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Agencies and the Arts: The Dilemma of Subsidizing Expression

By Jennifer Weatherup *

*This so-called piece of art is a deplorable, despicable display of vulgarity This is an outrage, and our people's tax dollars should not support this trash, and we should not be giving it the dignity.*¹

[T]he Arts Endowment has another unique strength to bring to the area of advocacy – the hard won wisdom of having survived the culture wars as a public agency. No major cultural institution in America was subject to more prolonged and exacting criticism – from both right and left – than the NEA. No agency survives such a process without gaining clarity about its mission and its methods, its constituency and its challenges.²

I. ISSUES RAISED IN THE ARTS REGULATION CONTEXT

“Art” is an innately ambiguous concept, and evaluations of artwork inevitably involve a degree of subjective judgment. Not only is art difficult to classify, but it may also spark controversy. Many artists seek to push the envelope with their work, calling social norms and conventions into question and often offending communities.

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1. 135 Cong. Rec. S5594-01 (daily ed. May 18, 1989) (statement of Sen. D’Amato). Alfonse D’Amato’s statement appears on a photograph by Andres Serrano.

2. Dana Gioia, Chairman of the National Endowment for the Arts (NEA), *Can the National Endowment for the Arts Matter?*, Speech before the National Press Club in Washington D.C. (Jun. 30, 2003), *available at* <http://www.nea.gov/news/news03/PressClubSpeech.html>.

Nonetheless, while particular works of art may be decried, the arts as a field are often embraced, and artistic works are often considered central to the character of a community or nation. The artistic impulse has long been considered a humanistic ideal which can enrich the lives of artists and art lovers alike, as “the arts have the ability to touch and move the soul, and can impress all kinds of beauty upon it.”³

Our government has affirmed the value of art, providing financial support for artists and arts programs through agencies such as the National Endowment for the Arts (NEA). However, any sort of arts regulation program will raise some inherent conflicts between opposing ideals and concerns regarding governmental funding of artistic expression. First of all, art by its very nature defies regulation, making it difficult for an agency to adhere to a set of standards without making an arbitrary judgment about what art is acceptable. Likewise, the potential for art to offend or challenge the public may become even greater when it is the general public that must pay for “offensive” artwork,⁴ leading taxpayers and their representatives to put political pressure on the agency to reform. If art is intended to be subversive to some extent, it is inevitable that controversial art will occasionally spark “a breakdown in relations among the actors: the taxpaying consumers of the arts, the subsidized artists, and the largess-dispensing agency.”⁵

As funding decisions are being made by the United States government, the question of arts funding implicates the Constitution. Unlike a private patron, the government must consider whether a particular funding program is likely to infringe upon the First and

3. Jacques Nicholas Paillot de Montabert, *On the Necessity of Theoretical and Philosophical Teaching of the Arts in our Education* (1843), in *ART IN THEORY, 1815-1900: AN ANTHOLOGY OF CHANGING IDEAS* at 214 (Charles Harrison, et al. eds., 2001).

4. “[T]he only shock to the middle class in such ‘shock art’ is having to foot the bill for it.” Neil C. Patten, *The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law* in *National Endowment for the Arts v. Finley*, 37 Hous. L. Rev. 559, 596 (2000).

5. Enrique R. Carrasco, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1534 (1986) (referring to a 1984 production of Verdi’s *Rigoletto* which transplanted the story to 1950’s New York and cast the characters as Mafia members, angering the Italian-American community and Representative Mario Biaggi).

Fifth Amendment rights of the artists that it chooses to patronize or ignore. Artistic work falls under the umbrella of free speech protected by the First Amendment;⁶ the free flow of ideas, like art itself, is valued for its ability to broaden the minds of citizens. Though the government is not affirmatively restricting speech, as in a more conventional First Amendment context, the government's spending power may have the same coercive effect as actual regulations. Thus, because the government might selectively fund artists based on their viewpoints, artists may find themselves handicapped unless they self-censor in an effort to gain access to a grant program. Additionally, the inherent ambiguity of arts funding may raise concerns over due process, as artists are ultimately subject to the opinions of those judging their art, which are difficult to quantify or analyze. However, the status of a merit-based grant is problematic when considered in a due process context; although government funds are relied upon by artists, who may have an expectation of receiving grants,⁷ that expectation may not be enough to trigger a due process analysis. It is necessary for the government and the agencies that enact arts legislation to consider the proper extent of their power to fund artists when speech is involved, as well as possible obligations with which the artists should comply.

However, the NEA and similar agencies have to consider factors aside from the constitutional implications of funding art; arts agencies are also vulnerable to political and economic realities that influence the government's funding priorities. In the past, the funding of controversial artists or exhibitions has sparked criticism from politicians, who have attempted to eliminate taxpayer funding for an agency which they claim undermines the values held dear by Americans. "[P]oliticians hostile to the N.E.A. portrayed artists as deviants, with too great a sense of entitlement and too little sense of social responsibility. Year after year the House of Representatives pledged to shut down the endowment."⁸

More mundane considerations also threaten arts agencies. As arts

6. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting).

7. Celia A. Cohen, *An Endangered Species? Artistic Grants as a Vehicle for the Evolution of Entitlements Law*, 49 SYRACUSE L. REV. 1277, 1284 (1999).

8. Robin Pogrebin, *Inheriting Uneasy Truce Between Art And Politics*, N.Y. TIMES, Dec. 24, 2001, at E8.

funding is considered less vital than many federal and state programs, politicians and their constituents will be hesitant to spend money on art, especially controversial art, when that money could be put towards more practical programs. "For many people the arts and arts education are viewed as expendable, elitist luxuries rather than necessary elements of a healthy democratic society."⁹ Thus, arts agencies are uniquely susceptible to budget cuts unless they can convince the public that the arts are worthy of public support. This year, states reduced funding for their arts agencies by an average of twenty-three percent, with California cutting about ninety percent of its arts funding and Missouri completely eliminating its arts program.¹⁰ In cases where agencies' budgets increase, arts funding is likely to attract the ire of those who find such spending wasteful. President Bush's bid to increase the NEA's budget by \$18 million¹¹ quickly attracted criticism even though the funds were relatively small in relation to the President's overall budget proposal.¹²

The NEA and arts agencies are thus faced with the dilemma of ensuring that their decisions do not infringe on artists' constitutional rights while convincing an often hostile public of the validity of its mission. This paper will first examine the issues and the obligations that arise in the context of arts regulation, considering the limitations on the government's ability to fund as well as the limits of artists' constitutional rights. Later, this paper will deal with the case of the NEA and its enabling statute, focusing on the "decency and respect

9. Gioia, *supra* note 2.

10. Carl Hartman, *Cash-Strapped States Cut Arts Funding*, L.A. TIMES, Jan. 2, 2004, at E41. Federal funding has slightly increased in the past year, going from 115.7 million to 122.5 million, however, the seven million dollar increase in federal funding is dwarfed by the over eighty million dollars in cuts by state arts agencies. *Id.* The decline in government funding, along with the decrease in corporate philanthropy, has had a significant effect on arts organizations which must be more conscientious about finances, and therefore less able to take artistic risks. See Stephanie Strom, *Soft Financing Causes Arts Groups to Make Hard Choices*, N.Y. TIMES, June 19, 2004, at B7.

11. The vast majority of funding would go towards a new program titled "American Masterpieces: Three Centuries of Artistic Genius." *The Gift Horse*, N.Y. TIMES, Jan. 31, 2004, at A16.

12. "[T]he line item that has most riled the party's conservative activists is trivial by comparison: it's the \$18 million boost for the National Endowment for the Arts – an agency long questioned by conservatives." Gail Chaddock, *Budget Austerity? Only in Part*, CHRISTIAN SCI. MONITOR, Feb. 2, 2004, at 2.

clause,” which was added amid a period of criticism of the NEA’s mission and required the agency to consider “general standards of decency and respect for the diverse beliefs and values of the American public” when making its funding decisions.¹³

II. THE CONSTITUTIONAL IMPLICATIONS OF ARTS FUNDING

The very idea of governmental funding for the arts raises certain unique issues. Perhaps most significantly, the government’s patronage of the arts necessarily means that the government is entering the area of expression, thereby creating potential First Amendment issues. Although the government, as a patron, does not forbid expression in a technical sense, an agency’s power to allocate funds, if done selectively, may indirectly cause artists to curb their expression in order to get funding. The practical importance of federal funds on an artist’s reputation and livelihood ensures that most artists will not risk losing these funds by expressing themselves as freely as they might.

The subjective nature of the arts agencies’ judgment is also constitutionally problematic, as overly vague guidelines may violate due process. Artists, unable to know for certain what the agency requirements entail, must restrict their work in order to make sure that it fits well within the unclear requirements for applicants. Additionally, given the unquantifiable nature of these requirements, artists who are denied funding will be unable to know how the agency reached its decision, and even whether it based the denial on merit or on the viewpoints expressed. In order to determine the duties of arts agencies, it is necessary to consider the rights of those who are applying for funding as well as those of the government.

A. Advocates for the Arts v. Thomson

One of the key early cases involving arts agencies is *Advocates for the Arts v. Thomson*,¹⁴ which laid out many of the principles and issues inherent to arts funding. The controversy arose in 1973, eight

13. 20 U.S.C. § 954(d)(1) (2004).

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

years after the National Endowment for the Arts was created by Congress.¹⁵ The state of New Hampshire, reacting to this legislation, created the New Hampshire Commission on the Arts and gave it authority over the state's grant program.¹⁶ Eventually, the Commission began to submit grant proposals of over \$500 for the approval of the Governor and Council; this practice was not codified until 1975.¹⁷ *Granite*, a literary journal that had previously received a grant from the Commission, was denied a second grant after the Governor and Council judged a particular poem included in an earlier, government-funded, issue of the magazine to be "an item of filth."¹⁸ This decision, based on a "personal adverse reaction to a single poem," was challenged on both First and Fourteenth Amendment grounds.¹⁹

Turning to the First Amendment claim, the court found that *Granite* did not suffer a constitutional harm.²⁰ Significantly, the court noted that there had been no affirmative governmental suppression of speech; rather, the magazine had not received any additional government support.²¹ Moreover, it was necessary in this context for there to be denials based on a judgment of the artistic merits of a work,²² and "courts have no particular institutional competence warranting case-by-case participation in the allocation of funds."²³ The court also denied that a more deliberate procedure would be desirable.²⁴ In order to delineate the meaning of "artistic merit" for purposes of administrative review, the Commission would have needed to sacrifice the flexibility that was necessary to make continued subjective judgments on the merits of various artistic works. Artistic merit, by definition, eludes categorization and cannot

15. *Thomson*, 532 F.2d at 793.

16. *Id.*

17. *Id.*

18. *Id.* The Governor and Council had originally planned to approve the grant but changed their minds after the poem was shown to them. *Id.*

19. *Thomson*, 532 F.2d at 794.

20. *Id.* at 798

21. *Id.* at 795.

22. "If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable." *Id.* at 796.

23. *Id.*

24. *Id.* at 797.

be fully translated into standards for review.²⁵

Near the end of its discussion, the court touched on the potential for viewpoint discrimination in the funding context. For the court, the existence of arts funding posed a certain threat; “[t]he real danger in the injection of government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others.”²⁶ Thus, if there were evidence of a *pattern* of discrimination, the Constitution would be implicated.²⁷ The Commission’s decision in this case was not seen as adequate to raise a constitutional question regarding discrimination, but the court nonetheless acknowledged the potential for a viewpoint discrimination claim in the context of a governmental arts funding program.²⁸

The court found more substance behind *Granite*’s contention that there was a denial of due process when the Commission rejected *Granite*’s grant. However, the court ultimately decided that the magazine did not qualify for due process protection, stating:

What is perhaps most troubling about this case is not that *Granite* should be denied public support, but that the denial should be based on a reading of just one poem in a back issue, without consideration of the overall quality of the publication either alone or as compared to competing grant applicants. But we doubt that this problem has a constitutional solution.²⁹

Although the court did not deny that the Commission may have treated *Granite* arbitrarily, it noted that there is no “right to public support of private expression.”³⁰ *Granite* did not have a property interest in continued grant support and could not seek constitutional

25. *Id.*; see also Cara Putman, *National Endowment for the Arts v. Finley: The Supreme Court Missed an Opportunity to Clarify the Role of the NEA in Funding the Arts: Are the Grants a Property Right or an Award?*, 9 GEO. MASON U. CIV. RTS. L.J. 237, 248 (1999).

26. *Thomson*, 532 F.2d at 798.

27. *Id.*

28. *Id.*

29. *Id.* at 797.

30. *Id.*

treatment.³¹

Even if such an interest were present, the court was skeptical that there could be meaningful process due to “the ultimate necessity of subjective judgment.”³² The court likewise found it difficult to claim that any deprivation of a grant that would be awarded purely under subjective artistic merit criteria could be given unfairly.³³ The court concluded that a more formal finding on the matter of artistic merits would have little substantive value,³⁴ and that the risks presented in this case were not significant enough to argue that a costly hearing or statement of reasons would be constitutionally necessary.³⁵ Despite the fact that the Governor and Council probably denied funds arbitrarily, the nature of merit-based grants and art in general make the availability of higher procedural requirements untenable.³⁶

*B. Southeastern Promotions, Ltd. v. Conrad*³⁷

Southeastern Promotions dealt with the granting of theater space controlled by the city as a form of subsidization.³⁸ In the case, the Supreme Court found that the city, in its denial of theater space to Southeastern for its production of the controversial musical *Hair*, had imposed an unconstitutional prior restraint on the theater company.³⁹ After receiving Southeastern’s application, the directors voted to disallow use of the space despite the fact that there were no conflicting engagements at the theater.⁴⁰ In addition, none of the directors had been directly exposed to the play or script but relied on

31. *Id.*

32. *Thomson*, 532 F.2d at 797; see Cohen, *supra* note 7, at 1295-98 (for an analysis of property rights in an art funding context).

33. Carrasco, *supra* note 5, at 1549.

34. *Thomson*, 532 F.2d at 797. The court goes so far as to say that such a finding would only be of “cosmetic significance.” *Id.*

35. *Id.*

36. The relative value of procedural requirements may be debated. “[P]erhaps if the author had been offered the opportunity, he could have been able to explain the symbolism and the ideas behind the poem. The court could not possibly have known what would be the outcome of the hearing.” Cohen, *supra* note 7, at 1299.

37. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

38. *Id.* Although the theater itself was privately owned, it had been under a long-term lease to the city. *Id.* at 547.

39. *Id.* at 552.

40. *Id.* at 548.

secondhand knowledge in making the determination that the production would be inappropriate.⁴¹ Having made the determination that a production of *Hair* was not “in the best interests of the community,”⁴² the directors notified Southeastern of the decision without presenting a written statement of reasons.⁴³ Southeastern applied for an injunction, but the advisory jury determined that the musical was obscene.⁴⁴

The Court did not determine whether the finding of obscenity or the standard used by the jury was correct; rather, it chose to focus on the issue of whether the board’s action consisted of an unconstitutional prior restraint.⁴⁵ Noting that “[a]n administrative board assigned to screening stage productions – and keeping off stage anything not deemed culturally uplifting or healthful – may well be less responsive [to constitutional interests] than a court,”⁴⁶ and that the risks of overbroad censorship are high, the Court concluded that procedural protection must be provided.⁴⁷

The procedure followed in *Southeastern Promotions* was considered to be highly inadequate. There was no procedure in place that allowed Southeastern to quickly try its case on the merits, thereby forcing Southeastern to reschedule the performances.⁴⁸ Regardless of the validity of the board’s decision, it failed in its duty to provide safeguards to ensure that the production was not unjustly treated by the agency.⁴⁹

Notably, the Court did not believe that Southeastern’s option of performing the show at a private venue eliminated the possibility that a constitutional violation had occurred.⁵⁰ Although the particular facts indicated that other theaters would not be capable of housing

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 550.

45. *Id.* at 552. However, opinions varied in this 5-4 decision. See Carrasco, *supra* note 5, at 1539-40.

46. *Southeastern Promotions*, 420 U.S. at 560-61.

47. *Id.*

48. *Id.* at 561-62.

49. *Id.*

50. *Id.* at 556

the show,⁵¹ the existence of an alternative did not justify the government in restricting use of its theater without some process.⁵² The Court noted that “[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”⁵³

Thus, the holding ensured that the artist seeking use of a state-controlled theater has certain rights, although they are procedural rather than expressive. However, the nature of the benefit, namely the use of a theater, differs from the money grants at issue in many other arts subsidies cases.⁵⁴

C. Brooklyn Institute of Arts and Sciences v. New York⁵⁵

The court found a First Amendment injury in *Brooklyn Institute*, which demonstrates the limitations of governmental power in a funding context.⁵⁶ The case arose out of the controversy surrounding the museum’s *Sensation* Exhibit and Mayor Rudolph Giuliani’s attempts to terminate funding for the museum.⁵⁷ Although the museum was supported by the city of New York (the City), the City’s funding was relatively limited in scope, covering expenses related to the museum’s maintenance and educational programs, but not its artistic endeavors.⁵⁸ The *Sensation* Exhibit, showcasing the collection of Charles Saatchi, was not funded through the government at all.⁵⁹ However, city officials offended by the exhibit moved to withdraw support from the Brooklyn Institute.⁶⁰ Giuliani, particularly taken aback by Chris Ofili’s *The Holy Virgin Mary*, was critical of the idea that a museum that displays “offensive” works

51. “[N]one apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required.” *Id.*

52. *Id.*

53. *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)).

54. Carrasco, *supra* note 5, at 1540-41.

55. *Brooklyn Inst. of Arts & Scis. v. New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

56. *Id.*

57. *Id.*

58. *Id.* at 189.

59. Daniel Kunitz, *True “Sensation”* (Oct. 2, 1999), at <http://archive.salon.com/ent/feature/1999/10/02/dung/>.

60. *Brooklyn Inst.*, 64 F. Supp. 2d at 186.

should be sponsored by the government in any form.⁶¹ He stated: “[y]ou don’t have a right to a government subsidy to desecrate someone else’s religion [I]f you are a government subsidized enterprise then you can’t do things that desecrate the most personal and deeply held views of the people in society.”⁶² The City eventually withheld payments and filed for ejectment, claiming “a right to eject the Museum based solely on its perception of the content of works in the Sensation Exhibit.”⁶³

The court noted that the indirect as well as direct suppression of ideas may create a First Amendment violation.⁶⁴ Citing *Perry v. Sindermann*,⁶⁵ the court furthered the notion that, while a party may not be entitled to a benefit, the government is still constrained by constitutional concerns:

[E]ven though the government may deny him the benefit for a number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech This would allow the government to ‘produce a result which [it] could not command directly.’ Such interference with constitutional rights is impermissible.⁶⁶

Thus, the basic principle of unconstitutional conditions, which states that the government cannot use the denial of benefits to curb a constitutional right such as expression, was applied to the arts funding context. While the City claimed that it did not preclude a purely private exhibition which taxpayers do not have to help

61. *Id.* at 191.

62. *Id.*

63. *Id.* at 192-93. The City dropped earlier bases for ejectment in the suit. *Id.* at 192.

64. *Id.* at 199.

65. *Perry v. Sindermann*, 408 U.S. 593 (1972) (stating that a professor without tenure cannot be denied renewal of contract for criticism of the school’s administration).

66. *Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

finance, the aversion of taxpayers and government officials to the artwork was considered irrelevant to the constitutional claim.⁶⁷

*D. People for the Ethical Treatment of Animals v. Giuliani*⁶⁸

In this case, the court dealt with a less hallowed form of artistic expression: a public art exhibition.⁶⁹ In considering a public exhibition with goals other than the free expression of ideas, such as tourism, encouragement of civic spirit and appeal to a broad base of viewers, the committee that administers the event may be required to comply with somewhat different constitutional standards. These standards, based on the nature of the forum in which the artwork is being presented, are more generous in allowing the government to control speech.

The exhibition in the case was New York City's *CowParade*, a joint public-private enterprise⁷⁰ in which fiberglass cows had been decorated, sponsored, and displayed in prominent places around the city.⁷¹ The city's interest in *CowParade* was not simply an aesthetic one; it had hoped to profit from increased tourism, the sale of *CowParade* merchandise, and the eventual auction of the cows.⁷² A committee, set up by an agreement of the public and private parties and consisting of city representatives, was given the discretion to create submission guidelines and reject any submission that "includes material that is indecent or demonstrates a lack of proper respect for

67. *Brooklyn Inst.*, 64 F. Supp. 2d at 200.

[Taxpayers] subsidize all manner of views with which they do not agree, indeed, which they may abhor, through tax exemptions and deductions given to other taxpayers...where the denial of a benefit, subsidy, or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial will be enjoined. That is all that is involved here.

Id.

68. *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294 (S.D.N.Y. 2000).

69. *Id.*

70. *CowParade* was co-hosted by New York and the private entities CowParade, LLC, CowParade Holdings Corp., and CowParade NYC 2000, Inc. *Id.* at 298.

71. *Id.* at 298-99.

72. *Id.* at 299.

public morals or conduct.”⁷³ The guidelines eventually adopted by the committee stressed that the exhibit was to be “festive, decorous, whimsical, and appropriate for a broad-based audience of all ages,”⁷⁴ and excluded designs with religious, sexual, and political themes.⁷⁵ Submissions that were not rejected could be “adopted” by private sponsors.⁷⁶

Although People for the Ethical Treatment of Animals (PETA) had one of its two submissions approved,⁷⁷ its second submission, which “divided the cow into sections in a manner intended to resemble a butcher shop chart . . . with statement[s] or quotation[s] ‘concerning the health and ethical problems associated with the killing of cows for food,’”⁷⁸ was rejected.⁷⁹ The design was unanimously “flagged” by the committee members, who independently searched the designs for potentially troublesome content.⁸⁰ Taking note of three of the statements, the committee “didn’t reject the design merely because it compelled people to think What troubled the committee was the provocative, graphic, offensive effect of the text chosen.”⁸¹ PETA rejected the opportunity to resubmit a slightly different design.⁸²

In determining whether the rejection could be considered a content-based restriction, and therefore a violation of the First Amendment,⁸³ the court in *PETA* determined that its analysis would

73. *Id.*

74. *Id.* at 320.

75. *Id.*

76. *Id.* at 300.

77. Organizations sponsor cows, typically created by other artists, for *CowParade*, but PETA requested to have its own artist design the cows instead. *Id.* The approved cow was covered with imitation leather and displayed the message “buy fake for the COW’S sake.” *Id.*

78. *Id.*

79. The other three rejected designs were “Moni-Cow Lewinsky,” rejected as a personal attack, a cow designed to look like a Hasidic Jew, considered potentially offensive to Hasidic Jews, and a “stamp of approval” cow that was rejected as a political attack on Mayor Giuliani. *Id.* at 301 n.7. Around 1200 designs were accepted by the committee, and 500 of the accepted designs were eventually sponsored. *Id.* at 301.

80. *Id.*

81. *Id.*

82. *Id.* at 302.

83. *Id.* at 304.

turn on the question of how to properly classify *CowParade* as a forum.⁸⁴ In a traditional public forum, which is set aside for public debate, the government “may enforce content-based exclusions and promulgate content-neutral time, place and manner regulations of speech.”⁸⁵ However, the government has the burden of showing that such restrictions are needed to further a compelling state interest and are “narrowly drawn” to serve that interest.⁸⁶ In contrast, the government is given more latitude to regulate speech in a nonpublic forum, which has not been designated for debate; the government must only ensure that its restrictions are reasonable and that suppression of speech is not based in government opposition to a speaker’s viewpoint.⁸⁷ The court also described an intermediate category: the designated or limited purpose public forum, “created either for a limited purpose, such as use by particular groups, or for the discussion of certain subjects.”⁸⁸

However, the court in *PETA* noted that this third category has been the subject of confusion among courts.⁸⁹ Among the principal Supreme Court cases in the analysis was *Rosenberger v. Rector*,⁹⁰ which defined a university’s method of allocating activities fees as a limited purpose public forum.⁹¹ The Court in *Rosenberger* distinguished the designated forum category and held that an intermediate level of scrutiny was proper, and required any restrictions to be not only reasonable, but viewpoint-neutral.⁹² Moreover, a strict scrutiny test applies to judicial analysis of viewpoint discrimination.⁹³ A later interpretation of the designated

84. *Id.* at 304-05.

85. *Id.* at 305. The court cites *Perry v. Sindermann* for this principle and for other concepts related to the classification of forums. *Id.*

86. *Id.* *PETA* argues that the *CowParade*, which uses public spaces such as parks to display the decorated cows, is a traditional public forum. *Id.* at 311. However, the court rejects this argument, noting that the government can “carve out” spaces within public forums if such actions serve a valid purpose. *Id.* at 314. Speech occurring in these nonpublic forums is subject to a lesser standard or review. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

91. *PETA*, 105 F. Supp. 2d at 306-07.

92. *Id.* at 307

93. *Id.*

public forum doctrine⁹⁴ defined a designated forum as one in which the government intended to grant general access to a class of speakers.⁹⁵ “[G]iving ‘selective access’ to a *particular* class of speakers whose members must then individually ‘obtain permission’ denotes a nonpublic forum.”⁹⁶

The court moved on to consider the treatment of limited purpose public forum in the Second Circuit. In *Travis v. Owego-Apalachin School District*,⁹⁷ a limited forum was described as a government-created nonpublic forum in which expression was limited to “certain kinds of speakers or to the discussion of certain subjects.”⁹⁸ The *PETA* court noted that the application of either a “reasonableness” or “strict scrutiny” standard will depend on whether the speaker “falls within the purpose for which the forum was created.”⁹⁹

The often contradictory definitions of limited public forums proved inconclusive for the court. Looking to the facts of the case, the court noted that the cow sculptures, and the forum in question, were financed and owned by private parties,¹⁰⁰ as well as sponsored with a limited purpose in mind.¹⁰¹ Given the intent to circumscribe expression, as well as the fairly limited and private nature of participation, the court was unable to find a public forum.¹⁰²

94. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

95. *PETA*, 105 F. Supp. 2d at 307.

96. *Id.*

97. *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688 (1991).

98. *Id.* at 692 (citing *PETA*, 105 F. Supp. 2d at 308).

99. *PETA*, 105 F. Supp. 2d at 309.

100. The court stated:

The structures are owned not by PETA nor by the City, but by the CowParade Organizers. The forum from which PETA’s cow design was excluded therefore is not a particular corner of a sidewalk or park, but the actual cow artwork with the message PETA would place there under the auspices of the CowParade program.

Id. at 317.

101. From the beginning, the government imposed limits on the size of the forum as well as the expression that was allowed. *Id.*

102. *Id.* at 355-36. The use of the “forum doctrine” in cases involving government funding of speech is criticized by Frederick Schauer:

In the typical case, the complaint is not about access, but about discriminatory treatment. And at the heart of this issue is the seemingly banal but quite important point that content-based

Having determined the CowParade to be a nonpublic forum subject to a lighter degree of scrutiny, the court turned to the guidelines and decision-making process of the Commission.¹⁰³ Noting the artistic context of the Commission's guidelines, the court denied PETA's contention that they were overbroad.¹⁰⁴ As was noted in *Thomson* and other arts cases, vague regulations may be upheld in order to allow the government to regulate artistic programs.¹⁰⁵ The government, when acting as patron, "requires a reasonable zone for exercise of discretion and flexibility which is not always capable of being articulated as precise and universal standards."¹⁰⁶ Moreover, the exhibition's guidelines and restrictions have a reasonable basis: to increase tourism and appeal to many groups across society. Restricting access was necessary in order to achieve these aims:

Were the art exhibit to turn into such a carnival and maelstrom of public protest, the capital investment expended by its proponents to produce it would be imperiled, as would be the reasonable expectations of the government and the CowParade Organizers of generating the revenues necessary to fulfill some of the other primary purposes they contemplated for the event.¹⁰⁷

discriminatory treatment is appropriate in some contexts, but not in others. Yet once we recognize the idea, the point of combining the determination of which contexts permit content discrimination and which do not with public forum analysis is elusive.

Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 98-99 (1998).

103. *PETA*, 105 F. Supp. 2d at 321.

104. *Id.*

105. *Id.*

106. *Id.* at 322.

107. *Id.* at 330. However, the court does not accept the City's contention that CowParade is merely "humorous entertainment" which is not intended to spark any sort of debate and that PETA's "message-based designs" are therefore inconsistent with the stated purpose of the event. *Id.* at 323. Such a position "implies that, as though by some Cartesian means, art may be disassociated from ideas, or entirely drained of conceptual content, leaving a residue of nothingness. This [c]ourt cannot lend weight to that premise In fact, art is a poetry of ideas, a medium for the very embodiment of thought." *Id.*

Broad guidelines excluding certain designs were appropriate in this case, given that acceptance of the designs was a matter of artistic discretion and that the event was created to promote tourism and to entertain a variety of passersby, rather than to allow for a wide range of expression.

Moreover, the Committee's actions towards PETA were fair in light of the restrictions provided by the guidelines. The Committee did not give a flat denial; rather, it explained the reasons that the submission did not comport with the aims of the project and gave the organization an opportunity to amend its design.¹⁰⁸ The potentially broad guidelines were also augmented by an internal memorandum, which further codified and standardized the Committee's selection procedure.¹⁰⁹ The uniformity of the selection process, and the explanation of a reasoning process, seemed to negate contentions that the Committee was not acting reasonably.

E. Rights and Responsibilities

Although *Thomson*, *Southeastern Promotions*, *Brooklyn Institute*, and *PETA* vary in terms of the role played by the government and the interest of the affected artist or speaker, all four cases illustrate concepts that can be applied in the context of art patronage by a government agency and help to delineate the boundaries of First Amendment protection in cases where arts subsidies are involved. As a general rule, the arts are by their very nature a matter of value judgment and discretion, and thus, the government and agencies which control funding are given some latitude in the development of workable standards. The nature and purpose of the art subsidization program itself may also alter the extent to which expression is protected. If the government is implementing an arts program which will necessarily have a limited scope, it may have greater justification for limiting artworks to those that fit within the scope of that program. Thus, when the government reasonably does not intend to open a program to a diverse group of voices, more restrictions are acceptable, and the government must face greater scrutiny if it creates a program that is meant to support free debate or expression.

108. *Id.* at 324.

109. *Id.* at 325.

However, the government is not given unbridled discretion and cannot allocate funds in a manner that would constitute improper viewpoint discrimination. The denial of funding, which may not technically be a vested proprietary right, may nonetheless implicate concerns similar to the denial of property. It appears that courts have generally not interpreted merit-based grants as “proprietary” rights deserving of due process protection. However, courts have considered the interests of potential grantees as similar to those of the untenured professor in *Perry v. Sindermann*,¹¹⁰ while the government has the right to take away the grant, it may not be able to do so for reasons which implicate a constitutional right, particularly if the decision to deny funding is based on aversion to a particular point of view.

III. CASE STUDY: THE NEA’S “DECENCY AND RESPECT” REQUIREMENTS

The most prominent arts agency in the United States is, unsurprisingly, the National Endowment for the Arts, which was created in 1965 with the express aim of fostering “a climate encouraging freedom of thought, imagination, and inquiry.”¹¹¹ However, carrying out its mandate is not as straightforward as it might look, as the NEA must also accommodate an often hostile legislature, which may explicitly or implicitly encourage the agency to fund projects that are less controversial or distasteful to taxpayers. The so-called “decency and respect” clause that is currently incorporated into the agency’s enabling statute is a direct result of this controversy. The attempts of the agency and courts to grapple with this phrase demonstrate the unique challenges inherent in a

110. *Perry*, 408 U.S. 593.

111. Kimberly Schmaltz, *National Endowment for the Arts v. Finley: Viewpoint Discrimination Masked as the Government’s Foray Into the Realm of Art Patron*, 26 N. KY. L. REV. 337, 338 (1999) (quoting 20 U.S.C. § 951(7) (1965)).

112. Carrasco, *supra* note 5, at 1525. Carrasco illustrates the antipathy that was felt towards the arts, providing as examples: a 1665 incident in which Virginians were prosecuted for producing a play; a Pennsylvania statute from 1700 which prohibited stage plays, masks, and revels; and some colonial Americans’ opposition to English ballad operas. *Id.*

program that provides government subsidies for creative expression.

A. A History of Arts Funding and the NEA

Government subsidization of artists and arts programs have been implemented fairly recently. In contrast to Europe, colonial America was unsupportive of the arts.¹¹² Private patronage began to flourish in the nineteenth century, and Presidents James Buchanan, Theodore Roosevelt, and William Howard Taft unsuccessfully attempted to establish federal arts programs.¹¹³ The first federally funded art programs arose during the Depression, when the Federal Arts Project (FAP) and Federal Theatre Project (FTP) were created as part of the Works Progress Administration (WPA).¹¹⁴ However, the aims of the programs were not to promote artistic or cultural merit, but rather to provide jobs for the unemployed.¹¹⁵ Although the programs helped to promote the careers of various artists, including Jackson Pollock, Stuart Davis, and Orson Welles,¹¹⁶ they were weakened in the wake of fears that allowing artists to have so much freedom of expression would lead to the creation of Communist propaganda.¹¹⁷ Both programs were eliminated by the time of World War II.¹¹⁸

It was not until the mid-1960s that the government took up the task of supporting the arts again. President Kennedy and President Johnson each appointed Special Assistants on the Arts, and Johnson created a National Council on the Arts.¹¹⁹ The NEA was one step further in promoting artistic and cultural excellence as values

113. *Id.*

114. *Id.* at 1526.

115. *Id.* “[I]n qualifying for the subsidies more weight was assigned to financial need rather than true ‘artistic excellence.’” Craig J. Flores, *Indecent Exposure: An Analysis of the NEA’s “Decency and Respect” Provision*, 5 UCLA ENT. L. REV. 251, 257 (1998).

116. Brenda L. Tofte, “*Baby, It’s Cold Outside:*” *The Chilling Effect of the Decency Clause on the Arts in the Aftermath of National Endowment for the Arts v. Finley*, 22 HAMLINE L. REV. 303, 314 (1998).

117. *Id.* at 313-15.

118. *Id.*

119. Carrasco, *supra* note 5, at 1526.

inherent to Johnson's "Great Society."¹²⁰ For the program's proponents, the artist, as the quintessential "individual," could serve as a representative for America, standing against Soviet conformity.¹²¹ However, support for the bill was not universal, and several artists were concerned that federal subsidization of the arts would infringe on artists' freedom or promote the creation of an *official* school of art.¹²²

The final legislation establishing the National Foundation for the Arts and Humanities seemed to reflect these ideals and concerns, demonstrating an intention to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States"¹²³ and expressly prohibiting control over the programs of grantees.¹²⁴ The NEA was given a three-tiered structure consisting of a chairperson appointed by the President,¹²⁵ the National Council on the Arts, which itself consisted of the chairperson as well as twenty-six appointees from the private sector,¹²⁶ and advisory panels which were made up of experts in areas that are under review.¹²⁷ The chairperson had the final responsibility to ensure that the requirements for selection were fulfilled by an

120. *Id.* at 1527. "The concept of the Great Society is unthinkable without a rich and flourishing cultural life. We lead the world in scientific achievement. Our standard of living is the highest in the world. We can afford to enjoy material things like no other nation on the globe." *Id.*

121. MICHAEL BRENSON, *VISIONARIES AND OUTCASTS: THE NEA, CONGRESS, AND THE PLACE OF THE VISUAL ARTISTS IN AMERICA* 16-18 (The New Press 2001).

122. Carrasco, *supra* note 5, at 1528. Critics, in an allusion to Stalin's "cultural watchdog" Zhdanov, expressed fears that the program would create "federal czars over the arts and humanities." *Id.*

123. 20 U.S.C. § 953(b).

124. "In the administration of this subchapter 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." 20 U.S.C. § 953(c).

125. 20 U.S.C. § 954(b)(1).

126. Carrasco, *supra* note 5, at 1530. Among the first members of the National Council on the Arts were Marian Anderson, Leonard Bernstein, Duke Ellington, Gregory Peck, Richard Rogers, and John Steinbeck. Nat'l Endowment for the Arts, *History and Purpose*, available at http://www.nea.gov/about/NCA/About_NCA.html (last visited Feb. 4, 2004).

127. Carrasco, *supra* note 5, at 1530-31.

applicant who was selected for funding.¹²⁸

B. The Controversy over Arts Funding

The NEA soon became a prominent political target; politicians have reacted to various controversial works by criticizing a system that could reward artists for producing works that appeared antithetical to the values of taxpayers who ultimately subsidize these artists. Although the vast majority of works did not attract controversy,¹²⁹ a few federally funded artworks prompted groups to try and overhaul the agency's grant process, or even disband the NEA itself. A 1984 production of *Rigoletto*, which modernized the setting to incorporate the New York Mafia, led the Italian-American community to protest the stereotypical portrayal of Italians.¹³⁰ Eventually, Representative Mario Biaggi proposed to amend the National Foundation on the Arts and Humanities Act to prohibit grantees from using NEA funds "to denigrate any ethnic, racial, religious or minority group" and to monitor grantee productions in order to ensure compliance.¹³¹

Further controversy arose in 1989 and 1990, when controversial work from photographers Robert Mapplethorpe and Andres Serrano came under fire, prompting Congress to check the NEA to prevent similarly offensive works from being funded in the future.¹³²

128. 20 U.S.C. § 954(d).

129. "Throughout the NEA's history, only a handful of the agency's roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public's trust." *Finley*, 524 U.S. at 574.

130. Carrasco, *supra* note 5, at 1521.

131. *Id.* at 1522-23. "[T]here 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.* at 1523; *see also* Flores, *supra* note 115, at 261-63.

132. Flores, *supra* note 115, at 252-53. Jesse Helms states his opinion on the NEA after funds go towards Serrano's "Piss Christ":

The Constitution may prevent the government from prohibiting this Serrano fellow's – laughably, I will describe it – artistic expression. It certainly does not require the American taxpayers or the Federal Government to fund, promote, honor, approve, or condone it. None of the above. Mr. President, the National Endowment's procedures for selecting artists and works of art deserving of taxpayer support are badly, badly flawed if this is an example of the kind of programs they fund with taxpayers'

Congress decreased the NEA's budget, subtracting the exact amount of money that was used to pay for the Mappelthorpe and Serrano exhibits.¹³³ In October of 1989, Congress compromised on an amendment to the NEA's statute. According to the amendment, NEA funds could not go towards work that the agency *judged* to be obscene.¹³⁴ When this requirement was held to be unconstitutional by the District Court's decision in *Bella Lewitzky Dance Foundation v. Frohnmayer*,¹³⁵ the NEA decided not to appeal the decision. Congress, with advice from an independent commission of constitutional law scholars, reformed its grant procedures.¹³⁶

Congress adjusted its earlier amendment, eventually implementing the "decency and respect" clause.¹³⁷ This provision, which was described by its author as "add[ing] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be *constantly taken into account* on behalf o[f] the American public,"¹³⁸ and "mandat[ing] that in the awarding of funds, in the award process itself, general standards of decency *must* be accorded,"¹³⁹ provided that applications were to be judged on the

money . . . [w]ell, they do not know what they are doing. They are insulting the very fundamental basis of this country. I say again I resent it.

135. Cong. Rec. S5594-01 (daily ed. May 18, 1989) (statement of Sen. Helms).

133. Flores, *supra* note 115, at 262-63.

134. *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774, 776 (C.D. Cal. 1991).

135. *Id.*

136. The Commission's report:

[c]oncluded that there is no constitutional obligation to provide arts funding, but also recommended that the NEA rescind the certification requirement and cautioned against legislation setting forth any content restrictions. Instead, the Commission suggested procedural changes to enhance the role of advisory panels and a statutory reaffirmation of 'the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us.'

Finley, 524 U.S. at 575.

137. The amendments also determined that the judiciary, not the NEA, could declare something obscene under *Miller*, that NEA panels would be more diverse, and that grants would not have content restrictions. Tofte, *supra* note 116, at 323.

138. *Finley v. National Endowment for the Arts*, 100 F.3d 671, 677 (9th Cir. 1996) (quoting 136 Cong. Rec. H9417 (Oct. 11, 1990)) (emphasis added).

139. *Id.* (quoting Cong. Rec. H9457 (Oct. 11, 1990)) (emphasis added).

basis of merit,¹⁴⁰ while “taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”¹⁴¹ The NEA accommodated Congress’ mandate by ensuring that the advisory panels would be diverse, as they would more accurately represent the nation itself because, by extension, their considerations would reflect the concerns and values of the people.¹⁴² This interpretation was also advantageous in that it was less likely to result in limitations on funding.¹⁴³

C. *Bella Lewitzky v. Frohnmayer*

Bella Lewitzky arose under a version of the NEA statute which existed after the October 1989 amendment and prohibited the funding of works that the NEA judged as possibly obscene.¹⁴⁴ The statute further described work that “may be considered obscene [as] including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.”¹⁴⁵ In response, the NEA added a new “certification requirement” to its grant request forms in which the grantee had to certify that funds would not be used to “promote, disseminate, or produce” works that the NEA may judge to be obscene.¹⁴⁶ The NEA, in its internal Statement of Policy, also indicated that the previously articulated “*Miller* standard”¹⁴⁷ would be used.¹⁴⁸

The *Bella Lewitzky Dance Company*, (the Company)¹⁴⁹ having

140. The statute noted that obscenity “is without artistic merit” and would not be funded. 20 U.S.C. § 954(d)(2).

141. 20 U.S.C. § 954(d)(1).

142. *Finley*, 524 U.S. at 577.

143. Putman, *supra* note 25, at 253-54.

144. *Bella Lewitzky*, 754 F. Supp. at 774.

145. *Id.* (quoting Department of the Interior and Related Agencies Appropriation Act § 304(a) (1990)).

146. *Id.*

147. See *Miller v. California*, 413 U.S. 15 (1973).

148. *Bella Lewitzky*, 754 F. Supp. at 777 n. 4.

149. The Company, a Los Angeles-based dance troupe, was created in 1966 by dancer Bella Lewitzky. Lewitzky has been the recipient of multiple awards and honorary doctorates, including a National Medal of Arts in 1997. The Company

earned a \$72,000 grant, had to comply with the new requirement; however, Bella Lewitzky's manager simply crossed out the certification requirement.¹⁵⁰ Later, the NEA notified the Company, indicating that if funds were to be spent, all the terms of the grant needed to be complied with, including the agreement not to use funds on works that the NEA could find obscene.¹⁵¹

In finding summary judgment for the Company, the court found that the statute and certification requirement violated both the First and Fifth Amendment rights of Bella Lewitzky.¹⁵² The court found that the vague certification requirement was likely to have a chilling effect on speech, causing any grant recipient who was attentive to the requirement to avoid any artwork that might, by a stretch of the imagination, be considered obscene by the NEA:

[T]he vagueness of the statute forces grant recipients to avoid even coming close to the line between what is merely provocative and what is proscribed . . . because NEA applicants must certify that they will not violate Section 304's vague restrictions, many major legitimate artistic projects will not be undertaken either for fear of violating the vague terms of the certification, or even merely for fear of becoming embroiled in a dispute with the NEA over an accusation that the work of art in question might violate the certification.¹⁵³

The Company could never completely know what the NEA may consider to be obscene. Even though the agency had resolved in its policy statements to use the clear *Miller* standard, it was not bound to follow that policy and could change its policies at will.¹⁵⁴ The statute's vague requirements therefore made it likely that any artist

ended after its 1996-1997 season. Valley College, *Alumni*, at http://www.valleycollege.edu/sbvc_hm/index-past.php?page=alumni_lewitzky.htm (last visited Oct. 20, 2004); see also Bella Lewitzky, *THE ECONOMIST*, Jul. 24, 2004, at 79.

150. *Bella Lewitzky*, 754 F. Supp. at 776-77.

151. *Id.* at 777.

152. *Id.* at 781, 783.

153. *Id.* at 782 (quoting Rockefeller Foundation amicus brief at 54).

154. *Id.*

who genuinely attempted to comply with the grant requirements would find their expression limited, as grantees would feel compelled to self-censor in order to ensure that funding is not taken away.¹⁵⁵

The statute, being unconstitutionally vague, was determined to violate the Company's due process rights.¹⁵⁶ The court outlined the reasons that vagueness infringes on due process rights; vague laws fail to provide notice or warning of potential violations, eliminate safeguards against arbitrary application of the law, and, as noted before, inhibit or "chill" potentially sensitive speech.¹⁵⁷ "Obscenity," which had been "left to the judgment of the National Endowment for the Arts,"¹⁵⁸ is a malleable concept in spite of the agency's attempt to avail itself of the more concrete "*Miller*" definition of obscenity. Moreover, the court noted that the NEA was unable to provide artists with the procedural safeguards associated with *Miller*, particularly its requirement for a jury to determine the community's understanding of "obscenity."¹⁵⁹ "[T]he NEA is a national-level agency that, by hypothesis, is incapable of applying varying community standards for obscenity... how it will endeavor to do so in a grantee's particular local community is a matter about which grantees may only 'speculat[e] at their peril.'"¹⁶⁰

Finally, the court touched on the nature of the rights that subsidized artists should have, strongly rejecting the notion that the government has not violated the constitutional rights of artists due to its refusal to subsidize speech, as opposed to an affirmative suppression.¹⁶¹ Citing *Sindermann*, the court found that the NEA attempted to impose an unconstitutional condition on Bella Lewitzky and other grantees; although grantees do not have an express "right" to funding, the NEA cannot condition a grant that has already been awarded on compliance with requirements that are unconstitutionally

155. *Id.* at 783.

156. *Id.* at 781.

157. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

158. *Id.* at 782.

159. *Id.*

160. *Id.* (quoting *Whitehill v. Elkins*, 389 U.S. 54, 58-59 (1967)). The NEA's later focus on diverse advisory panels when analyzing "decency and respect" may be considered a response to this argument.

161. *Id.* at 785.

vague.¹⁶² The court also determined that the possibility of seeking only private funds was not a meaningful alternative, given the realities of the NEA and its position in the art world:

Plainly stated, the NEA occupies a dominant and influential role in the financial affairs of the art world in the United States. Because the NEA provides much of its support with conditions that require matching or co-funding from private sources, the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors... NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources. Grant applicants rely on the NEA well beyond the dollar value of any particular grant.¹⁶³

For the *Bella Lewitsky* court, the practical importance of federal aid for artists and foundations strengthened the government's obligations; an agency could not act with impunity simply because it provided a discretionary grant, but must act in such a way that the NEA's "power of the purse" did not compel grantees to suppress their speech.¹⁶⁴

D. National Endowment for the Arts v. Finley

The constitutional validity of this Congressional compromise was disputed in *Finley*, in which the "Finley Four," a group of performance artists¹⁶⁵ who had been denied grants in spite of their

162. *Id.* at 782.

163. *Id.* at 783.

164. *Id.*

165. The group consisted of Karen Finley, Tim Miller, Ho Hughes, and John Fleck. Finley, who became the chief "spokesperson" for the movement against the clause, used her performance art to make a statement against the oppression of women by appearing "nude, covered only by chocolate and alfalfa sprouts as she recounts a sexual assault." Gary Devlin, *NEA v. Finley: Explicating the Rocky Relationship Between the Government and the Arts*, 27 PEPP. L. REV. 345, 351 (2000).

earlier approval by the advisory panel,¹⁶⁶ presented a facial challenge to the NEA's "decency and respect" clause. Their challenge had been successful at both the district court and circuit court levels;¹⁶⁷ the courts found a restriction on artists' First Amendment freedoms as the statute "seeks to dissuade the NEA from funding what is 'indecent.' When a statute directed at speech is overbroad, as is the decency clause, it gives rise to the hazard that 'a substantial loss or impairment of freedoms of expression will occur.'"¹⁶⁸ The clause was eventually upheld by the Supreme Court, but the decision did not entirely serve the interests of those members of Congress who had pushed for the NEA legislation. Though artists were unable to overturn a clause that pushed for consideration of factors unrelated to merit during the grant process, that clause was divested of much of its meaning by the Court, who gave the NEA great discretion in applying the legislation.¹⁶⁹

1. The Majority

Writing for the majority,¹⁷⁰ Justice O'Connor began by emphasizing the heavy burden that those raising a facial challenge to legislation must bear. "[R]espondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech."¹⁷¹ Ultimately, she did not find that risk to be present in the "decency and respect" clause, which would not eliminate the possibility of funding for applicants who produce indecent work.¹⁷²

166. Patten, *supra* note 4, at 566. "[D]espite the Panel's unanimous recommendation that individual plaintiffs be awarded fellowships as 'individuals of exceptional talent,' Frohnmayer denied those fellowships for political reasons, *i.e.*, to appease congressional critics." *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1465 (C.D. Cal. 1992).

167. Patten, *supra* note 4, at 566.

168. *Finley*, 795 F. Supp. at 1476 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

169. "The operation was a success, but the patient died . . . [The Court] sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it." *Finley*, 524 U.S. at 590 (Scalia, J., concurring).

170. Ginsburg joined in part, Scalia wrote a concurrence in which Thomas joined, and Souter dissented. *Finley*, 524 U.S. at 569.

171. *Id.* at 580.

172. *Id.*

Likewise, she did not find that the statute is viewpoint discriminatory in a way that would invalidate it.¹⁷³ The subjectivity of such requirements, which may arguably put applicants at risk for viewpoint discrimination, did not introduce a greater risk than an already subjective determination of artistic merit.¹⁷⁴

Significantly, the Court was able to find the clause constitutional in large part because the majority considered it to be “hortatory.”¹⁷⁵ The clause would not *require* that “offensive” artists be denied funding. Looking at the language of the statute, the Court agreed with the NEA’s reading: “the provision [is] merely hortatory . . . it stops well short of an absolute restriction.”¹⁷⁶ The decision reflected a degree of deference to Congress and the legislative process. As “Congress has wide latitude to set spending priorities,”¹⁷⁷ it is within the power of Congress to selectively fund in order to achieve a valid purpose, such as improving public confidence in the NEA.¹⁷⁸ O’Connor emphasized the process by which the statute was developed. She contrasted the absolute restriction on obscenity with the treatment of “indecent” or “disrespectful” art, which may ultimately be funded.¹⁷⁹ Likewise, the provision was characterized as a compromise which had been “introduced as a counterweight to amendments aimed at eliminating the NEA’s funding or substantially constraining its grant-making authority.”¹⁸⁰ Using “advisory language” to determine the NEA’s responsibilities, it incorporated recommendations by the Independent Commission, focusing on

173. *Id.* at 583. O’Connor also argues that consideration of “decency and respect” is constitutionally appropriate in several contexts contemplated by the NEA enabling statute, particularly educational and cultural heritage programs. However, she concludes that these possible applications are not dispositive. *Id.* at 584-85.

174. “[I]t seems unlikely that this provision will introduce any greater element of selectivity than the determination of ‘artistic excellence’ itself.” *Id.* at 584. Although the Court is looking at the case as a facial challenge to the provision, it is interesting to note that the artists in *Finley* may well have been rejected in spite of their merit by an NEA which did not want to incur Congress’ wrath.

175. “Tending or serving to exhort” OXFORD AMERICAN DICTIONARY 423 (Heald Colleges ed. 1980).

176. *Finley*, 524 U.S. at 580.

177. *Id.* at 588.

178. *Id.*

179. *Id.* at 581.

180. *Id.*

“procedure” rather than banning particular categories of speech.¹⁸¹ The majority did not address whether the NEA, in forming diverse panels, complied with Congress’ “suggestion” to consider these factors in its application procedure.¹⁸²

In addressing the claims that the statute is vague, and therefore implicates the First and Fifth Amendments, the majority did not deny that the language of the statute is imprecise. “The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns.”¹⁸³ However, the Court concluded that it was appropriate to have a different standard for particularity when the government had been placed in the position of a “patron” rather than a “sovereign,” as noncompliance with the standards of a grant program would not yield the same consequences as noncompliance with a criminal or regulatory law.¹⁸⁴ Furthermore, vagueness may be inevitable in a situation where the NEA or another agency handed out grants based on criteria such as merit.¹⁸⁵

Finally, Justice O’Connor rejected the argument that the NEA had excluded the artists from a limited public forum. For her, a parallel to *Rosenberger v. Rector*,¹⁸⁶ in which it was held unconstitutional for a public university to deny funding for the printing of a Christian student newspaper, was inappropriate; although both cases dealt with institutions which provided limited funding, funding for university publications is given “indiscriminately” with an aim towards enabling debate and expression, whereas arts funding is selectively given with a goal of promoting “excellence.”¹⁸⁷ “The NEA’s mandate is to make esthetic judgments, and the *inherently content-based* ‘excellence’ threshold for NEA support sets it apart.”¹⁸⁸

181. *Id.*

182. *Id.*

183. *Id.* at 588.

184. *Id.* at 589. However, while a lesser standard may be appropriate, the Court notes that “the First Amendment certainly has application in the subsidy context.” *Id.* at 587.

185. *Id.* at 589.

186. *Rosenberger*, 515 U.S. 819 (1995).

187. *Finley*, 524 U.S. at 586.

188. *Id.* (emphasis added).

2. Concurrence and Dissent

Scalia's concurrence and Souter's dissent, following similar lines of argument, ultimately reached different conclusions about the constitutionality of the provision. Both determined that the terms of the statute imposed an affirmative requirement to *favor* "respectful" art, even if some controversial artwork may ultimately be funded. In addition, both were critical of the NEA's reading, which did not comply with the terms of the statute and rendered the statutory language redundant. However, Scalia and Souter differed as to whether such viewpoint discrimination is constitutional.

The majority's view that the statute was constitutional because it was "hortatory" and did not impose an absolute restriction was criticized by both the concurrence and dissent. For Scalia and Souter, if the statute itself was to be taken seriously, it would have to be considered viewpoint discriminatory. The provision, as it created a mandatory restriction on the actions of the NEA, could not be analyzed as merely suggestive.

One can regard [the decency and respect criteria] as either suggesting that decency and respect are elements of what Congress regards as artistic excellence and merit, or as suggesting that decency and respect are factors to be taken into account *in addition to* artistic excellence and merit. But either way, it is entirely, 100% clear that decency and respect are to be taken into account in evaluating applications. This is so apparent that I am at a loss to understand what the Court has in mind (other than the gutting of the statute) when it speculates that the statute is merely 'advisory.'¹⁸⁹

Likewise, the fact that the statute made it possible for funds to be granted to controversial artwork did not eliminate its viewpoint discriminatory nature because, given applications of equal merit, the agency would invariably choose those which were more in tune with the "decency and respect" considerations over those which were

189. *Id.* at 591 (Scalia, J., concurring).

controversial.¹⁹⁰ As any considerations related to community standards such as “decency” are “quintessentially viewpoint based [and] require discrimination on the basis of conformity with mainstream mores,”¹⁹¹ they could only be constitutional if such discrimination is permissible in a subsidy context.

The existence of viewpoint discrimination “is not altered by the fact that the statute does not ‘compel’ the denial of funding, any more than a provision imposing a five-point handicap on all black applicants is saved from being race discrimination by the fact that it does not compel the rejection of black applicants.”¹⁹² The intent behind the provision itself was to ensure that awards to artists such as Mapplethorpe and Serrano were not granted, and this underlying intent did not change when Congress made concessions by declining to impose a more absolute restriction.

[I]t cannot be read as tolerating awards to spread indecency or disrespect, so long as the review panel, the National Council on the Arts, and the Chairperson have given some thought to the offending qualities and decided to underwrite them anyway. That, after all, is presumably just what prompted the congressional outrage in the first place, and there was nothing naïve about the Representative who said he voted for the bill because it does ‘not tolerate wasting Federal funds for sexually explicit photographs [or] sacrilegious works.’¹⁹³

The possibility of funding for “indecent” or “disrespectful” works of art did not rescue the statute from being viewpoint discriminatory; there still existed a pattern of discrimination in favor of less controversial works despite the fact that this bias could be overcome by a highly meritorious work.

Given this interpretation of the statute, Scalia and Souter were highly critical of the NEA’s implementation of this requirement by

190. *Id.* at 593.

191. *Id.* at 605 (Souter, J., dissenting).

192. *Id.* at 593 (Scalia, J., concurring) (internal citation omitted).

193. *Id.* at 609 (Souter, J., dissenting) (quoting 136 Cong. Rec. 28676 (1990)).

ensuring review by representative groups. Firstly, the statute seemed to require mandatory deliberation on matters of decency in each decision, but the NEA's interpretation merely made it more likely that the panels would raise concerns related to community mores. "The reference to considering decency and respect occurs in the subparagraph speaking to the 'criteria by which applications are judged' . . . it is in judging applications that decency and respect are most obviously to be considered,"¹⁹⁴ and it was therefore contradictory to implement such a requirement by expecting it to "occur derivatively through the inclinations of the panel members."¹⁹⁵ Though this interpretation could have made an accurate judgment of what "decency and respect" means more possible, it would not require or ensure that such a judgment would take place.¹⁹⁶ Moreover, this interpretation seemed redundant given that the NEA was already statutorily required to compose diverse panels.¹⁹⁷ If having a diverse panel was enough to ensure compliance with the "decency and respect" provision, the clause itself would be "wholly superfluous."¹⁹⁸ Both justices were critical of the fact that the majority simply ignored the issue of the NEA's compliance and what faithful compliance to the statute might require.

However, Scalia and Souter parted on the issue of whether a statute requiring viewpoint discrimination when subsidizing expression would be constitutional. In Scalia's opinion, he suggested that the clause, or even a more sweeping restriction on the content of arts funding, would be constitutional because Congress was able to selectively fund certain viewpoints. For him, the denial of funding would not invoke the First Amendment as it did not prevent expression. "Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of the statute."¹⁹⁹ Ultimately, favoring certain perspectives "is the very business of government,"²⁰⁰ and the

194. *Id.* at 607.

195. *Id.* at 608 (Souter, J., dissenting).

196. *Id.* at 591-92 (Scalia, J., concurring).

197. 20 U.S.C. § 959(c).

198. *Finley*, 524 U.S. at 592 (Scalia, J., concurring).

199. *Id.* at 595 (Scalia, J., concurring).

200. *Id.* at 598 (Scalia, J., concurring).

government is thus entitled to discriminate directly or indirectly, as it does when it funds art subject to certain conditions.²⁰¹ Moreover, the dissent indicated that *Rosenberger* would not apply, as the limited public forum established by the university was different in nature from “the NEA’s granting of highly selective (if not highly discriminating) awards.”²⁰² For Justice Scalia, the First Amendment rights of artists do not apply when they are seeking money to fund their art, but only when their conduct is being regulated.²⁰³

Souter ultimately found that the provision violated the Constitution. “The Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of *public authority over expressive activity* is unconstitutional.”²⁰⁴ Emphasizing the primacy of the concept that society cannot limit expression merely because it conflicts with general mores, Souter did not restrict that notion to a criminal or regulatory context, but applied it “not only to affirmative suppression of speech, but also to disqualification for government favors.”²⁰⁵ Souter considered the government’s position as “patron” as compared to its roles as “speaker” and “regulator,” concluding that it would be more fitting to consider the patronage role as analogous to that of a regulator.²⁰⁶ For Souter, *Rosenberger* controlled the outcome because, in both cases, an institution had been created with the purpose of funding and thereby encouraging a multiplicity of views rather than expressing the government’s own point of view.²⁰⁷ In “subsidizing the expression of others, [the government] may not prefer one lawfully stated view over another.”²⁰⁸ Moreover, the competitive and scarce nature of the grants did not create an exception to this principle, as funds can be legitimately allocated using merit, which Souter characterized as a vague but relatively viewpoint-neutral standard, as a criterion for filtering applications without implicating viewpoint-

201. *Id.*

202. *Id.* at 599.

203. *Id.*

204. *Id.* at 600-01 (Souter, J., dissenting) (emphasis added).

205. *Id.* at 601 (Souter, J., dissenting).

206. *Id.* at 611-12 (Souter, J., dissenting).

207. *Id.* at 613.

208. *Id.*

discrimination by the government.²⁰⁹ Finally, he rejected Scalia's conclusion that *Rosenberger* is distinct in that it involves a limited public forum, emphasizing the centrality of viewpoint discrimination in the holding of that case.²¹⁰

Finally, Souter emphasized the practical impact that a provision such as the "decency and respect" clause might have on the artistic community. Although the majority only upheld the language of the statute and theoretically allowed artists to preserve their rights by challenging the provision "as-applied," the dissent noted that, given the nature of the NEA's decision-making process, such an opportunity provided little protection for artists' First Amendment rights:

The NEA does not offer a list of reasons when it denies a grant application, and an artist or exhibitor whose subject raises a hint of controversy can never know for sure whether the decency and respect criteria played a part in any decision by the NEA to deny funding.²¹¹

Souter also stressed the coercive potential for such a provision, as artists will chill their expression if there is a chance, however small, that a work may be considered controversial and thus be deprived of federal funds. "To whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid esthetic."²¹² Mirroring the sentiment in *Bella Lewitzky*, Souter noted that if such a provision is upheld, the NEA would serve in a practical manner to suppress rather than encourage free artistic expression.²¹³

3. The Consequences of the Court's Decision

The majority opinion represented an uneasy and occasionally

209. *Id.* at 614-15.

210. "Like this case, *Rosenberger* involved viewpoint discrimination, and we have made it clear that such discrimination is impermissible in all forums, even nonpublic ones Accordingly, *Rosenberger*'s brief allusion to forum analysis was in no way determinative." *Id.* at 615 n.10.

211. *Id.* at 617.

212. *Id.* at 621.

213. *Id.* at 621-23.

contradictory attempt to reconcile both sides of the conflict. Instead of choosing between the stark alternatives offered by Scalia and Souter, either allowing the government to ignore the First Amendment in the patronage context or forbidding the government from imposing any viewpoint-based limitations on subsidies and potentially dooming the NEA in the hands of a hostile Congress, the Court instead chose to uphold the “compromise” legislation while giving the NEA enormous discretion in applying it.²¹⁴

Justice O'Connor's majority opinion in *Finley* used an implausible doctrinal structure to retreat, at least in part, from an explicitly institution-specific approach to determining which governmental institutions can employ which kinds of content-based, and indeed viewpoint-based, criteria... this absence of a categorical effect played a large part in saving what would otherwise have been an unconstitutional standard.²¹⁵

The rationale offered by the majority tiptoed around the fundamental question of how much an agency such as the NEA may regulate artistic expression. By robbing the statute of much potential meaning and focusing on the limited effect of a provision that was not strictly exclusionary, the Court was able to reach a decision that “blessed the

214. One commentator criticized the “practical approach” of the Court in *Finley*:

Finley is an example of ‘decisional minimalism’ . . . it assiduously avoids bold doctrinal or theoretical pronouncements. Similarly, like many minimalistic opinions, its internal contradictions suggest that it was the product of severe disagreement within the Court regarding the appropriate rationale. In *Finley*, where the Court found itself probably facing some internal disagreement as well as wrestling with a politically controversial issue already largely resolved by other branches of the Government, the Court . . . resolved the case with a narrow and shallow opinion.

Lackland Bloom, Jr., *NEA v. Finley: A Decision in Search of a Rationale*, 77 WASH. U. L.Q. 1, 25-26 (1999).

215. Schauer, *supra* note 102, at 94.

solution”²¹⁶ brought forth by the Congressional compromise and protected the agency from further Congressional disapproval while ensuring that intrusions on speech were minimal.²¹⁷

Although the majority’s reasoning may be disappointing and even a bit illogical from a theoretical perspective, the decision itself appears to further a more realistic policy regarding the NEA or any agency that is charged with supporting expressive activity. Scalia’s conclusion that *any* restriction on funding for expressive activity may be permissible may shield the NEA from Congressional hostility, but it would also permit the government to impose more far-reaching requirements on funding, seriously weakening the integrity of an organization that is supposed to promote artistic expression rather than the values of the status quo. Likewise, while Souter’s refusal to allow the government to impose any content-based funding restrictions appears the most compatible with First Amendment guarantees, it ignores the political ramifications of such a decision. If Congress, frustrated that the NEA may use federal money to fund “distasteful” art, was stripped of any control over the agency’s decisions, it would be loath to give any support at all to the NEA.

Thus, the majority’s pragmatic decision validates the NEA’s basic mission while allowing it to continue as a politically viable institution. Such an approach ensures that revered cultural institutions²¹⁸ and arts outreach programs will not lose public support in the face of a widespread political attack on the more “outrageous”

216. Bloom, *supra* note 214, at 50.

217. However, the Court’s rule should not be overstated:

While the Court may have validated this political compromise, it does not deserve credit for saving the NEA as such. The NEA apparently had weathered the political storm, and it is unlikely that a judicial invalidation of the decency and respect clause would have led to a serious assault on its continued existence... Even in the absence of any congressional limitation, the NEA would be unlikely to deliberately approve grants that might plunge it back into the political turmoil from which it had only recently escaped.

Id. at 24.

218. These institutions include 2004 grantees such as the Alvin Ailey Dance Foundation, Chicago’s Joffrey Ballet, New York’s Museum of Modern Art and Metropolitan Museum of Art, Carnegie Hall, the Los Angeles Philharmonic, and the Mark Taper Forum. A complete list of grantees is available at <http://www.nea.gov/grants/recent/04grants/Creativity.html>.

works that had clouded the public's image of the NEA during the 1990's. Although it may be argued that the private sector should be counted on to support such "worthy" art, the addition of federal support ensures that there is a degree of stability in the art world. While private parties may provide support for the arts in a major metropolis, programs bringing art and culture to local communities would be unlikely to survive without the aid of the NEA.²¹⁹ Moreover, private donors may condition their support more freely than the federal government, creating further conflicts. For example, Philip Morris threatened to eliminate its arts funding in New York City if smoking restrictions were enacted.²²⁰

However, despite the virtues of the majority's decision, it is nonetheless difficult to apply. The Court, in failing to establish a "bright line rule," made it difficult to determine when an agency's decision violated artists' constitutional rights.²²¹ Moreover, insofar as the *Finley* Court gave its "blessing" to an admittedly vague statutory requirement, it may be considered as precedent to support vague requirements in similar circumstances.²²² Finally, because the Court justified its decision by minimizing the strength of the provision rather than acknowledging the balance of interests involved, it ultimately did little to delineate the breadth of the government's, agency's, or artist's interests.

IV. CONCLUSION – THE "HARD WON WISDOM" OF THE NEA

Rather than being conclusive, *Finley* leaves many questions unanswered, and its broad grant of discretion to the NEA obscures the extent to which the agency may have duties to protect the First Amendment rights of grantees while maintaining taxpayers' confidence in the institution. One way to begin answering this question is to understand what the NEA's mandate was as well as the way in which it has evolved.

Since becoming embroiled in the "culture wars" of the 1980s and

219. Flores, *supra* note 115, at 310.

220. Karen Finley, *The Art of Offending*, N.Y. TIMES, Nov. 14, 1996.

221. See Robert Vosburgh, *Government Subsidies of Controversial Art: Dung, the Virgin Mary, and Rudy Giuliani*, 11 TEMP. POL. & CIV. RTS. L. REV. 221, 234 (2001).

222. See *PETA*, 105 F. Supp. 2d at 321.

1990s, the NEA has changed its focus somewhat, emphasizing the need to win the confidence of taxpayers²²³ and reach out to American communities as well as the need to encourage artistic excellence. The NEA has consciously attempted to make the NEA less “elitist,” perhaps most notably by including six members of Congress in nonvoting positions on the National Council of Arts.²²⁴ Likewise, although provisions such as the “decency and respect” clause imposed few real restraints on the discretion of the agency, the NEA has become more conservative in its allocation of funds. “It became apparent that the NEA had internalized the lessons of the *Mapplethorpe* and *Serrano* controversies and had decided to attempt to steer clear of obviously controversial grants to the extent possible.”²²⁵

This shift is reflected in the official statements of the NEA. During his tenure as chairman, William Ivey noted that the NEA had to make the case that art held something of value for the average American. “The day of being able to increase funding for the nonprofit arts simply by talking lofty platitudes about the value of art for citizens – that it’s good for you, that it elevates the soul – are over.”²²⁶ The current Chairman, Dana Gioia, has likewise shunned “elitism” and focused on outreach as an essential component of the NEA’s leadership role. Gioia’s vision for the agency involves convincing the public of the validity of federal arts funding and emphasizing outreach and education programs that bring established art to communities²²⁷ rather than innovation. “In order to gain the necessary support at the federal, state, and local levels, this new consensus must be positive, inclusive, democratic, and non-divisive rather than confrontational, partisan, polarizing, and elitist.”²²⁸

The attempt to allocate funds in a publicly acceptable manner has led to a greater degree of public support for the agency. The NEA

223. This modified purpose was codified in 20 U.S.C. § 951(5) (2004).

224. Marika Clark, *Second Year of NEA’s New Grant Structure a Battle*, DANCE MAGAZINE, May 1998.

225. Bloom, *supra* note 214, at 24.

226. William Ivey, quoted in Robin Pogrebin, *Inheriting Uneasy Truce Between Art and Politics*, N.Y. TIMES, Dec. 24, 2001.

227. Shakespeare in American Communities, PBS Great Performances, and the new Rimrock Opera company of Billings, Montana are examples cited in Gioia’s speech. Gioia, *supra* note 2.

228. *Id.*

has gradually recovered from massive cuts during the 1990s, although funding is still short of the \$171 million that the agency received in 1992,²²⁹ and is dwarfed by arts funds outside of the United States, such as the \$330 million arts budget for Berlin²³⁰ and funding for Italian opera houses that is “nearly ten times the size of the annual NEA working budget.”²³¹ This growing acceptance may be problematic, as arts agencies are increasingly encouraged to neglect innovation in favor of mainstream and classical artwork.²³² However, the “anti-elitist” approach is almost necessary to promote the NEA’s mandate of making art and culture available to more Americans, as reaching out must require a degree of support, both in terms of finances and public appreciation of the artist’s mission.

Perhaps inevitably, the stated aim of the NEA to create a broad and dynamic program for supporting the arts is in conflict with this secondary goal, and thus the NEA and related agencies must balance these values in making funding decisions. In determining how much of a “concession” to public taste is acceptable, these agencies are faced with the difficult task of maintaining their integrity while retaining an appearance of legitimacy. It may be difficult, if not impossible, to make decisions in order to inspire “taxpayer confidence” without facing some danger of creating the “timid esthetic” warned of by Justice Souter. However, such a contradiction does not necessarily mean that the NEA and its fellow arts agencies are invalid. Arts agencies, which are composed largely of arts

229. *Arty Party: Have Republicans Learned to Stop Worrying and Love the NEA? Not Quite.*, Mother Jones, Jan. 2004.

230. *Id.*

231. Gioia, *supra* note 2.

232. Although President Bush has increased support for the arts, this support has been largely directed at promoting works and institutions that are established and uncontroversial:

So while appearing to be more open to the creative side of life, Bush at the same time makes it clear that the money will mostly go towards canonical, classic American art and not be used to fund new, modern, creative, experimental and potentially controversial endeavors. Just as Bush administration ‘sex education’ money is really used for ‘abstinence education’, his arts funding is tied to similar political restrictions that aim to define ‘good’ art.

Arty Party, *supra* note 230.

experts and given a broad mandate to define and support “art,” which is itself a contradictory, ambiguous, and malleable concept, may be instrumental in shaping the debate about what art is or should be.²³³ Thus, a large part of these agencies’ mission is to act as arbiters between competing evaluations of art and artistic value, and such an analysis may justifiably include balancing the ideals of innovation and outreach to a larger public.

233. It may be noted that art does not exist in a vacuum; consequently, agencies such as the NEA will inevitably wield control over how art is defined and understood:

Art, under at least one view, may be defined in terms of the institutions that create, support, and evaluate it, and because artistic quality may consequently exist as an institution-dependent idea, the constitutional permissibility of content and viewpoint control in arts funding . . . might depend on the involvement of the institutions of art in the decision under attack. Schauer, *supra* note 102, at 115.