middle-America has been ignored by the artistic culture both in receiving NEA funds and retaining its artists, it has been suggested that those industries which financially benefit the most from the art should fund it. The NEA opposers argue "that funding art as a jobs program is just pork-barreling, which we all detest and despise, and if high culture is R[esearch] & D[evelopment] for Hollywood, why shouldn't Hollywood pay for it?" *See* Pollitt, *supra* note 20, at F2.

However, if the NEA was privatized, it would become very difficult, if not impossible to make sure smaller endeavors such as a local high school or community play in a small obscure town also received adequate funding. Those in rural communities would feel the most robbed and would be left to wonder why their "decent" "uncontroversial" art was no longer being funded:

> In some cases NEA money keeps the local arts alive, and their loss would hit a community hard. It takes a lot of money to run a theater, an orchestra, a tiny opera company in a town of limited means. Big cities can pick up the slack, but for some small burgs where the local chicken plant just closed, the NEA is the only thing that lets the community theater put on "Show Boat."[220]

Many of the same problems that arise with the "decency and respect" provision would also arise if privatization occurred, but these problems would not run afoul of the Constitution. Large conglomerates would be able to influence public thought, attitudes, and debate even more than they already do. Because corporations are typically concerned with public image and marketing, they may avoid funding controversial works of art. Thus, new explosive ideas would stand little chance of becoming funded. Industries like Hollywood already have immense power over culture today. The publicly funded NEA, with artistic excellence as its standard, was a haven for artists who did not want to "sell-out" to corporate or industrial ways of thinking. If the NEA was abolished in favor of private funding, the concept of a truly "neutral" forum where the marketplace of ideas could flourish will cease to exist.

VI. CONCLUSION

The First Amendment's goal is to protect speech that contributes to the marketplace of ideas. Frequently, speech that is most influential in public debate is speech that may be considered controversial, indecent, or offensive to the status quo. Although this speech may be offensive to some, it must be tolerated in order to broaden the subjective norm of speech that is acceptable in society. The government, via the NEA, is in the best position to facilitate a truly neutral marketplace of ideas and to contribute to America's culture by subsidizing art in a way that is

[220] Lileks, *supra* note 55, at A9.

least restrictive of the artist's message. However, in the government's noble attempt to encourage thought and expression it has attempted to gain more control over the type of speech allowed to influence the marketplace and has artificially skewed public debate.

The NEA's "decency and respect" provision is one such way government controls or censors messages allowed to have an impact on the marketplace of ideas. Government funding of expression is vital to a speaker's ability to convey his message to a broad audience. Tempering the government's authority in its effort to restrict the speaker's message is vital to the preservation of the First Amendment. Thus, the Court should be increasingly skeptical of restrictions that target certain messages and situations where the government is able to hide its control behind false definitions of government subsides.