ART: TO FUND OR NOT TO FUND? THAT IS *STILL* THE QUESTION

INTRODUCTION

In the guise of art, the Virgin Mary has been poised in the center of a painting made of elephant dung surrounded by a scattered array of tiny photographs of female genitalia and buttocks.[1] The artist's name is Chris Ofili.[2] He entitled this work *The Holy Virgin Mary.*[3] The image of a crucifix purportedly immersed in urine is captured in a photograph.[4] The artist's name is Andres Serrano.[5] He entitled this work *Piss Christ.*[6] The image of Christ, as originally depicted in da Vinci's painting *The Last Supper,* is replaced by a nude photograph of the artist herself—an African-American woman.[7] The artist's name is Renée Cox.[8] She entitled

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[1] *See generally* The Brooklyn Institute of Arts and Sciences v. The City of New York and Rudolph W. Giuliani, 64 F.Supp.2d 184 (E.D.N.Y. 1999). The case discussed the following: The *Holy Virgin Mary* was part of a temporary exhibit shown at the Brooklyn Museum in New York. The exhibit, entitled *Sensation: Young British Artists from the Saatchi Collection,* also included a Hirst work of two pigs in formaldehyde. Mayor Giuliani criticized the exhibit as "sick" and "disgusting," and characterized it as an offensive attack on the Catholic religion. As a result, the City withheld already-appropriated funds to the Museum for operating expenses and maintenance. Additionally, in a suit filed in the New York Supreme Court, the City sought "to eject the Museum from the city-owned land and building in which the Museum's collections have been housed for over one hundred years." *Id.* at 186. District Judge Gershon found that the facts established "an ongoing effort by the Mayor and the City to coerce the Museum into relinquishing its First Amendment rights." *Id.* at 198. Given the likelihood of success on its claim that Mayor Giuliani violated the First Amendment when he cut the Museum's funding and began eviction proceedings against it, Judge Gershon granted the Museum's preliminary injunction, which enjoined (among other things) the City (and the Mayor) "from inflicting, or taking any steps to inflict, any punishment, retaliation, discrimination, or sanction of any kind against the Brooklyn Institute of Arts and Sciences. . . ." *Id.* at 205.

[2] *See id.* at 186.

[3] *See id.* The Saatchi Collection is not the first controversial exhibit the Brooklyn Museum has displayed. A 1990 art and performance exhibit entitled *The Play of the Unmentionable: The Brooklyn Museum Collection,* and a 1991 art and performance exhibit entitled *Too Shocking to Show,* also created a great deal of public controversy. *See id.* at 189.

[4] *See* Symposium, *Art, Distribution & The State: Perspectives on the National Endowment for the Arts,* 17 CARDOZO ARTS & ENT.L.J. 705, 706 (1999) (providing introductory comments by Amy Schwartzman, Executive Director, Volunteer Lawyers for the Arts.) The controversial work was a "subgrant that exhibited artist Andres Serrano's work, *Piss Christ,* a photograph of a crucifix purportedly immersed in urine." *Id.*

[5] *See id.*

[6] *See id.*

[7] *See* Elisabeth Bumiller, *Affronted by Nude Last Supper, Giuliani Calls for Decency Panel,* N.Y. TIMES, Feb. 16, 2001, at A1. *Yo Mama's Last Supper* is part of a collection of 188 photographs by 94 African-American photographers exhibited by the Brooklyn Museum of Art. *See id.* The color photograph, measuring fifteen feet in length, presents the artist, a nude Renée Cox, as Christ and also replaces the twelve apostles who surround Christ in the original painting, with African-American persons. Mayor Giuliani declared that the photograph was "disgusting," "outrageous," and "anti-Catholic," and that he intended to "appoint a commission to set 'decency standards' to keep such work out of museums that

this work *Yo Mama's Last Supper.*[9] A man with a bullwhip protruding from his rectum and a young girl with her vagina exposed are featured in a sexually explicit photography exhibit.[10] The artist's name is Robert Mapplethorpe.[11] He entitled this work *X Portfolio.*[12] On stage, a woman stripped to her waist and smeared chocolate on her breasts while using profanity to recount a sexual assault.[13] Her name is Karen Finley.[14] She entitled this work *We Keep Our Victims Ready.*[15] In a stage performance, a man dressed as a mermaid created an altar out of a toilet bowl by placing a photograph of Jesus Christ on the lid, and urinating in front of an audience.[16] His name is John Fleck.[17] He entitled this work *Blessed Are All The Little Fishes.*[18]

Unquestionably, these artists have a particular point of view. In fact, artists by nature have a view. Indeed, if they did not, would we want to experience the expression of their work in any form, including photography, theatrics, sculpture, cinematography, dance or still life?[19] Artists, by expressing their views through the medium of art, and by "[c]onjuring up that which has not been experienced, [pose] a challenge to the participant's preconceived and preordained world view."[20] By virtue of this fact, art at times disrupts notions of cultural decency.[21]

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receive public money." *Id.* William Donahue, the President of the Catholic League for Religious and Civil Rights, stated that although "this exhibit was not as bad as the 'filth of "*Sensation*",' he considered Ms. Cox's photograph nothing more than "shock art." *Id.*

8 *See id.*

9 *See id.*

10 *See* Lackland H. Bloom, Jr., NEA v. Finley*: A Decision in Search of a Rationale,* 77 WASH. U.L.Q. 1,3 (1999).

11 *See id.*

12 *See id.* "A segment titled the *X Portfolio* . . . featured a number of sexually explicit images, including a young girl with her vagina exposed and a man with a bullwhip protruding from his rectum." *Id.*

13 *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 596 n.2 (1998) (Scalia, J. concurring).

14 *See id.*

15 *See id.*

16 *See id.*

17 *See id.*

18 *See id.*

19 By experiencing various forms of art, we expose ourselves to the experiences of others thereby expanding our own cultural education. Joseph Sittler captures well the lure of experiencing the expression of others' art:

> We ought not permit the meaning of the term 'experience' to be confined within the brackets of one's own existence. The meaning of experience is a poor and haggard thing if it refers only to what has happened to me. The meaning of education and of culture is that we live vicariously a thousand other lives.

JOSEPH SITTLER, PROVOCATIONS ON THE CHURCH AND THE ARTS 291, 293 (1986).

20 Marci A. Hamilton, *Art Speech,* 49 VAND. L. REV. 73, 87 (1996) (citing WOLFGANG ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE at 70 (Johns Hopkins U., 1978)).

21 "Art is an ever-present irritant to the social and legal system." *Id.* at 91. *But see id.* at

Art forces the participant, while experiencing the art, to recognize pre-existing world views and to defamiliarize[22] and distance himself from his presumptive world view.[23] These two "phenomena" simultaneously "create a reorientation experiment, the commitment-free experiencing of a perspective different from his own."[24] As evinced by history, that which is different man fears, that which man fears he judges, and that which man judges, he suppresses through discrimination.[25] Particularly, arts funding has been used to thwart artistic expression that threatens governmental power structures, thereby limiting society's exposure to perspectives different from the prevailing political norm.[26] Accordingly, governmental arts funding has been employed in the redirecting of the market toward the status quo.[27]

The First Amendment is designed to protect from governmental suppression speech and other forms of expression, through which society is exposed to perspectives other than that of the prevailing status quo. This protection extends to artists as a negative right; the right to the unimpeded production of art that may be disruptive to preconceived and preordained world views.[28] The

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n.48 (referencing Iser's view that some art, which confirms existing world views, rather than challenges them, tends to be "didactic," or "propagandistic"). *Cf.* ISER, THE ACT OF READING, at 189-90.

22 In her article *Art Speech*, Professor Hamilton conveys defamiliarization as a "phenomenon of consciousness by which one permits a familiar world to move to the background and simultaneously experiences a new world." Hamilton, *supra* note 20, at 91. Professor Hamilton offers, as an example, the experience of a forest:

> [o]ne familiar experience of a forest includes the color green, leafiness, and somewhat random positioning of the trees in nature. In contrast, a painting could depict the trees as gray, aligned as though in military formation, and barren. During the experience of the painting, the familiar world of green trees is backgrounded and the quite different world of gray trees is foregrounded. This new "forest" challenges preconceptions of forests in general, stretching the imagination to fit gray, military trees under the rubric 'forest.' The experience teaches one to see the gray forest as different from the usual image and to see a green forest as a nonuniversal phenomenon. Thus, the defamiliarization experience threatens conventional world views by offering an alternative and by making the conventional world view appear less determined.

Id. at 91-92.

23 *See id.* at 88.

24 *Id.*

25 *See* IRIS MURDOCH, THE FIRE & SUN 86 (1977) (providing that "[art] is feared and attacked by dictators, and by authoritarian moralists . . . ."); *see also* Hamilton, *supra* note 20, at 97 (stating that "visual art since Impressionism has been one era after another that reorients the view's perspective, prompting dictatorial ideologues such as Hitler and Stalin to destroy and suppress the new.").

26 *See* Hamilton, *supra* note 20, at 98-99.

27 *See id.* at 98; *see also* David Cole, *Beyond Constitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 740 (1992).

28 "President Eisenhower argued in 1954 that 'for our Republic to stay free those among us with the rare gift of artistry must be able freely to use their talent . . . .'" Cole, *supra* note 27, at 739 (citation omitted).

First Amendment, however, does not confer to artists an *affirmative right* to funding of their art. Yet, when the government becomes involved in the culture business "as a patron subsidizing the expression of others,"[29] it must decide how to allocate its limited tax dollars. (There are, after all, many more artists seeking funding than the government is prepared to fund.) In so doing, the government effectively subverts the intent of the First Amendment by affording an affirmative right to some, but not all artists. In extending this right to some artists, and not others, under the guise of "objective criteria," the government puts some artists at a disadvantage in the marketplace of ideas effectively suppressing what are often disruptive works of art. The government should afford all artists—even offensive artists, equal opportunity to thrive in the marketplace of ideas.[30] While not expressly addressed in the Establishment Clause, this situation is analogous to religion, and therefore, as with religious organizations, the government should not directly fund art.

Part I of this Note presents the history of arts funding in the United States, including the National Endowment of the Arts ("NEA"). Moreover, Part I provides an overview of the incidents leading to the creation of 20 U.S.C. Section 954(d)(1),[31] the statutory provision that sparked the controversy in the seminal case *National Endowment of the Arts v. Finley*.[32] Part II examines the *Finley* decision and the implications it holds for potential as-applied challenges, such as that present in *Esperanza Peace & Justice Center v. City of San Antonio*.[33] Part III juxtaposes *Finley* and *Esperanza* and discusses the claims brought by the Esperanza Center under the First Amendment and Establishment Clause. Finally, in Part IV this Note concludes that arts funding is better left to the private sector. Without governmental arts funding, the government is unable to selectively fund the art that shores-up governmental ideology and oppresses the very eclectic views on which the health of our democracy exists.

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29 National Endowment for the Arts v. Finley, 524 U.S. 569, 611 (1998) (Souter, J., dissenting).

30 *See id.* "[The government] may not prefer one lawfully stated view over another." *Id.*

31 20 U.S.C. § 954(d)(1) (1994).

32 524 U.S. 569 (1998).

33 *See The Esperanza Center, Plaintiff's Statement of Facts, available at* http://www.esperanzacenter.org/litigation/sumjud/pfacts.html (last visited Apr. 30, 2001) (providing Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment) [hereinafter *Plaintiff's Statement of Facts*].

I. BACKGROUND

A. *The History of Arts Funding in the United States*

During the twentieth century, the United States made two attempts at providing governmental funding for the arts.[34] The first was in response to the Depression.[35] In 1935, President Franklin Roosevelt created the Works Progress Administration ("WPA").[36] The objective of the WPA was to provide funding to put Americans back to work.[37] The Federal Arts Project ("FAP") specifically focused on putting American artists back to work.[38] As one commentator noted, "[a]lthough only a small percentage of the funding was earmarked for artists, its 'impact on the artistic community was diluvial.'"[39] The FAP supported the artistic community by providing "living wages, studios, supplies, and patrons for thousands of artists and would-be artists."[40] The funding that was available, however, caused an influx of people claiming to be artists when, in fact, they were not.[41] As a result, the government instituted "draconian . . .directives on creative activity."[42] A painter was forced to choose between murals or easel painting.[43] Painters, among others artists, often were "subjected to productivity quotas," and forced to show up at a supervised location to paint for a "specified number of hours each week."[44] Sadly, the FAP fostered the production of art that lacked quality.[45] Moreover, the FAP caused tension between artists and the public,[46] and even among the artistic community itself.[47] Nearing its demise in 1941, the WPA had run out of governmental money, and had exhausted the tolerance of the public.[48]

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34 *See* Hamilton, *supra* note 20, at 113.

35 *See id.*

36 *See id.*

37 *See id.*

38 *See id.*

39 *Id.* (citing STEVEN NAIFEH & GREGORY WHITE SMITH, JACKSON POLLOCK: AN AMERICAN SAGA 275 (1989)).

40 Hamilton, *supra* note 20, at 113.

41 *See, e.g., id.* n.151 (citing NAIFEH & WHITE SMITH, *supra* note 39, at 273 (indicating that New York City experienced an estimated ten-fold increase of artists under the FAP)).

42 Hamilton, *supra* note 20, at 113.

43 *See id.* at 114.

44 *Id.*

45 *See, e.g., id.* at 113, *citing*, NAIFEH & WHITE SMITH, *supra* note 39, at 275, (explaining that "murals were required to have sponsors, and sponsors preferred conservative approaches, murals tended to be 'flat wall decorations of the lowest order.'").

46 *See* NAIFEH & WHITE SMITH, *supra* note 39, at 276-77. "At the same time, [the FAP] drove a wedge between artists and the public by paying artists more than many other members of society." *Id.*

47 *See* Hamilton, *supra* note 20, at 114.

48 *See id.*

B. *The National Endowment for the Arts*

In 1965, Congress created the National Endowment for the Arts ("NEA") as a vehicle to assist in arts funding.[49] The purpose of the NEA was, and is, to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States, and for institutions which preserve cultural heritage of the United States . . . ."[50] Congress pledged funds to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent"[51] because it believed that "the practice of art and the study of the humanities require[d] constant dedication and devotion."[52]

The enabling statute, 20 U.S.C. § 953(b), provides the NEA with a great deal of discretion in awarding grants.[53] This statute sets forth only the broadest funding priorities,[54] including "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts."[55]

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[49] *See id.*; *see also* National Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998).
[50] 20 U.S.C. § 953(b) (1994).
[51] *Id.* § 951(7); *see also Finley*, 524 U.S. at 573.
[52] 20 U.S.C. § 951(7).
[53] *See Finley*, 524 U.S. at 573.
[54] *See id.*
[55] *Id.*; *see also* 20 U.S.C. § 954(c)(1)-(10):

> The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support—
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> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;
> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
> (5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;
> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
> (7) programs for the arts at the local level;

The program includes an advisory panel, comprised of experts in the relevant field of the arts, which reviews grant applications and thereafter makes recommendations to the NEA chairperson.[56] As a result of the 1990 Amendments to the enabling statute,[57] these advisory panels must reflect "diverse artistic and cultural points of view," include "wide geographic, ethnic, and minority representation," and "lay individuals who are knowledgeable about the arts."[58] The panels are charged with the duty to report to the twenty-six-member National Council on the Arts ("Council"), "which, in turn, advises the NEA Chairperson."[59] Ultimately, the NEA Chairperson has the authority to grant awards, but he may not approve an application that received a negative recommendation from the Council.[60] Recently, Congress has confined grants primarily to organizations and state art agencies, and in so doing, has greatly restricted the availability of federal funding for individual artists.[61]

C. *The Evolution of Section 954(d)(1)*

Since its inception in 1965, the NEA had been relatively free from controversy. In fact, "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."[62] It was not until 1989, when the NEA awarded two particular grants, perceived by the public as provocative, that Congress reevaluated the NEA's funding priorities and efforts to increase oversight of its grant-making procedures.[63]

The first prelude to Congress's renewed interest in the NEA was a 1987 grant to the Southwest Center for Contemporary Art

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(8) projects that enhance managerial and organizational skills and capabilities;
(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and
(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

Id.

56 *See* Bloom, *supra* note 10, at 3; *Finley*, 524 U.S. at 573.

57 *See* 20 U.S.C. § 954(c)(1)-(10) (1994).

58 20 U.S.C. § 959(c)(1)-(2); *Finley*, 524 U.S. at 573.

59 *Finley*, 524 U.S. at 573.

60 *See id.*; 20 U.S.C. § 955(f)(1999).

61 *See* Department of the Interior and Related Agencies Appropriations Act, 1998, Pub.L. 105-83, § 329, 111 Stat. 1600. "By far the largest portion of the grants distributed in fiscal year 1998 were awarded directly to state arts agencies. In the remaining categories, the most substantial grants were allocated to symphony orchestras, fine arts museums, dance theater foundations, and opera associations." *Id.*; *see also National Endowment for the Arts*, FY 1998 Grants, Creation & Presentation at 5-8, 20, 21, 27.

62 *Finley*, 524 U.S. at 573.

63 *See id.*

("SECCA") in Winston-Salem, North Carolina.[64] SECCA, in turn, awarded a grant to an artist named Andres Seranno.[65] The subgrant provided by the Center was used by Serrano to produce a photograph of a crucifix immersed in urine, entitled *Piss Christ.*[66]

The second incident attributing to the controversy was a grant given to the Institute of University of Pennsylvania in 1989, to display a retrospective of the photographs of the late Robert Mapplethorpe.[67] Although the majority of Mapplethorpe's work was uncontroversial, the segment entitled *X Portfolio*[68] was provocative in nature, and stirred public controversy.[69]

In response to the public outcry created by these provocative works,[70] Congress reduced the NEA's budget appropriation for the following year by forty-five thousand dollars.[71] Additionally, Congress amended the statute by prohibiting the use of NEA funds

> to promote, disseminate, or produce materials which in the judgment of the NEA may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.[72]

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64 *See* Karen M. Kowalski, National Endowment for the Arts v. Finley*: Painting a Grim Picture for Federally-Funded Art,* 49 DEPAUL L. REV. 217, 220 (1999). "SECCA received funding for its visual arts program from the Rockefeller Foundation, Equitable Life (a corporation), and the NEA." *Id.*

65 *See* Bloom, *supra* note 10, at 3. Andres Serrano is an African-American artist from Brooklyn, New York. He was awarded a $15,000 visual arts grant. His works, and that of nine other artists, were scheduled for display in Los Angeles, Pittsburgh, and Richmond. The works did not encounter any opposition until they appeared in Richmond, at which time Philip Smith, a computer designer, was offended and outraged by *Piss Christ.* His outrage and subsequent letter addressed to the *Richmond-Times Dispatch,* created a flood of letters to Congress and the acting Chair of the NEA, Hugh Southern. The letters complained of the misuse of taxpayer dollars to fund *Piss Christ. See* Kowalski, *supra* note 64, at 220.

66 *See* Symposium, *supra* note 4, at 706.

67 *See id; see also* Bloom, *supra* note 10, at 3. The $30,000 grant was used to arrange the exhibit *The Perfect Moment.* The Corcoran Gallery in Washington subsequently canceled the exhibit, which included 150 pieces of photography by the late Robert Mapplethorpe. The museum's decision to cancel the exhibit was rooted in the fear that the exhibit would incite the public's violent and negative reaction, as did the Serrano exhibit. *See* Kowalski, *supra* note 64, at 221.

68 The segment "featured a number of sexually explicit images including a young girl with her vagina exposed and a man with a bullwhip protruding from his rectum." Bloom, *supra* note 10, at 3.

69 *See* Amy Schwartzman, Symposium, *supra* note 4, at 706; *see also* National Endowment for the Arts v. Finley, 524 U.S. 569, 574 (1998); Bloom, *supra* note 10, at 3.

70 *See* Bloom, *supra* note 10, at 3; *Finley,* 524 U.S. at 573.

71 Forty-five thousand dollars was the amount of the grants for the Mapplethorpe and Serrano exhibits. *See* Bloom, *supra* note 10, at 3; *see also Finley,* 524 U.S. at 573.

72 Bloom, *supra* note 10, at 3 (citing Act of Oct. 23, 1989, Pub. L. No. 101-21, 103 Stat. 701, 738-42 (making appropriations for Department of Interior and related agencies for fiscal year ending Sept. 30, 1990)).

The NEA attempted to implement this amendment by requiring that all "grantees certify in writing that they would not utilize federal funding to engage in projects inconsistent with the criteria in the 1990 appropriations bill."[73] Subsequently, the certification requirement was rescinded by the NEA after it was invalidated by a Federal District Court.[74]

In the fall of 1990, as Congress was considering the NEA's reauthorization, it debated a myriad of proposals concerning the agency's grant-making process.[75] Congress chose not to adopt either the Crane Amendment,[76] which sought to eliminate the NEA altogether;[77] nor the Rohrabacher Amendment,[78] which would have introduced a prohibition on awarding any grants that could be "used to promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating beliefs, tenets, or objects of a particular religion or of denigrating an individual, or group of individuals, on the basis of race, sex, handicap or national origin."[79] The NEA faced a formidable challenge: receive no funding at all or receive funding with some constraints.

Congress ultimately adopted the Williams/Coleman Amendment,[80] which was "a bipartisan compromise between Members opposing any funding restrictions and those favoring some guidance to the agency."[81] The proposal, which later became Section 954(d), was "introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority. . .."[82]

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73 *Finley*, 524 U.S. at 575.

74 *See* Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F.Supp. 774 (C.D. Cal. 1991). "The NEA did not appeal this decision." *Finley*, 524 U.S. at 575.

75 *See Finley*, 524 U.S. at 575; *see also generally* H.R.J. Res. 494, 101st Cong. (1990).

76 *See* H.R. 4579, 101st Cong. (1990); *see also* 136 CONG. REC. H9407 (daily ed. Oct. 11, 1990) (referring to Crane Amendment); *see id.* at H9442-9433 (citing the amendment); *see also* H.R. REP. No. 101-801, at 1-4 (1990).

77 *See Finley*, 524 U.S. at 575. "The House rejected the Crane Amendment, which would have virtually eliminated the NEA, see 136 Cong.Rec. 28656-28657 (1990)." *Id.*

78 *See* 136 CONG. REC. H9407 (daily ed. Oct. 11, 1990) (referring to Rohrabacher Amendment); *see id.* at H9442-9433 (citing the amendment); *see also* H.R. REP. No. 101-810 at 5 (1990).

79 H.R. REP. No. 764-810, at 5 (1990).

80 *See* H.R. 4825, 101st Cong. (1990); *see also* H9407 (daily ed. Oct. 11, 1990) (referring to Williams/Coleman Amendment); *see also* H.R. REP. No. 101-801, at 10 (1990).

81 *Finley*, 524 U.S. at 575.

82 *Id.* at 581. Section 954(d) provides in full:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations and procedures, the Chairperson shall ensure that—
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> > artistic excellence and artistic merit are the criteria by which applicants are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and applications are consistent with the purpose of this section. Such regula-

II. THE WAKE OF SECTION 954(d)(1)

Funding for the arts, by nature, must take content into consideration.[83] "The NEA has limited resources and it must deny the majority of the grant applications that it receives, including many that display 'artistic excellence.'"[84] The content, however, must be judged solely on the basis of its artistic merit.[85]

Prior to the enactment of Section 954(d), art, ostensibly, was judged solely on the basis of its artistic merit.[86] The addition of Section 954(d), specifically the decency and respect clause,[87] allows for viewpoint-based considerations.[88] The critical inquiry becomes, then, did the addition of Section 954(d)(1) make the statute facially unconstitutional?

A. *The Finley Case*

Indeed whether Section 954(d)(1) is facially unconstitutional was the question before the Court in the *Finley* case.[89] The constitutional challenge, which was brought by Karen Finley[90] and three individual respondents,[91] all of whom were denied funding,[92] as-

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tion shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.

20 U.S.C. § 954(d).

83 *See Finley*, 524 U.S. at 583. "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding." *Id.* Given the very fact that there are many more artists seeking funding than funding available, which warrants the use of subjective criteria, "absolute neutrality is simply 'inconceivable.'" *Id.* at 585 (citing Advocates for the Arts v. Thompson, 532 F.2d 792, 795-96 (C.A.1), cert. denied, 429 U.S. 894 (1976)).

84 *Finley*, 524 U.S. at 583.

85 *See id.* Artistic merit includes considerations "such as the technical proficiency of the artist, the creativity of the work, . . . the work's contemporary relevance. . . ." *Id.* "The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth to the competing applications . . . .'" *Id.*

86 *See generally* 20 U.S.C. § 954(c).

87 *Id.* § 954(d)(1) (providing that "artistic excellence and artistic merit are the criteria by which applicants are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public").

88 *See* Bloom, *supra* note 10, at 11; *see also Finley*, 524 U.S. at 615 n.9 (Souter, J., dissenting) (stating that "[d]ecency and respect, . . . are inherently and facially viewpoint based."); *see also id.* at 593 (Scalia, J., concurring joined by Thomas, J.) (arguing that decency and respect, as commonly defined and as intended in the legislation, are viewpoint discriminatory).

89 National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

90 Karen Finley is a performance artist who applied for an NEA grant before the enactment of § 954(d)(1). Her show entitled *We Keep Our Victims Ready*, was an issue of controversy. In the second segment, she recounted a sexual assault by stripping to the waist and smearing her breasts with chocolate, while using profanity to describe the assault. *See id.* at 596 n.2.

91 The three individual respondents are also performance artists who applied for NEA grants. Holly Hughes, in her monologue *World Without End*, graphically recollects her experiences as a lesbian and reminisces about her mother's sexuality. John Fleck, during his performance of *Blessed Are All The Little Fishes*, deals with issues of Catholicism and alcohol-

serted that Section 954(d)(1) "was void for vagueness and impermissibly viewpoint-based."[93] The respondents also claimed that the NEA had violated their rights to free speech, a First Amendment guarantee, by rejecting the applications on political grounds.[94]

Although the NEA agreed to settle the individual statutory and as-applied constitutional claims by reinstating the amount of the vetoed grants,[95] the District Court went on to grant a summary judgment in favor of the respondents.[96] The court reasoned that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency.'"[97] Given that the provision did not adequately set forth the requirements expected of the applicants, or how to secure NEA funding in the face of discretion,[98] the court concluded that the statute "cannot be given effect consistent with the Fifth Amendment's due process requirement."[99]

The District Court's decision was later affirmed by a divided Court of Appeals.[100] The majority concluded that the "decency and respect" criteria was not "susceptible to objective definition."[101] They, too, voided the statute for vagueness under the First and Fifth Amendments,[102] finding that Section 954(d)(1) "[gave] rise to the danger of arbitrary and discriminatory application."[103]

The dissent, however, found that Section 954(d)(1) did not

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ism. Dressed as a mermaid, Fleck urinates on stage after creating an altar out of a toilet bowl by placing a photograph of Jesus Christ on the lid. Tim Miller, in his performance of *Some Golden States*, uses vegetables as representations of sexual symbols to recount his childhood experiences, his life as a homosexual and the constant threat of AIDS. *See id.* The advisory panel recommended approval of all four respondents' grants, but a majority of the Council recommended disapproval, and subsequently, in June 1990, the NEA officially denied funding to the artists. *See* Hope O'Keeffe, Symposium, *supra* note 4, at 713 n.43.

92 *See Finley*, 524 U.S. at 577.

93 *Id.* at 577.

94 *See id.*

95 As a result of a settlement, the artists were awarded the amount of the vetoed grants as well as damages and attorneys' fees. *See id.*

96 *See id.*

97 Finley v. National Endowment for the Arts, 795 F.Supp. 1457, 1463-68 (C.D. Cal. 1992).

98 *See id.* at 1472. The District Court stated the provision "fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.*

99 *Id.*

100 *See Finley*, 524 U.S. at 577.

101 Finley v. National Endowment for the Arts, 100 F.3d. 671, 680 (9th Cir. 1996).

102 *See* U.S. CONST. amend. I (providing that "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"); *see also* U.S. CONST. amend. V (providing in relevant part "[n]or [shall any person] be deprived of life, liberty or property, without due process of law . . . .").

103 *Finley*, 100 F.3d at 680.

prohibit the NEA from funding indecent or offensive art, but merely required the agency to consider the "decency and respect" criteria in the grant selection process.[104] The dissent criticized the majority for having extended "First Amendment principles to a situation that the First Amendment doesn't cover."[105] Moreover, they contended that "the First Amendment protects artists' rights to express themselves as indecently and disrespectfully as they like, but does not compel the Government to fund that speech."[106]

One commentator noted that the *Finley* Court "confronted a very messy area of First Amendment jurisprudence and left it even messier."[107] Indeed, many critics of *Finley* find the decision unsatisfying from both a doctrinal and theoretical standpoint.[108] Notably, Justice Scalia in his concurring opinion, and Justice Souter in his dissenting opinion, criticize the Supreme Court's majority opinion (written by Justice O'Connor) as lacking in both clarity and principle.[109]

In June 1998, the Supreme Court reversed the Ninth Circuit.[110] The Court asserted that by providing broad guidelines rather than strict categorical requirements, there is no "realistic danger that [Section] 954(d)(1) will compromise First Amendment values," thereby utilized to "preclude or punish a particular view."[111] The Court further opined that "[g]iven the varied interpretations of the criteria and the vague exhortation to 'take them into consideration,' it seems unlikely that this provision will introduce any greater element of selectivity than the determination of

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104 *See id.* at 689 (Kleinfeld, J., dissenting).

105 *Id.*

106 *Id.* at 684; *see also* Rust v. Sullivan, 500 U.S. 173 (1991) (asserting that the First Amendment does not provide to individuals an affirmative right to subsidies for their speech and thus, the government can choose, on content grounds, not to subsidize speech without infringing free speech rights). *But see* Cole, *supra* note 27, at 678 (interpreting *Rust* narrowly noting that the Court did not overrule prior cases which mandated "strict content neutrality in government subsidies to the press").

107 Bloom, *supra* note 10, at 1; *see also* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 31 n.106 (2000) (providing that "[t]he [*Finley*] Court upheld the statute on its face, in a messy opinion that provides fodder for both sides in the continuing debate.").

108 *See* Bloom, *supra* note 10; *see also* Greene, *supra* note 107; *see also* Cara Putnam, 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 (1999) (arguing that the majority missed the opportunity to enforce Congress's intent to reform the way in which the NEA awards grants); John Tuskey, Symposium, *supra* note 4, at 707 (citing JAMES FITZPATRICK, AMERICANS FOR THE ARTS, SPECIAL REPORT, JULY 1998: NOT AN ARMAGEDDON FOR THE ARTS, *available at* http://www.artsusa.org/advocacy/jimfitz.html (last visited Apr, 30, 2001)). "As Americans for the Arts note in their report, *Finley* is a rather toothless decision." *Id.*

109 *See* Bloom, *supra* note 10, at 1.

110 *See Finley*, 524 U.S. at 579.

111 *Id.* at 581.

'artistic excellence' itself."[112] The court held that Section 954(d)(1) was facially constitutional and made clear that "unless and until [Section] 954(d)(1) is applied in a manner that raises concerns about the suppression of disfavored viewpoints, the Court will uphold it."[113]

The *Esperanza* case, discussed *infra*, is the case in which Section 954(d)(1) was applied "in a manner that raises concerns about the suppression of disfavored viewpoints."[114] Moreover, it is the case to which Justice O'Connor was referring when she indicated that the Court would welcome an as-applied challenge to Section 954(d).[115] Justice O'Connor opined, "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then the Court would be presented with a different constitutional question."[116] In *Esperanza*, subjective criteria were employed to award grants. On the basis of these subjective criteria, the Esperanza Center was penalized because of its disfavored viewpoints. Accordingly, *Esperanza* is a paradigmatic example of viewpoint discrimination.

B. *The Esperanza Case*

1. Background

The Esperanza Peace and Justice Center ("Esperanza Center") is a non-profit cultural arts and education center located in San Antonio, Texas.[117] The Esperanza Center was founded in 1987 and is currently incorporated as a non-profit organization under Texas law.[118] The Esperanza Center offers "programming in visual arts, music, film, video performance, and cultural studies to San Antonio's diverse communities and visitors as well as space and assistance to many local organizations and artists."[119]

The Executive Director of the Esperanza Center, Graciela Sanchez, a Chicana lesbian filmmaker, has been involved in the

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112 *Id.*
113 *Id.*
114 *Id.*
115 *See id.* "So suppression of disfavored viewpoints. . .calculated to drive certain ideas and viewpoints from the marketplace may after *Finley* be struck down as unconstitutional." *Id.* "Thus we have no occasion here [in *Finley*] to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination." *Finley*, 524 U.S. at 585.
116 *Id.* The *Esperanza* case "promises to be an as-applied challenge that might well meet the burden of proving viewpoint discrimination." Marci Hamilton, Symposium, *supra* note 4, at 725.
117 *See generally The Esperanza Center, available at* http://www.esperanzacenter.org (last visited May 2, 2001) [hereinafter *The Esperanza Center*].
118 *See id.*
119 *Id.*

San Antonio art and culture scene for the greater part of her life.[120] Sanchez and others involved in the Esperanza Center have created a vision statement that attempts to convey the importance of a community educated in the arts, and one in which people, regardless of color, sexual orientation or economic status, exchange ideas and honor one another.[121] Furthermore, the people of the Esperanza Center have set forth specific goals that they, along with the aid of the community, wish to achieve. These goals are referred to as The Strategic Plan of the Esperanza Center.[122]

The Esperanza Center is partially funded by the San Antonio Department of Arts and Cultural Affairs ("DACA"), which is, in turn, supported by both the Texas Commission on the Arts ("TAC") and the NEA.[123] To assist in the administration of arts funding, the City Council appoints an eleven member Cultural Advisory Board ("CAB"), of which the Mayor, Howard Peak, is a member.[124]

DACA's mission is very similar to that of the NEA, in that it has established the Arts Funding Program to maintain and develop funding for programs that address the agency's mission, by furthering artistic excellence, and by fostering increased, diverse public participation and awareness of the role the arts play in San

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120 *See id.*

121 *See id.* The vision statement provides in full:

> The people of Esperanza dream of a world where everyone has civil rights and economic justice, where the environment is cared for, where cultures are honored and communities are safe. The Esperanza Center advocates for those wounded by domination and inequality—women, people of color, lesbians and gay men, the working class and poor. We believe in creating bridges between people and exchanging ideas and education and empowering each other. We believe it is vital to share our vision of hope. . .we are esperanza.

Id. "Esperanza" is Spanish for "hope."

122 *See id.* The Strategic Plan established the following as its goals:

> (A) To provide programming which generates multi-issue/multi-cultural community organizing while providing resources and space where the creation and presentation of the arts reflect the cultures of people in struggle; and
>
> (B) To construct, develop, and operate a permanent, safe, central, multi-purpose facility for artists, activists and other community members to do their work with a sense of community, history, quality, and hope.

Id.

123 *See Esperanza Center, Plaintiff's Post-trial Findings of Fact, available at* http://www.esperanzacenter.org/litigation/trial/posttrialbrief/pfacts.html (last visited Apr. 30, 2001) (providing Plaintiff's Amended Proposed Findings of Fact, which states that the Esperanza Center is funded in part by DACA) [hereinafter *Plantiff's Post-trial Findings of Fact*]; *see also City of San Antonio Cultural Affairs—Index, available at* http://www.ci.sat.tx.us/daca (last visited Mar. 27, 2001) (providing that DACA is supported in part by both the Texas Commission on the Arts and the NEA) [hereinafter DACA homepage].

124 *See Esperanza Center, Report and Recommendation of the United States Magistrate, available at* http://www.esperanzacenter.org/litigation/sumjud/mrec.html (last visited Apr. 30, 2001) (providing Report and Recommendation of the United States Magistrate) [hereinafter *Report and Recommendation of the United States Magistrate*].

Antonio.[125]

The grant award process is also similar to that of the NEA. Applications for arts funding are submitted to DACA, at which time they are evaluated by staff and peer panels.[126] The panels that are selected by CAB to review the applications are comprised of independent and objective experts, including arts professionals, arts patrons and experts familiar with arts organizations.[127] The staff and panel discuss the applications and use the Strategic Plan guidelines to distinguish the art which is to receive funding from that which is not. Thereafter, the panel and staff make recommendations to the CAB for awarding grants to applicants.[128] The program employs the criteria set forth in DACA's Strategic Plan for evaluating applications, which parallels Section 954(d)(1), in requiring "artistic excellence" and "high artistic quality."[129]

In addition to the DACA, TAC and NEA support, the Esperanza Center also receives its funding from donations by individuals; various means of earned income—ticket sales, subscriptions, and the sale of merchandise; fund-raising events—benefits, dinners, dances, and auctions; as well as grants from both private foundations and governmental programs on the city, state and federal levels.[130] Of the $335,000 budget allocated for the 1997-98 fiscal year, thirty-seven percent came from individual donations; ten percent came from special fundraising events; and fifty-three percent came from public and private organizations.[131]

The City of San Antonio has contributed arts funding grants to the Esperanza Center since the 1990-91 fiscal year when it con-

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125 *See Plaintiff's Post-trial Findings of Fact, supra* note 123. DACA has set forth the following as its goals:

> (1) to support programs that futher artistic excellence and foster public participation,
> (2) to increase arts and cultural audiences,
> (3) to support cultural tourism initiatives as an economic development strategy, and
> (4) to collaborate with other City departments and community groups in the implementation of neighborhood revitalization, economic development and youth initiatives where the arts, artists and cultural activities play integral roles.

Compare id., with National Endowment for the Arts—Learn About the NEA, available at http://arts.endow.gov/learn/ (last visited June 4, 2001) (providing the NEA's mission statement and goals), *with* 20 U.S.C. § 954(c)(1)-(10), *supra* note 55 and accompanying text.

126 *See Plaintiff's Post-trial Findings of Fact, supra* note 123.

127 *See Plaintiff's Statement of Facts, supra* note 33.

128 *See id.*

129 *Compare id., with* 20 U.S.C. § 954(d)(1), *supra* note 82 and accompanying text.

130 *See Declaration of Gráciela Isabel Sánchez, available at* http://www.esperanzacenter.org/litigation/sumjud/pgraciela.html (last visited June 4, 2001) [hereinafter *Sánchez Declaration*].

131 *See id.* The public and private foundation grants came from organizations including the Rockefeller Foundation, the Ford Foundation/Human Rights USA Project, the Texas Commission on the Arts and the Nathan Cummings Foundation. *See id.*

tributed $5,000 for the PazARTE programming.[132] PazARTE is the Esperanza Center's general arts programming, which provides a broad range of arts and educational programs for the residents and visitors of San Antonio.[133]

Moreover, the Esperanza Center "provides technical assistance and meeting space for numerous local social justice, community, and cultural arts organizations."[134] The Esperanza Center provides support while serving as fiscal agents for various associations such as VAN[135] and San Antonio Lesbian and Gay Media Project ("The Media Project").[136]

2. The Controversy

Although the Esperanza Center previously had received funding for six years,[137] in August and September of 1997, a public campaign "rooted in fear of lesbians and gay men" affronted the Esperanza Center and its heretofore support by the City of San Antonio.[138] According to the Esperanza Center, the public campaign was launched without regard for the "breadth of the Esperanza's programming,"[139] and instead focused on its sponsorship of

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132 *See id.*

133 *See id.* PazARTE includes MujerCanto, featuring women's performance, music, song, and thought; Visiones de Esperanza; Inner City Youth Media Project, which trains inner-city youth to tell their stories in video; MujerArtes, a Westside community arts project in which low-income women develop their artistic skills and produce pottery for sale; Platicas, a community forum for writers and speakers to address current issues; the Other American Film Festival, presenting films about communities and social, economic, and political issues throughout the Americas; and Exhibiciones Activas, a series of visual arts exhibits featuring art by women, people of color, youth, lesbians and gays, and other disenfranchised voices. *See generally id.*

134 *Id.*

135 *See VAN, available at* http://user.dcci.com/pboyer/VAN_Homepage.htm (last visited Feb. 20, 2000). VAN, pronounced "vein," as in ARTery, provides art aid, art resources, technology and information to the public. Additionally, VAN hosts artists such as Bill T. Jones and Arnie Zane Dance Company of New York. VAN, an unincorporated association, was formed in 1994. *See id.; see also Plaintiff's Statement of Facts, supra* note 33.

136 *See Esperanza Center, Out at the Movies, available at* http://www.esperanzacenter.org/programs/outmovies/intro.html (last visited May 2, 2001) [hereinafter *Out at the Movies*]. The Media Project, also an unincorporated association, was formed in 1991 and has as its principal project the "Out at the Movies" film festival. *See id.*; *see also Plaintiff's Statement of Facts, supra* note 33.

137 *See Plaintiff's Statement of Facts, supra* note 33. "Due to its innovative arts programming and important social justice focus in the community, the Esperanza Center had received City funding for six years previously." *Id.* The Esperanza Center received arts grants from the City for fiscal years 1990-91 through 1996-97 for itself and as fiscal agent for the Media Project for 1994-95 through 1996-97. *See Sánchez Declaration, supra* note 130.

138 *See Plaintiff's Statement of Facts, supra* note 33.

139 *Id.* "Other than the 'Out at the Movies' film festival, opponents had limited knowledge of Esperanza's arts programming and activities;" "Nine of the council members had never visited an Esperanza-sponsored event or visited Esperanza Center, and most council members had never seen Esperanza's grant applications. Most council members had no knowledge of the Media Project or VAN or that these agencies were affected by the budget vote." *Id.*

a lesbian and gay film festival.[140] Individuals responsible for the campaign attacked the Esperanza Center "over the radio, through petitions, and in public meetings."[141] These individuals denounced the Esperanza Center for supporting and "promoting a deviant homosexual lifestyle," "targeting our children," and "furthering the homosexual agenda."[142] Council Members, infected by the "vitriol," were flooded with "letters, calls and statements at Council meetings demanding that they exclude the Esperanza Center from arts sponsorship."[143] Without familiarizing themselves with the recognition the Esperanza Center had received as an important cultural center by national funders,[144] the City Council was "drawn into the public animus," which decried the Esperanza Center's work as too "in-your-face"[145] and made "supportive appearances on talk radio shows that urged them not to fund a 'lifestyle [that] is an abomination before almighty god.'"[146]

Ostensibly, as a direct result of the public campaign, "the City Council voted to eliminate all of the proposed funding for the Esperanza and the two groups it sponsored," the Media Project and VAN.[147] Consequently, the Esperanza Center, VAN and the Media Project were the only agencies not awarded funding.[148] Due to this decrease in funding, both the Esperanza Center and the Media Project have significantly reduced the amount of programming, and VAN has ceased to exist.[149]

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140 *See id.* During public hearings on the budget for the 1997-98 fiscal year, most public commentary focused on opposition to Esperanza's gay and lesbian programs. *See id.*

141 *Plaintiff's Statement of Facts, supra* note 33. "Council members received a high volume of constituent correspondence opposing grants to Esperanza because of its support for gay and lesbian issues." *Id.*

142 *Id.*

143 *Id.*

144 *See id.*

145 *Id.* "Mayor Peak was quoted saying that Esperanza "seem[ed] to go way beyond what they want money spent on. The group flaunts what it does. It's an in-your-face organization. They are doing this to themselves. . . .They are almost rubbing it in people's faces." *Id.*

146 *Id.* "Radio talk show host Adam McManus used his show to denounce City funding for plaintiffs because 'we do not want them to fund the Esperanza Center or any other so-called arts group which promotes the radical homosexual agenda.'" *Plaintiff's Statement of Facts, supra* note 33. McManus claimed that the Esperanza Center was "'the most egregious, they're most heinous in what they are doing with the funding.'" *Id.*

147 *Plaintiff's Statement of Facts, supra* note 33.

148 *See id.* "The Esperanza was the lone grantee that was targeted for defunding." *Id.; see also City of San Antonio Office of Cultural Affairs, available at* http://www.ci.sat.tx.us/daca/Grant/overview.doc (last visited Feb. 20, 2000) (providing a list of agencies funded for the Fiscal Year 1998-99 by the City of San Antonio Office of Cultural Affairs). Some of the agencies which continued to receive funding despite the City's efforts to attribute Esperanza's defunding to the need to allocate funds for City upkeep were Alamo City Men's Chorale, Jewish Community Center of San Antonio, San Antonio Youth Yes!, Gemini Ink, and Natyanjali Center for the Performing Arts. *See id.*

149 *See Plaintiff's Statement of Facts, supra* note 33

On August 4, 1998, the Esperanza Center filed a lawsuit under 42 U.S.C. Section 1983.[150] They alleged that San Antonio's decision not to fund the Esperanza Center constituted viewpoint discrimination in violation of the First Amendment, and a violation of their equal protection rights under the Fourteenth Amendment.[151] As a result of the lawsuit, the Esperanza Center now finds itself in the decade-long debate at issue in the *Finley* case—the First Amendment and the boundaries it creates for governmental funding and the arts.[152]

3. The Esperanza Center's Perspective

The Esperanza Center grounds its argument on the "core principle," which the nation boasts, namely that "the government may not 'aim at the suppression of ideas.'"[153] The Esperanza Center argues that "when [the government] actively fosters a marketplace of ideas, as with an arts sponsorship, it may not excise one alone simply because some people dislike it; nor may the government treat one speaker differently from all the rest, simply because the public despises who she is and what she has to say."[154]

It is uncontested that the Esperanza Center satisfied the neutral criteria—artistic expression, audience development, and administrative capacity.[155] Moreover, both DACA and CAB favorably rated the Esperanza Center, and recommended that grants be

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150 *See Plaintiff's Post-trial Findings of Fact, supra* note 123. "[P]laintiffs have sued under 42 U.S.C. § 1983 for viewpoint discrimination in violation of the right to free speech guaranteed by the First Amendment; animus-based decisions in violation of the right to equal protection under the Fourteenth Amendment; and retaliation in violation of the rights to petition and free expression under the First Amendment." *Id.* Additionally, plaintiffs have sued for violation of the Texas Open Meetings Act in violation of TEX. GOVN'T CODE ANN. § 551.001. *See id.* "The Texas Open Meetings Act is violated when a majority of a decision-making body engages in a deliberation, even though a quorum may not be in one room at the same time." *See Esperanza Center, Plantiff's Post-trial Brief, available at* http://www.esperanzacenter.org/litigation/trial/posttrialbrief/pbrief.html (last visited June 5, 2001) (providing Plaintiff's Post-trial Brief) [hereinafter *Plaintiff's Post-Trial Brief*]. On August 21 and 22, 2000, the parties appeared before Judge Orlando Garcia of the Western District Court of Texas. *See id.*

151 *See Esperanza Center, Defendant's Motion for Summary Judgment, available at* http://www.esperanzacenter.org/litigation/sumjud/dbrief.html (last visited May 2, 2001) (providing Defendant's Motion for Summary Judgment) [hereinafter *Defendant's Motion for Summary Judgment*].

152 *See* Bloom, *supra* note 10, at 1.

> For the better part of a decade, debate has raged over whether Congress can constitutionally restrict, or at least influence, the ability of the National Endowment for the Arts . . . to award grants to artists and institutions for the creation or display of art work that a significant segment of the public would consider highly offensive.

Id.

153 *Id.* at 14. (citation omitted).

154 *Plaintiff's Statement of Facts, supra* note 33.

155 *See id.*

awarded.[156] The City, however, rejected the recommendation and refused to include the Esperanza Center in the 1997-98 budget.[157] As a result, the Esperanza Center contends that the City "leverage[d] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," particularly on issues relating to gay and lesbianism, politics, and social issues.[158] Furthermore, the Esperanza Center argues that when the City singled out the Esperanza Center and incited public animus toward them,[159] it violated its own procedures enumerated in DACA's Strategic Plan, which emphasizes the goal of funding agencies that provide diverse programming.[160]

4. The City's Defense

The City contends that in the case of competitive funding, the government may award grants based on criteria that may be prohibited in other areas of speech regulation.[161] The City also argues that it can refuse to fund a protected activity without its actions constituting a penalty against the subsidy.[162] Additionally, the City denies singling out the Esperanza Center for its gay and lesbian views, noting that other gay and lesbian affiliated groups received arts grants from the City.[163]

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156 *See id.*

157 *See id.*

158 *Plaintiff's Post-Trial Brief, supra* note 150 (citing NEA v. Finley, 524 U.S. 569, 587 (1998)).

159 Plaintiffs argue that by sanctioning voters' animus and by voting in favor of the expressed biases of council members toward Esperanza, the City inhibited speech and demonstrated the motive to suppress an unpopular viewpoint. *See Esperanza Center, Plaintiff's Response, available at* http://www.esperanzacenter.org/litigation/sumjud/presponse.html (providing Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment) [hereinafter *Plaintiff's Response*].

160 *See Plaintiff's Statement of Facts, supra* note 33. "DACA's Strategic Plan . . . establishes the goals and general guidelines for allocating funding to arts organizations, including the three criteria for evaluation of applications: artistic excellence, audience development, and administrative capacity." *Id.*

161 *See id.* Scarcity of governmental resources does not justify viewpoint discrimination, allocations must be made on neutral grounds." Rosenberger v. Rector and Visitors Of the University Of Virginia, 515 U.S. 819, 828 (1995); *see also Plaintiff's Post-Trial Brief, supra* note 150 (citing Board of Regents, University of Wisconsin v. Southworth, 529 U.S. 217, 233 (2000) "[which held] that government has an obligation of viewpoint neutrality in government subsidy programs").

162 *See Defendant's Motion for Summary Judgment, supra* note 151. Defendants argue that "[their] refusal to fund a protected activity, without more, [should] not be equated to a 'penalty' on that activity." *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 192 (1991) (quoting Harris v. McRae, 448 U.S. 297, 317 n.19 (1980))); *Cf.* National Endowment for the Arts v. Finley, 524 U.S. 569, 601 (1998) (Souter, J., dissenting) (stating "Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses."). "[T]he City had the discretion to fund other arts agencies and exclude Esperanza without running afoul of the Constitution." *Defendant's Motion for Summary Judgment, supra* note 151.

163 *See Defendant's Motion for Summary Judgment, supra* note 151. The Alamo City Men's

In its decision to defund the Esperanza Center, the City Council claims it merely took into consideration the opposition voiced by its constituents.[164] In the Council's view, Esperanza had "crossed the line" between politics and art with certain exhibits that were considered offensive.[165] Many councilmen, though admittedly in agreement with the opposition expressed by their constituents, stated that the budget cut was due to a desire to allocate more funds to the City's upkeep, including street and sidewalk repair.[166] In its defense, the City claims that it is able to selectively fund programs deemed to be in the pubic interest.[167] The Council argues that it had a "plethora" of reasons for its decision to deny funding the Esperanza Center.[168] Public opposition, the desire to compromise among varying priorities, and the perception that the Esperanza Center had become too politicized, were among the reasons offered by the City to support their decision.[169]

III. THE JUXTAPOSITION: *FINLEY V. ESPERANZA*

A. *Viewpoint Discrimination Examined: Rosenberger v. Rector & Visitors Of the University Of Virginia*

The *Finley* case may or may not have been a case of viewpoint discrimination.[170] Indeed, the Supreme Court Justices differ dra-

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Chorale, the Guadalupe Cultural Arts Center and the Jump Start Performance Co. (Jump Start Theater), all were targeted by conservative groups as promoting a "homosexual agenda." *Id.* Each of these organizations, however, received funding. *See id.* "Furthermore, two of these organizations played active roles in supporting the 'Out at the Movies' film festival sponsored by the Lesbian and Gay Media Project and were also funded." *Id.*

164 *See Plaintiff's Statement of Facts, supra* note 33. Councilwoman Debra Guerrero opined in her deposition testimony that it was easy for council members to "'get caught up in [their] constituents' fears and rhetoric,'" especially when concerned about re-election. *Id.*

165 *See id.* Guerrero described the view of council members and constituents as expressing the belief that Esperanza had "'crossed the line politically, into a political realm as opposed to being art.'" [and said] "'There were some exhibits that tended to be offensive and in your face.'" *Id.*

166 *See id.* On the other hand, some council members "suggested that the budget vote reflected a desire to devote more money to 'basic services' such as street and sidewalk repair." *Id.*

167 *See Plaintiff's Statement of Facts, supra* note 33.

168 *See id.*

169 *See id.*

170 "Identifying viewpoint discrimination is notoriously difficult." Greene, *supra* note 107, at 32. Professor Greene bases this assertion in part on the fact that whether we, [the citizenry] see or don't see viewpoint discrimination depends on whether an "issue is seen as disputed in the current legal culture." *Id.* at 33. Professor Greene offers the following as an explanation:

> [I]f one had lived during an era in which homosexuality was widely thought to be deviant, a statement to that effect might not have seemed to be the expression of a viewpoint, but rather just the recitation of a fact. When, in later time, homosexuality becomes more widely (but still not uniformly) accepted, a similar statement now seems viewpoint-based.

Id.

matically in the way they define viewpoint discrimination.[171] Given these differences, it is not surprising that the case law surrounding this issue is in disarray. The *Rosenberger*[172] case, however, provides some clarity as it often surfaces as the paramount case with regard to viewpoint discrimination.[173]

The Supreme Court in *Rosenberger* defined viewpoint discrimination as an "egregious form of content discrimination."[174] Justice Kennedy, writing for the majority, held that viewpoint discrimination is presumed impermissible and only tolerated when a particular action serves a compelling governmental interest.[175]

It follows, then, that Professor Greene would find the statements made against the Esperanza Center seemingly viewpoint-based, as they were indeed made during a time in which homosexuality is more widely accepted.

171 *See generally* National Endowment for the Arts v. Finley, 524 U.S. 569 (1998). Justice O'Connor, writing for the majority, concluded that the decency and respect criteria is not viewpoint based. *See id.* "The provision . . .simply adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Id.* at 571. In his concurring opinion, Justice Scalia disagreed with the majority's holding that the provision did not constitute viewpoint discrimination. Justice Scalia opined in relevant part:

> It is 100 percent clear that decency and respect are to be taken into account in evaluating applications . . . .The presence of the '[t]ake into consideration' clause . . . means something. And the something is the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not. This unquestionably constitutes viewpoint discrimination. By its terms, [§ 954(d)(1)], establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

Id. at 583-84 (Scalia, J., concurring, joined by Thomas, J.). Although Justice Souter, in his dissenting opinion, shares Justice Scalia's perspective, that § 954(d)(1) encourages viewpoint discrimination, he declared the statute unconstitutional:

> The decency and respect proviso mandates viewpoint-based decisions in the disbursement of government subsidies, the Government 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.

Id. at 600 (Souter, J., dissenting). Justice Souter characterized § 954(d)(1) as facially unconstitutional. *See id.* "The question here is whether the italicized segment of this statute [*taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public*] is unconstitutional on its face . . . . It is." *Id.*

172 515 U.S. 819 (1995) (holding that public university's student activities funds may not be disbursed on viewpoint-based terms).

173 *See Finley*, 524 U.S. 569. "We have held time and time again that Congress may not 'discriminate invidiously in its subsidies in such a way as to aim at the suppression of . . . ideas.' Our most thorough statement of these principles is found in the recent case of *Rosenberger*." *Id.* at 612-13 (Souter, J., dissenting).

174 *Rosenberger*, 515 U.S. at 829. *See also* Greene, *supra* note 107, at 33-34. "Viewpoint discrimination is strong evidence of the desire of the 'ins' to exert their political muscle by harming the 'outs.'" *Id.*

175 *See Rosenberger*, 515 U.S. at 829-30:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed imper-

Finley does not appear to fit the criteria under which viewpoint discrimination is tolerated.[176] In fact, *Finley* does not present a compelling governmental interest at all. The government would be hard pressed to argue successfully that denying Karen Finley funding is a compelling governmental interest.[177]

Perhaps the facts surrounding the denial of funding (or the artists' works themselves) were simply not offensive enough to appeal to the sensibilities of the Justices so as to cause them to strike down Section 954(d)(1) as facially unconstitutional. However, *Finley* is pushed to its logical extreme in *Esperanza*. *Esperanza* is essentially a *reductio ad absurdum*[178] to *Finley*. By upholding the constitutionality of the statute and allowing the statute to stand as written—inherently vague and broad,[179] clear cases of viewpoint discrimination are allowed to creep up, such as in *Esperanza*.[180]

One commentator notes that "the Court's decision not to clarify the meaning of this clause[181] allows it to operate as a tool of discrimination and censorship against ideas brought to the public by artists . . . ."[182] Indeed, had the City Council in *Esperanza* been savvy enough not to make the distinction between funding decisions based on artistic merit and excellence, and the decision in *Esperanza*—based on sexual orientation and lifestyle, they would have been entitled to deny the funding under the umbrella of *Fin-*

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missible when directed against speech otherwise protected within the forum's limitations.

Id.

176 *See Finley*, 524 U.S. 569, 583 (stating that there are plenty of instances where viewpoint discrimination is fine, such as in the case of children).

177 The compelling interest in protecting the public from her unique use of chocolate is beyond me.

178 BLACKS'S LAW DICTIONARY 1283 (7TH ed. 1999) (defining a *reductio ad absurdum* as the "disproof of an argument by showing that it leads to a ridiculous conclusion").

179 *See Finley*, 524 U.S. at 600. Justice Souter opined:

> [The question whether the statute is unconstitutional on its face cannot] be answered in the government's favor on the assumption that some constitutional applications of the statute are enough to satisfy the demand of facial constitutionality, leaving claims of the proviso's obvious invalidity to be dealt with later in response to challenges of specific applications of the discriminatory standards. This assumption is irreconcilable with our long standing and sensible doctrine of facial overbreadth, applicable to claims brought under the First Amendment's speech clause.

Id. (Souter, J., dissenting). "Since the decency and respect proviso of § 954(d)(1) is substantially overbroad and carries with it a significant power to chill artistic production and display, it should be struck down on its face." *Id.* at 611.

180 Kowalski, *supra* note 64, at 217-18. "By holding that [Section 954(d)(1)] is constitutionally permissible to utilize these viewpoint-based factors, the Court eased the way for potential suppression of disfavored, unconventional, and political speech typically protected under the First Amendment." *Id.*

181 *See* 20 U.S.C. § 954(d)(1) (referring to the "decency and respect" clause).

182 Robert Bedoya, Symposium, *supra* note 4, at 718.

ley.[183] In fact, under Scalia's opinion, both content-based discrimination and viewpoint-based discrimination would have been tolerated.[184]

The difficulty with *Esperanza* arises only because the City Council was not savvy enough to deny funding to the Esperanza Center without admitting that they were doing so based on the particular views expressed.[185] In fact, the City did little to conceal its motives behind the budget cut. Indeed, they were quite honest about their dislike for the Esperanza Center's views. Councilman Webster commented that he, and other Council members, were going to work hard to ensure that "[their] conservative and appropriate views" regarding gay and lesbian issues were represented.[186] Certainly the dedicated efforts of the City—specifically those of Councilmen Webster and Marbut—to ensure the representation of their views, exemplifies governmental arts funding used to "to redirect the market towards the status quo."[187] Consequently, the public is deprived of the potential cultural and artistic value of Esperanza's work merely because the City decried Esperanza as furthering the homosexual agenda by promoting a deviant homosexual lifestyle to the children of San Antonio.[188] The City, through the suppression of the Esperanza Center's art, has attempted to shore-up government ideology. By tolerating such action by a governmental agency, our society becomes more akin to fascist and oppressive governmental structures, such as those present in Eastern Europe.[189] Certainly, this is not the path down which our democracy

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183 The city government "was foolish enough to tell everyone that they [had ceased funding art groups altogether] because they did not like the group." Marci Hamilton, *id.* at 725.

184 *See Finley*, 524 U.S. at 583-84; *see also supra* note 171 and accompanying text.

185 "You do not have to be very smart to know to avoid saying, 'I am going to deny this because I do not like the viewpoint it encompasses.'" David Cole, Symposium, *supra* note 4, at 728. "As long as you do not say that, it is going to be very difficult to bring an as-applied challenge." *Id.*

186 *See Plaintiff's Statement of* Facts, *supra* note 33. Councilman Webster's statements during one of the radio programs included the following:

> I am confident that my taxpayers and my personal beliefs and my thoughts do not reflect what that particular group is bringing forward and how I want my tax dollars spent . . . .We're considered the conservative district of all the districts. My constituency is very conservative, very straightforward, very active in their community, very active in their church. And they have made it very clear during my 3½ years of service where they want their money spent and Esperanza is not on that list.

Id. Webster also stated that the vote to defund the Esperanza Center was unanimous because he and Councilman Marbut "worked hard to ensure 'the conservative and appropriate views' were represented." *Id.*

187 Hamilton, *supra* note 20, at 98-99.

188 *See Plaintiff's Statement of Facts* , *supra* note 33.

189 *See* Hamilton, *supra* note 20, at 100-01. Professor Hamilton asserts that the Cultural Revolution in China is a clear historical example of where art has been conformed as a

should travel.

B. *Esperanza's "hope" for a successful as-applied challenge*

Some commentators suggest that *Finley* has paved an unusually large obstacle to successful as-applied challenges to the NEA.[190] Historically, viewpoint discrimination is difficult to prove, and *Finley* may have made it even more difficult.[191] Although the Supreme Court's opinion contains encouraging language about future as-applied challenges,[192] the Court has nonetheless "erect[ed] substantial barriers to success."[193] The First Amendment and the Establishment Clause are undoubtedly the vehicles through which the Esperanza Center can "hope" for a successful challenge.

1. The First Amendment

It is well settled that the bedrock of the First Amendment is that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[194] There are simply some reasons upon which the government cannot rely to deny an individual a benefit, and a denial "aimed at the suppression of ideas" is one of them.[195] The Esperanza Center has presented some compelling evidence that the City's motives behind the defunding are suspect.[196] Indeed, the Esperanza Center may successfully prove that they were the target of an egregious type of content discrimination—viewpoint discrimination, which is an even "more blatant" violation of the First Amendment.[197]

2. The Establishment Clause

The Constitution, through the Establishment Clause, prohibits Congress from making any law "respecting an establishment of a

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result of governmental involvement in arts education and creation. "[T]he governments of Eastern Europe suppressed and marginalized art and artists." *Id.* at 99.

190 *See e.g.*, Marci Hamilton, Symposium, *supra* note 4, at 724 (emphasizing that "the Court, knowing the way that the NEA operates, crafts an opinion in a way that creates a nearly impossible means to challenge the NEA on an as-applied basis."); *See also* David Cole, *id.* at 727 (stating "I do not think that [*Esperanza*] is going to be a very fruitful endeavor in the long run.").

191 *See* Marci Hamilton, *id.* at 724. "Proof of the viewpoint discrimination will be difficult to establish." *Id.*

192 See National Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998).

193 Marci Hamilton, Symposium, *supra* note 4, at 724.

194 Texas v. Johnson, 491 U.S. 397, 414 (1989).

195 *Plaintiff's Statement of Facts, supra* note 33.

196 *See id.*

197 *See* Rosenberger v. Rector & Visitors Of the University Of Virginia, 515 U.S. 819, 828 (1995).

religion."[198] The clause "suggests that it is unconstitutional for the government to make direct payments to a religion."[199] Because the government does not provide direct funding to religious organizations, the government does not risk offending the sensibilities of the citizenry by favoring one religion over another. Accordingly, religious organizations are afforded freedom of establishment, exercise, and speech with regard to their beliefs, even if perceived as highly offensive by a subgroup of the citizenry.[200] It is simply understood that government will not directly fund the offensive act, nor expect the public to fund the religion for the mere purpose of promoting religious awareness.

Arts funding is not a per se violation of the Constitution.[201] Notwithstanding that there is no "corresponding arts Establishment Clause,"[202] in a sense what the government is doing in choosing to fund particular artworks and not others, is making law that will inevitably favor some art over others.[203] Although not expressly prohibited by the Constitution, the action by the government to burden or advantage one group over another, is analogous to that which is prohibited, in the religious context, by the Establishment Clause.

In effect, Karen Finley is free to smear her body with chocolate.[204] Indeed, she is free to smear her body with whatever she likes.[205] She can demand her freedom of speech and expression.

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198 U.S. CONST. amend. I; For full text of the First Amendment, see *supra* note 102.

199 Hamilton, *supra* note 20, at 113; *see also Rosenberger*, 515 U.S. 819, 842 (stating that "we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions"); *see also id.* at 863-64 (Souter, J., dissenting) (suggesting that the majority's holding allows a first amendment violation by extending government funding to a religious organization).

200 Although many people perceive the act of animal sacrifice as offensive, a religious organization was allowed to continue the ritual of sacrifice. *See generally* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). Here, a Hialeah, Florida ordinance prohibiting animal sacrifice was viewed as an example of invidious viewpoint discrimination as it targeted one particular religious group. *See id.* at 524. The ordinance was directed toward members of a church which follows the Santeria religion. *See id.* at 526-28. Santeria, most common in Cuba, practices a ritual in which animals (chickens, pigeons) are sacrificed as part of rites for birth, marriage, death and for cure of the ill. *See id.* at 524-26. The animals, killed by trauma to the carotid arteries, are usually cooked and eaten. *See id.* The ordinance was struck down by a unanimous Court and declared a violation of the Free Exercise Clause. *See id.* at 531-32.

201 *See* Hamilton, *supra* note 20, at 113.

202 *Id.*

203 *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 593 (1998) (Scalia, J., concurring) (noting that the decisionmaker "will favor applicants that display decency and respect, and disfavor applicants that do not. This unquestionably constitutes viewpoint discrimination."); *see also supra* note 171 and accompanying text.

204 See John Tuskey, Symposium, *supra* note 4, at 708 (emphasizing that "[e]ven if Karen Finley does not receive government money for smearing chocolate on herself, she is still perfectly free to do so. There is no censorship at all.").

205 *See generally Finley*, 524 U.S. 569.

Freedom of speech and expression is a right guaranteed by the First Amendment. What she cannot demand, however, is the right to have the government fund her art.[206] This is not a constitutionally-guaranteed right. By virtue of this fact, the Esperanza Center's claims under the First Amendment might very well fail. After all, no one is saying that they cannot continue addressing gay and lesbian issues through the medium of art. What is being said, however, is that the Esperanza Center may not be entitled to the additional benefit of having the government fund the art.

If the arts were treated more akin to religion,[207] rather than public education, scientific research through the NAS[208] and medical research through the NIH,[209] the postal service, or the military, and other situations in which tax dollars are spent to fund the public good,[210] then the potential for violations of the Establishment Clause might be reduced. The public good served by such expenditures on education, research and defense, for which funding is expressly provided by the Constitution, is less subjective in nature. By virtue of this fact, there is little risk of offending individual notions of decency and respect. Whereas art, like religion, is want of such an objective characterization.

IV. Arts Funding and the Private Sector

A. *The Public Good*

The arts, like religion, play an important role in society, and government recognizes the significance of both religious affiliation and exposure to the arts.[211] Indeed the societal import of art does

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206 *See Finley*, 100 F.3d. 671, 684 (noting the dissent's argument that the First Amendment protects artists' rights to express themselves as indecently and disrespectfully as they like, but does not compel the Government to fund that speech); *See also Finley*, 524 U.S. at 569, 595 (Scalia, J., concurring, joined by Thomas, J.) providing that:

> [t]hose who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. Avant-garde artists such as respondents remain entirely free to *epater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it.

Id. (citation omitted).

207 *See* Hamilton, *supra* note 20, at 77. (providing that "[a] strong analogy can be drawn between the protection of art and the protection of religion . . . .").

208 National Academy of Sciences.

209 National Institutes of Health.

210 *See* U.S. CONST. art. I, §8, cl.7 (providing that "[t]he Congress shall have the power to lay and collect taxes . . . to establish Post Offices and post roads); *See also* U.S. CONST. art. I, §8, cl. 1, 12, 13 (providing that "[t]he Congress shall have the power to lay and collect taxes . . . to raise and support Armies . . . [and] to provide and maintain a Navy").

211 "Members of Congress spoke of the importance of art in a democracy . . ." Hamilton, *supra* note 20, at 114. "[A]rt [has an] integral function in a successful representative democracy. In short, art provides the opportunity to experience alternative worlds and therefore to gain distance and perspective on the prevailing status quo." *Id.* at 78; *See also* 20

not go unnoticed. As one commentator notes, "[a]rt—like religion, political speech, the press, assembly, and grievance redress—is essential to freedom from the entrenched institutionalization of government."[212]

Moreover, the public good that art serves extends beyond entertainment and mere aesthetic pleasure. Art, like religion, "furthers the intangible and unquantifiable value of increasing the people's capacity to resist hegemony."[213] And by the very fact that art does increase the citizenry's ability to resist governmental domination, the government thwarts such resistance through the vehicle of arts funding. When the government funds particular art and not another, in the guise of decency and respect criteria, a nationalized art is the inherent result. De facto, the content of a particular religion or art expresses the particular view of the artist or the religious affiliate, and is thereby potentially more objectionable and offensive to individual notions of decency and respect, and that much more difficult to meet nationalized standards. Therefore, government should not positively fund the arts,[214] but instead do so indirectly through the use of tax exemptions, as done with religious organizations.[215]

B. *Tax Exempt Art and Religion*

Rather than creating an organization like the NEA, which as a result of limited funding inherently must choose to fund arts projects based upon their content and viewpoint, the government should provide tax breaks for private patrons of the arts,[216] thereby

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U.S.C. § 951(7) (providing that "[i]t is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of. . .creative talent"); 20 U.S.C. § 951(4) (providing "[d]emocracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.").

212 Hamilton, *supra* note 20, at 109 (emphasizing that "[n]o less than any other mode of expression encompassed by the Speech Clause, art is a lifespring of liberty in the face of representative democracy.").

213 *Id.* at 112.

214 *See id.* at 77 (providing that the government should not fund artists' work, but only their education).

215 *See generally* I.R.C. §501; *see also* I.R.C. § 501(a) (providing that "[a]n organization described in subsection (c) or (d) or Section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under Section 502 or 503."); I.R.C. §501(c) (providing "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . ."; *See also* Walz v. Tax Commission, 397 U.S. 664, 680 (1970) (holding constitutional the practice of granting churches exemptions from property taxes).

216 *See* Hamilton, *supra* note 20, at 118 (noting that "[t]he vast majority of arts project

avoiding a violation of the Establishment Clause, and the right to free speech and expression afforded by the First Amendment.[217] Just as government has carved out an exception in the tax code for all houses of worship, it should afford individual art-patrons the same benefit.[218] Thus, people would be deciding which art is funded based on their individual notions of decency and respect, and the government would not be changing the marketplace of ideas to reinforce the politicized notions of decency and respect, i.e. the status quo.[219] Inevitably, because individual ideas of what constitutes decency and respect are bound to vary among the citizenry,[220] a very eclectic and representative array of art would be funded by individual patron decisions.[221]

On the contrary, in attempting to select art on the basis of generalized notions of decency and respect, the government funds the art that conforms to its prevailing idea of decency and respect, and inevitably gives some artists a greater voice than others.[222] This is a violation of the First Amendment.[223] De facto, by imposing strict regulation and static characterization for the determination of art worthy of funding, the government does encroach upon the private sphere of art. This is the very encroachment from which the First Amendment protects us,[224] and it is unconstitutional.

The public good is better served by treating art just as we do

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funding has been provided by the private sector" and that "[i]n the absence of the NEA, such funding will continue and even increase.").

217 "The content guidelines suggested by the officials plainly violate the First Amendment and further illustrate why governmental funding for the art is not good for the art and is therefore not good for the people." *Id.*

218 *See* I.R.C., *supra* note 215.

219 *See* Hamilton, *supra* note 20, at 98 (stating that "[i]n particular, governmental arts funding has been used to redirect the market toward the status quo.").

220 *See* Hannegan v. Esquire Inc., 327 U.S. 146, 157 (1969) (providing that "[w]hat is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.").

221 *See* Hamilton, *supra* note 20, at n.1 (referencing TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION (U. Minn., 1983) to remind us that art is not [a] particular set of objectives but "rather the group of works valued by a particular culture at a given time."); *see also* Note, *Post-Modern Art and the Death of Obscenity Law,* 99 YALE L.J. 1369 (1990) (noting that art is traditionally difficult to characterize by a "static definition"). *See generally* Louise Harmon, *Law, Art and the Killing Jar,* 79 IOWA L. REV. 367 (1994) (noting that the range of artworks is not a static universe).

222 *See* Hamilton, *supra* note 20, at 98.

223 *See id.* at 82 (stating that "[t]he First Amendment explicitly forbids the government from manipulating certain private spheres, such as religion, art, and philosophy.").

224 "The function of the First Amendment is to preserve a sphere of private liberty beyond the government's jurisdiction." *Id.* "The First Amendment reinforces the subversive quality of the Constitution by preventing the government from suppressing the private spheres of religion, art, and philosophy that can enrich the people's capacity to challenge government's ideological hegemony." *Id.* at 85.

religion.[225] Governmental arts funding inherently runs the risk of advancing the art that it funds, and inhibiting that which it does not. This advancement or inhibition of potentially objectionable material is not tolerated in a religious context,[226] and should not be tolerated with the arts. The government cannot expect our citizenry to approve spending tax dollars on a work of art or on an artist whose body of work is deeply offensive to their sense of decency. Just as the government cannot expect our citizenry to approve spending tax dollars on a religion that is perceived as objectionable. Individuals may differ as to what is decent and respectful, and it is in this differing that the health of our democracy exists.

On one hand, it is clear that the granting of tax exemptions *generally* does not violate the Establishment Clause.[227] On the other hand, *some* tax exemptions afforded to religious organizations do violate the Establishment Clause.[228] The selective granting of tax exemptions with regard to art patrons or religious organizations is no less a violation of constitutional guarantees than direct funding itself. It is essential that the tax exemptions be applied broadly to all patrons of art without concern for the art which is funded by the individual.

The majority in *Everson v. Board of Education*[229] catalogued some important governmental actions that violate the Establishment Clause in a religious context, some of which are very analogous to the arts. There should be no official church.[230] Similarly, there should be no official art. Government may not prefer one religion over another.[231] Likewise, government should not be al-

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225 "In a diverse society, the establishment of an official art is an evil that should be avoided as assiduously as the establishment of an official religion." *Id.* at 118.

226 The *Walz* Court opined:

> [t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion. [The state] has not singled out one particular church or even churches as such; rather, it has granted exemption to all houses of worship within a broad class of property owned by nonprofit, quasi-public corporations [which the state considers] beneficial and stabilizing influences in community life.

Walz v. Tax Commission, 397 U.S. 644, 672-73 (1970); *See also* Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing that the government may not act to advance or inhibit religion without violating the Establishment clause).

227 *See generally Walz*, 397 U.S. 664; *Lemon*, 403 U.S. 602.

228 *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (striking down a sales tax exemption which exempted only periodicals that consisted of writings sacred to a religious faith and promulgated the teaching of the faith). The exemption was deemed a benefit that preferred religion over non-religion, and therefore a violation of the Establishment Clause.

229 330 U.S. 1 (1947).

230 *See Everson*, 330 U.S. at 7-8.

231 *See id.*

lowed to prefer one art over another. Government may not force or influence a person to go to a church, or profess a belief in any religion.[232] Accordingly, government should not be allowed to force a person to fund art which he finds offensive. Government may not participate in the affairs of religious organizations.[233] Most importantly, government should not participate in the affairs of arts funding.

CONCLUSION

When the government attempts to "actively foster a marketplace of ideas, as with an arts sponsorship program,"[234] it inherently encounters two problems, between which a balance is needed. By virtue of the fact that there is limited funding for an unlimited number of artists,[235] the government, through selective funding, risks suppressing artists' views, which though potentially offensive, may still serve a public good. With arts funding, the government also risks inciting public opposition against using taxpayer dollars to fund art that may offend individual notions of decency, and art that is perceived as a desecration of the fundamental beliefs of a particular subgroup of the citizenry.

Individual interpretations of what constitutes art differ vastly among the public view, so much so that there is little overlap. The District Court in *Finley* asserted that, because the very nature of our "pluralistic society" is that it is diverse in values and beliefs, there may be no national "general standards of decency."[236] The Court of Appeals concurred.[237] They were correct.

Consequently, an attempt to define something that is inherently subjective is fraught with complication. Justice Potter Stewart encountered such complication in *Jacobellis v. Ohio*,[238] where he made an heroic attempt to define pornography. Justice Stewart conceded that he could not intelligibly define pornography due to its subjective nature.[239] He ultimately surrendered to his instincts, and posited "I know it when I see it."[240]

The government should follow the lead of Justice Stewart.

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232 *See id.*
233 *See id.*
234 *Plaintiff's Statement of Facts, supra* note 33.
235 "We [the NEA] can fund less than a quarter of what we are asked for, and in some categories it is running at about four percent." Hope O'Keeffe (Acting General Counsel, NEA), Symposium, *supra* note 4, at 711.
236 Finley v. National Endowment for the Arts, 795 F.Supp. 1457, 1463-68 (1992).
237 *See* Finley v. National Endowment for the Arts, 100 F.3d. 671 (9th Cir. 1996).
238 378 U.S. 184 (1964)(Stewart, J., concurring).
239 *See id.* at 197.
240 *Id.*

Rather than attempt to define art through the criteria established for the NEA, the government should leave the decision whether to fund or not to fund art, to the private sector—the individual—who, like Justice Stewart, will know it—art—when he sees it.

The government, rather than directly funding the arts, could then participate in the public good that arts funding serves,[241] by providing tax breaks for individual art sponsorship, as it does for religious organizations. The government then bestows upon the individual the discretion to use his tax-deferred dollars to fund the art which is politically, morally and aesthetically appealing to him.[242]

When the government is relinquished of the responsibility of arts funding, the Establishment Clause is not violated, and the guaranteed right to First Amendment free speech is not circumvented. In effect, without arts funding, the government is not able to force art into a homogenous state, which only serves to reinforce the prevailing status quo.[243] Indeed, art is afforded a greater protection in the hands of the private sector. Art, then, is appreciated for the aesthetic value it provides for the individual who discerns "art" through his senses and his instincts, i.e., he who relies on the theory "I'll know it—and I'll fund it—when I see it."[244]

Postscript

On May 15, 2001, the United States District Court for the Western District of Texas (San Antonio Division) decided in favor

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241 Some critics of the NEA argue that governmental arts funding does not serve a public good. *See e.g.* Hamilton, *supra* note 20, "[Congress] did not engage in fact-finding to determine whether the government has a compelling interest in funding art." *Id.* at 115. Professor Hamilton suggests that the criteria by which art is to be judged is contrary to the fundamentals of the First Amendment and therefore not a public good. "The content guidelines suggested by the officials plainly violate the First Amendment and further illustrate why governmental funding for the arts is not good for art and is therefore not good for the people." *Id.* at 118. *But see* Greene, *supra* note 107, at 9 (arguing that art "might be considered a kind of public good, the production of which would lag if left to the private sector.").

242 Professor Hamilton posits: "that the government's involvement in the creation of new art ought to be carefully scrutinized. . .":

> A church, a club, a private school, or a family should be free to wield their private capacities—both financial and moral—to support or to boycott any particular artwork. Let the succeeding art cater to them or criticize them and, more importantly, let it defamiliarize them to their closely held assumptions. But do not let the government, with its force and authority, block the path from the familiar to the new.

Id. at 112.

243 *See* Kowalski, *supra* note 64, at 218. "[The 1990 Amendment] does more than merely prioritize decency, it coerces artists to create politically neutral and homogenous artwork. The effect will be that Americans will have the opportunity to view only artwork that a senator finds acceptable, and this artwork will have little to do with our diverse reality." *Id.*

244 *See Jacobellis,* 378 U.S. 184 at 2174.

of the Esperanza Center on both equal protection and First Amendment grounds.[245] The court also found that the City violated the Texas Open Meetings Act by deliberately meeting in closed sessions.[246] The Esperanza Center lost, however, on its claim of retaliation in violation of the right to petition and free expression under the First Amendment.[247]

Writing for the court, Judge Orlando L. Garcia determined that the City's decision to defund the Esperanza Center constituted viewpoint discrimination.[248] Judge Garcia outlined clearly what the City council can do when allocating limited tax dollars, and even more clearly what the council *cannot* do: "choose to withhold funds from a group merely because the council—or its constituents—disagree with the message the group espouses."[249]

Judge Garcia was careful, however, to heed the words of Justice Scalia in *Finley*, and noted that "nothing in this decision requires the governing body of a city to fund any art."[250] Notwithstanding, however, Judge Garcia reminded us that once a government body decides to fund art—be it the federal government, or a city council as was the case here, the Constitution requires neutrality in the manner in which funds are allocated.[251]

The Esperanza Center was penalized for its disfavored viewpoints. The decision to defund the Esperanza Center was the product of invidious viewpoint discrimination, and accordingly deemed unconstitutional. Indeed, as discussed *supra*, the *Esperanza*

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245 *See* Esperanza Peace and Justice Center, The San Antonio Lesbian & Gay Media Project v. City of San Antonio and Howard Peak, 2001 U.S. Dist. LEXIS 6259 (May 15, 2001). "The court finds that the record is devoid of evidence sufficient to establish a compelling governmental interest that is served by the decisions to defund the plaintiffs. Defendant's have not suggested such an interest, and the court cannot imagine one." *Id.* at *87. The court noted that Esperanza was treated differently from other similarly situated arts organizations, which constituted a violation of Esperanza's equal protection rights afforded by the Fourteenth Amendment. *See id.* at *87-90.

246 *See id.* at *136; *see also supra* note 150.

247 *See Esperanza*, 2001 U.S. Dist. at *104-09; *see also supra* note 150.

248 *See id.* at *136.

249 *Id.* at *62. "The City may not punish those who speak out on political and social issues." *Id.* at *70. Judge Garcia wrote that it was clear that the City had labeled Esperanza as "too political" and "too in your face" to disguise viewpoint discrimination. *See id.* at *68; *See also supra* notes 145 and 165 and accompanying text. "The City may not use the appellations 'gay' or 'political' as a pretext for viewpoint discrimination." *Id.* (citation omitted).

250 *Esperanza*, 2001 U.S. Dist. at *136; *see also supra* note 206 and accompanying text (summarizing Justice Scalia's relevant comments in *Finley*).

251 *See Esperanza*, 2001 U.S. Dist. at *137 Judge Garcia stated:

> Cities, not the courts, raise the taxes to fund services, and cities should make the decisions concerning how much, if any, of the public funds will be spent to support art. Once a governing body chooses to fund art, however, the Constitution requires that it be funded in a viewpoint-neutral manner, that is, without discriminating among recipients on the basis of their ideology.

Id.

case promised to be the very as-applied challenge to Section 954(d)(1) that *Finley* invited, and Justice O'Connor welcomed.[252] Perhaps, as Judge Garcia opined, this decision will ensure that others will not be subjected to the unfettered discretion of government officials, and denied arts funding merely because the ideas they espouse are disliked.[253]

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252 *See supra* notes 115 and 116 and accompanying text.

253 *See Esperanza*, 2001 U.S. Dist. at *137.

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