

I'M OFFENDED AND I'M PAYING FOR IT? PUBLIC ARTS FUNDING AND THE FIRST AMENDMENT

Steven J. Melzer

Government support of the arts in the United States is a highly contentious topic, one that has ignited political, moral, and constitutional crises alike. Unlike most European countries, the United States does not come from a royal tradition with institutions that feature strong, centralized state patronage of the arts. Rather, the United States has a model that focuses on local funding for individual artists and organizations. Instead of funds coming from large federal tax coffers, most arts funding is raised through substantial tax incentives and a strong culture of private, corporate, and foundation donations.

Government support of the arts is a recent phenomenon in American history. Federalized arts funding did not exist in institutionalized form until 1965 with the creation of the National Endowment for the Arts (NEA), which nevertheless comprises the smallest component of all arts funding in the U.S. Small though it is, the funding system is complex, supporting the multi-billion dollar non-profit arts community with small grants to encourage organizations to seek out larger private donors. Whatever the reasons for this complexity, the First Amendment and its interpretation most complicates the situation.

The First Amendment defends the freedom of expression without government intrusion. Yet in the course of promoting cultural growth through its grants, the NEA occasionally—and usually on these occasions, spectacularly—runs into constitutional problems with the First Amendment. A fine line has developed between government arts funding that is encouraged by the Constitution and supported by the country, and a policy that

Steven J. Melzer was a fourth-year undergraduate in the Economics and Music Departments at Columbia University.

systematically infringes on artists' free speech protections. This study explores several angles of this debate, with a focus on two recent legal cases that have determined the fate of arts funding in the context of the First Amendment. Each of the two cases presented offers a unique and vital perspective on the nature of that fine line and public support for the arts in general.

The first of the two cases, *Finley v. NEA* (1998), explores First Amendment challenges on the national level of public arts funding. The second, *Brooklyn v. Giuliani* (1999), occurs in a local arena, a case which emerged from the public outcry surrounding the opening of "Sensation" at the Brooklyn Museum of Art. Eventually settled in favor of the museum, the case provides an example of how the public arts funding debate can escalate and involve high emotion. Despite the seemingly contradictory rulings in these two cases, both are in line with the spirit of the First Amendment and solidify the government's role as an indirect patron of the arts.

THE BEGINNINGS OF THE CRISIS

I'm grateful to those who have so ably attacked the Endowment over the past year or so for making it necessary to defend it. I enjoy controversy.

If Congress doesn't do something about obscene art, we'll have to build galleries twice as big to hold the people who want to see it. And if Congress does do something about obscene art, the galleries will need to be even bigger (Ziegler ix).

~ *Garrison Keillor* (1990)

In 1987, Andres Serrano, a Catholic and overtly political photographer from Brooklyn, created a work entitled *Piss Christ*. As its title warns, the photograph is of a plastic crucifix submerged in a jar of the artist's urine. The artist contended that the image was both a comment on the commercialization of religion, and,

through combining bodily fluids with the “body and blood” of Christ, a way of connecting the artist to the crucifixion. Serrano called it a “very spiritually comforting image” (Zeigler 69). Serrano was awarded a \$15,000 grant from the Southeastern Center for Contemporary Art (SECCA) in North Carolina; Serrano’s work was then featured in a three-city tour over two years.¹

It was not until the tour’s final stop in Richmond in 1989 that the exhibit elicited a strong negative response. Initial outrage was sparked by a small letter to the editor in *The Richmond Times-Dispatch*, written by a follower of the Reverend Donald Wildmon, a fundamentalist preacher and leader of the American Family Association (AFA) based in Tupelo, Mississippi. The AFA had over 500 local chapters nationwide, a budget of \$5 million, a mailing list of nearly half a million, and an affinity for boycotts and protests.² Wildmon released a letter to his supporters blasting Serrano’s work and SECCA’s support. In April 1989, he sent a letter of protest to every member of Congress with a copy of *Piss Christ* (Zeigler 69-71). One month later, Senator Alfonse D’Amato (R-NY) tore up his copy and threw the pieces on the floor of the Senate, announcing that “this so-called piece of art is a deplorable, despicable display of vulgarity” (Bolton 3). The crisis had begun.

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

This kind of standard really doesn’t preclude any particular piece of art being funded. All it does is indicate that certain things should be taken into account (Conversation).

~ *William Ivey, Chairman of the NEA (1998)*

¹ SECCA’s budget for this program was jointly funded by the NEA, the Rockefeller Foundation, and the Equitable Life Corporation; the NEA designates Serrano’s grant a “subgrant.”

² The AFA had attempted the boycott of *The Last Temptation of Christ* in 1988 and

Who is going to be the decider of what's decent and what isn't? It will be a free-for-all. The witch-hunt can happen anywhere (Gussow).

~ Karen Finley (1998)

Amid the stirring controversy around the NEA's structure and grant-making procedures, subsidies were still being awarded on the recommendations and decisions of the Endowment's expert peer panels in various disciplines. Of the many grants offered through the Theater division, three in the late-1980s, totaling \$22,000, went to provocative performance artist Karen Finley. Finley's one-woman shows used unorthodox performance techniques to emphasize raw emotion about the degradation of women. In front of an audience in a small East Village New York City theater, Finley would slip off her dress and proceed to scream and howl, evoking extreme pain and pleasure. To simulate human excrement and subjugation, she would then cover herself in chocolate sauce and recite passionate feminist poetry. Finley's work was not well known, but she was highly regarded in New York's "underground culture" (Zeigler 110).

Finley was about to be elevated from a darling of the Village underground to a figure of national controversy representative of the NEA's confrontation with the First Amendment and politics. At the annual conference of the National Council of the Arts, when the time came to approve Endowment grants for Fiscal Year 1991, it was expected that Finley would be approved again as in the previous years. Rowland Evans and Robert Novak, in a column published in the *Washington Post* immediately before the Council convened, however, suggested otherwise. The columnists highlighted the perceived widespread negative reactions to funding offensive art. The focus of this article was not on past trouble, but centered on Karen Finley and her contentious performance style and subject matter—"tough stuff" according to the

pressured Pepsi-Cola to withdraw from a multimillion dollar advertising campaign featuring Madonna due to her "blatantly offensive" music video for "Like a Virgin."

authors. They strongly urged NEA Chair John Frohnmayer to reject her reapplication for government funds and to take strong leadership by siding “with Congress and the voters or be swayed by the spurious charge of betraying freedom of the arts” (Evans and Novak 208-209).

This article had a two-pronged effect, which endangered the future of public arts funding. It brought the third major conflict with the NEA in two years to a national level. It also succeeded in influencing Chair Frohnmayer’s and the Council’s decisions when assessing the grant applications. When the National Council on the Arts met, it clearly reacted to the charges Evans and Novak reasserted and followed their recommendations. The Council also chose not to rule on any of the eighteen applications of performance artists which were recommended for approval by the Theater expert panel, postponing discussion of them until a later meeting in August.

In the interim, Frohnmayer, still very much a political novice, publicly stated that “political realities” may influence the final decisions on some grants, regardless of panel recommendation (Zeigler 112). The announcement foreshadowed Frohnmayer’s June decision to approve fourteen of the eighteen performance arts grants recommended by the Theater panel; the NEA Four—Finley, Fleck, Hughes, and Miller—were rejected. The artists subsequently claimed unconstitutional content discrimination, specifically because of homophobia. “I think the reason my work was overturned,” said Hughes, “is because it is chock-full of good old feminist satire and secondly, I am openly lesbian” (Zeigler 112). Miller responded similarly, “So much of this is a homophobic attack on gay people and the visibility of gay people” (Zeigler 112). Counteracting, Representative Dana Rohrabacher (R-CA), who had once favored the abolishing of the Endowment altogether, disregarded the rejected artists’ works as “sacrilegious and pornographic art” not worth the government’s time and certainly not its money (Zeigler 112). The artists, with their funding lost, brought suit against the NEA and Chairman Frohnmayer.

The United States District Court for the Central District of

California heard *Karen Finley, John Fleck, Holly Hughes, Tim Miller and National Association of Artists' Organizations v. National Endowment for the Arts and John E. Frohnmayer* 795 F. Supp. 1457 in early 1992. The plaintiffs claimed that the NEA violated their constitutional rights by denying their grant applications after the expert panel had approved them.³ During this period, the obscenity pledge inserted into grant applications had expired and had been ruled unconstitutional (*Bella Lewitzky v. Frohnmayer*). In its place, the amended provision to the Foundation Act, §954(d), was added and the National Association of Artists' Organizations (NAAO) amended the plaintiffs' case in order to question the constitutionality of the section under the Fifth Amendment, which regarded vagueness rules and First Amendment freedom of speech.

Judge A. Wallace Tashima ruled in favor of the NEA Four in June 1992. The artists were able to show that the NEA not only refused to fund, but also withdrew approved grants due to political reasons and content discrimination. Judge Tashima agreed and deemed this a violation of First Amendment rights. The NAAO argued that even though §954(d) did not directly affect the other plaintiffs' applications, it did influence the final decision to reject the grants. The clause was then struck down due to vagueness under the Fifth Amendment.⁴ "The decency clause seeks to suppress speech," Judge Tashima asserted, and he ruled that it breached the First Amendment for "overbreadth" (*Finley v. NEA*).

The NEA immediately appealed the case, and it was accepted

³ Though this issue is not a focus of this study, the plaintiffs also argued that the NEA violated their privacy rights (in breach of the Privacy Act of 1974, 5 U.S.C. §552(a)) since the Endowment released information from their grant applications, without their consent. Newspaper articles published during the summer of 1990 about the situation referred to and quoted the applications and the NEA admitted to releasing the applications. The District Court determined this to be a violation of privacy rights in its ruling against the defendants.

⁴ The Court used *Connally v. General Constr. Co.* 269 U.S. 385 (1926) to determine Fifth Amendment vagueness.

by the Ninth Circuit Court of Appeals. Newly appointed Chairperson Jane Alexander replaced retired John Frohnmayer as a defendant in *Finley v. National Endowment for the Arts* 100 F.3d 671 (1996). The case was argued in February 1994 and included many of the same arguments heard in the District Court. A striking difference with the appeals case was that it was focused solely on the “decency and respect” clause of §954(d) rather than the individual grant denials. The NEA defended §954(d)’s decency clause by claiming that it did not constitute viewpoint discrimination. The section instructs the Chairperson to “take into consideration” decency and respect, not to regulate speech or favor a specific viewpoint over another. Judge James R. Brown disagreed in the opinion by explaining that “the First Amendment prohibits the government from ‘regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,’” citing *Rust and Rosenberger*. Though the government is not actively restricting speech when it removes funding and has to be selective using some guidelines, the Supreme Court in *Rosenberger* also found that “the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity” (*Rosenberger v. Rector and Visitors of University of Virginia*). Furthermore, Judge Brown rejected the NEA’s claim that the “decency and respect” provision, read literally, could be implemented in a viewpoint- and content-neutral manner, which would pose no constitutional problems.

As for vagueness, the Ninth Circuit concurred with the District Court that §954(d)’s provision to “take into consideration” decency and respect essentially required the NEA to use unclear and potentially inconsistent methods to award grants. It found that the Endowment’s attempt to avoid constitutional problems with its procedures used an “implausible reading of the ‘decency and respect’ clause” (Freeman 405-422). Once again, the NEA’s amended grant-making procedures in §954(d), devised at the culmination of a tumultuous legislative flurry in response to curtailed funding of offensive art, were ruled unconstitutional in violation of the First and Fifth Amendments.

The NEA appealed a final time to the Supreme Court, which heard *National Endowment for the Arts v. Finley* 524 U.S. 569 on March 31, 1998. As in the appeals case, this case questioned the First Amendment constitutionality of the “decency and respect” clause, §954(d), in the National Foundation on the Arts and Humanities Act of 1965. The ambiguity of case law, represented in *Rust and Rosenberger*, and the liberal reading of the section, caused the Court to reevaluate the plaintiff’s challenges and the NEA’s defense. The main point of contention for the NEA was that the previous rulings had read §954(d) to be compulsory in the agency’s decisions. It conceded that a *requirement* to use “decency and respect” might constitute a First Amendment violation in grant selection. No such requirement existed in §954(d), however, which advised that agency decision makers merely “take into consideration” those qualities.

The Endowment also used an alternative approach, claiming that the government is allowed to act differently, perhaps with more leniency, when acting as patron (direct or, as in this case, indirect) as opposed to as sovereign. The First Amendment challenge is then not valid since the government is not abridging speech but merely choosing to fund one type of art over another. The government is allowed to consider factors, such as “decency and respect,” when determining funding, which would be unconstitutional if considered when forming legislation or regulation code. The NEA further used the model of government as patron versus as sovereign to defend it against charges of vagueness under the Fifth Amendment. “Because denial of a subsidy does not inflict harm or stigmatize an individual, the government is free to make decisions based on imprecise factors” (Freeman 7). The entirety of the NEA’s position relied on the ability of the government to use some sort of subjective selection process, based on “excellence” or “decency” or any other factor, to award grants for the arts. While §954(d) would be unconstitutional if it were required and able to regulate speech, it was not nearly as strict or influential as the plaintiffs asserted.

The artists’ arguments held fast to the section being consti-

tutionally invalid for both First and Fifth Amendment violations, causing undue harm to the protection of speech and being so vague as to allow the NEA to be inconsistent and arbitrary in its decisions. While the NEA claimed that its expert peer panels could evaluate both excellence in the arts deserving to be supported as well as “decency” representative of the “beliefs and values of the American people,” this put outstanding influence on the panels’ subjective tastes, amounting to a vague provision (20 USC 954d). The NEA’s methods of determining and funding works that were acceptable under the “decency and respect” clause were clearly viewpoint discrimination in government actions, and thereby infringements of First Amendment rights. The plaintiffs held that NEA grants were essential and that any overt influence or restrictions placed on the decision-making process, which would skew government funding to one viewpoint—in this case, expressly away from provocative performance art—constituted unconstitutional discrimination and should be overturned.

The Supreme Court ruled nearly three months later in favor of the NEA, reversing the previous decisions and upholding the constitutionality of §954’s “decency and respect” clause. Though the ruling was an 8-1 vote, the three reports, especially the majority and concurring, differed greatly in their interpretations of the government’s role as patron, its responsibility to fund the arts effectively, and how these actions coincide or conflict with the First Amendment.

The majority opinion was written by Justice Sandra O’Connor and joined by Chief Justice William Rehnquist and Justices John Paul Stevens, Anthony Kennedy, Stephen Breyer, and Ruth Ginsburg. The majority agreed with the NEA that 20 U.S.C. §954(d) was constitutional on the grounds that it did not direct the agency to censor, unduly influence, or even quantify “decency and respect.” “§954(d)(1)’s plain text clearly does not impose a categorical requirement” to determine grants based on “decency and respect” or to adhere to the “beliefs and values of the American people” (*NEA v. Finley*, 20 USC 954d). Encouraging the Endowment to “take into consideration” extra factors

on top of artistic excellence was “aimed at reforming procedures rather than precluding speech.” The Court rejected the artists’ argument that the clause violated their rights since there was no element of censorship or even pressure to conform grant applications to any standard. “Thus,” the majority determined, “we do not perceive a realistic danger that §954(d)(1) will compromise First Amendment values” (*NEA v. Finley*).

The opinion went further to bolster §954(d)’s legal standing by systematically rejecting the decisions of the Ninth Circuit appellate decision. The Court noted that the NEA has limited funds and must award grants in a highly selective and inevitably subjective manner. Like any selective process, it may deny highly qualified applications in favor of others for complex reasons that may appear to be random. These contentious decisions are made by expert peer panels composed of artists well regarded in their disciplines, not, as the Court wisely points out, politicians seeking to censor or otherwise silence opposition speech through failure to fund. The appellate court’s reliance on *Rosenberger* was misguided since the competitive selection procedure permits and *requires* the government to narrow down grant applicants. This process is inherently content-based discrimination since aesthetic evaluations require more scrutiny which exists in the “gray” policy zone of cultural funding.

The section was also validated under the Fifth Amendment’s vagueness provisions. The Court acknowledged that the amended section could influence artists to conform their applications to get funding. However, this was neither a violation of the First Amendment nor the Fifth since under the government-as-patron model, it can use subjective factors of assessment. “Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process” (*NEA v. Finley*).

Section 954(d) had potential to fail First Amendment constitutionality if it required or allowed the government to actively suppress disfavored viewpoints. By simply “taking into consideration” factors and not demanding their compliance, this was not the case. As Justice Scalia’s concurring opinion, joined by Justice

Thomas, asserted, this took the teeth out of the enforcement of granting funds to appropriate works. “The operation was a success, but the patient died,” decried Justice Scalia, accusing the majority of rewriting the section as it upheld it (*NEA v. Finley*).

According to Justice Scalia, the provision was constitutional under the First and Fifth Amendments. Viewpoint discrimination is valid when the government is acting as patron because it must decide funds on some criteria, which will necessarily amount to a sort of discrimination. As the opponents of large-scale funding of the arts are wont to argue, there is a great distinction between “abridging” speech and choosing not to fund it. Simply put, the concurring opinion maintained that the First and Fifth Amendments have “no application to funding” of the arts in a selective process and therefore §954(d) was valid to restrict grants.

Justice Souter’s dissent held fast to the lower courts’ and the artists’ positions that the “decency and respect” clause violated First Amendment protections by instituting viewpoint discrimination in the NEA’s grant-making procedures. “A statute disfavoring speech that fails to respect America’s ‘diverse beliefs and values’ is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the American populace” (*NEA v. Finley*). Justice David Souter was wary of accepting the NEA’s expert peer panels as being representative of “America’s beliefs and values.” Despite the Court’s opinion that the section’s direction to simply “take into consideration” factors of decency amount to no more than a suggestion, it very directly instructs the grant evaluators to bias against whatever they deem is indecent and disrespectful. When the government acts as patron, it still serves as sovereign and any severe regulation of speech, even through failure to fund, is a violation of First Amendment rights.

LOGIC EXTENDED LOCALLY

From the beginning of the Brooklyn Museum controversy,

Rudolph Giuliani used the argument that it was completely within the First Amendment to *privately* fund, create, and view art which was offensive, it was also within legal boundaries for the government, when acting as a patron, to remove funding from that art. This reasoning, seen in the theoretical and historical justification section of the 1989 NEA conflicts and Scalia's decision in *Finley*, was hardly original, but Giuliani used his position as the mayor as a means to determine arts policy based on his perception of decency.

Increasing his attacks on the museum, the mayor threatened not just to withhold monthly subsidies to the museum, but also to remove the painting from the building itself. A public institution, the Brooklyn Museum of Art leases its building from the city. In order to establish sound legal leverage, Giuliani accused the museum of violating this lease, which states that the museum "shall at all reasonable times be free, open and accessible to the public and private schools of the city, and accessible to the general public on such terms of admission as the Mayor sees fit" (Good-nough). For the "Sensation" exhibit, the museum had established a separate entrance and posted signs throughout the museum stating that children under the age of sixteen should be accompanied by an adult. The mayor, therefore, paradoxically demanded that the museum both close the show due to offensive works and adhere to its lease by opening the disturbing exhibit to children. The 'gray' area of public policy of arts funding had again been exposed.

The public debate over Giuliani's First Amendment challenges heated up in the media and in discussion by civil rights organizations. The American Civil Liberties Union and the New York Civil Liberties Union cosigned a letter to the mayor criticizing his actions as violating the First Amendment by illegally coercing and penalizing the museum. "When government fosters a marketplace of ideas by providing funding to the arts, it may not excise certain artistic visions because public officials dislike them" (NYCLU). Like the plaintiffs in *Finley*, the groups held that when the government acts as a patron, it must not use its funding

to stifle viewpoints, especially if based on personal objections by those in the government. The *Finley* decision is cited deftly in the criticisms of Giuliani's threats. While upholding the NEA's use of "decency and respect" to evaluate grants, *Finley* also ensured that the government could not place much weight on these factors and warned that doing so would result in a First Amendment violation.

In his weekly Sunday radio address on September 26, Giuliani responded to the letter and elaborated his position. The mayor asserted that his actions did not infringe upon any First Amendment rights since the removal of funding did not stifle speech. Furthermore, he argued that "the right to freedom of expression does not entail the right to public money." Specifically, he argued that the people of New York "should not be required to have to spend public money on something that desecrates religion or things of national significance" (Giuliani). The mayor then explained that the museum violated the terms of its lease by restricting sections of the exhibit to those over sixteen, and should therefore be penalized by the termination of its lease with the city.

The Brooklyn Museum took the next step to escalate the conflict over the mayor's attempts to shut it down by filing suit in Federal court on September 28, claiming that Giuliani's threats to cut funding and evict the museum violated the First Amendment. The city immediately responded by canceling the next monthly payment of nearly \$500,000 to the museum. The Cultural Institutions Group, composed of thirty-three museums and arts organizations in New York, supported the Brooklyn Museum by publishing a statement fearing that the mayor's actions could lead to similar conflicts in all areas of city arts funding and an atmosphere of belligerency toward the arts.

Floyd Abrams, one of the nation's preeminent First Amendment lawyers, represented the museum. Abrams noted that while public funding is not required, "the funding process may not be used to coerce institutions...to do the bidding of its political leaders" (Barstow). The museum's approach to the case would be

based primarily on First Amendment principles and on the argument that the mayor was actively using government funds to impose his views and abridge the freedom of speech.

The city prepared its prosecution to argue that the museum violated its 106 year-old lease and should be penalized. Represented by Corporation Counsel Michael Hess, the city sought to punish the museum by terminating the lease and evicting it from the building, cutting off funding for its maintenance and special projects, or even replacing the museum's Board of Trustees, which is composed of appointed public officials.

Both parties had significant case law—including, among others, the major cases that have already been introduced—and logical reasoning to bolster their opinions. In favor of Giuliani, the Supreme Court in *Rust* had determined that government was able to selectively award grants to programs without sponsoring alternatives. Further, *Finley* upheld the use of decency to assess applications for grant money. The city also claimed that the warnings that children should be accompanied by an adult constituted a violation of the lease, which required that the museum be truly and wholly open to all.

The museum had the support of many First Amendment experts who said that despite *Rust* and *Finley*, the law favored the museum's request for an injunction against any further punitive action the mayor may take. *Rosenberger* ordered the University of Virginia to reinstate subsidies to student publications with a religious bias. And *Finley* advised the NEA that its "decency and respect" clause, if used to impose viewpoint discrimination, would be unconstitutional against the First Amendment. The mayor's strong words of personal offense to his Catholicism, as the foundation for his threats to remove funding, proved that Giuliani was violating free speech rights and his resulting punishments were unconstitutional. New York University law professor Amy Adler recognized that while the government could set rules for funding of the arts, Giuliani's public reaction towards "Sensation" after the exhibit had been organized undermined the city's attempt to claim that its actions were within the realm of the First

Amendment (Glaberson). The court would have to determine if this was a case of First Amendment violations, as the museum professed, or a matter of a lease violation, as the city insisted.

The Brooklyn Institute of Arts and Sciences v. The City of New York and Rudolph W. Giuliani 64 F. Supp. 2d 184 was heard as the “Sensation” exhibit opened to record crowds (and record protests) at the Brooklyn Museum of Art. Although Giuliani had failed to stop the exhibit from opening, he was able to use the case to defend himself and seek to close the exhibit and punish the museum.

Rejecting the city’s arguments and siding decisively with the museum on November 1, 1999, Judge Nina Gershon from the Federal District Court for the Eastern District of New York saw the case as a clear-cut First Amendment issue. “There is no federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the vitality of a major cultural institution as punishment for failing to abide by governmental demands for orthodoxy” (*Brooklyn v. Giuliani*). The mayor’s attempt to withdraw funding amounted to viewpoint discrimination in breach of the First Amendment.

The crux of Judge Gershon’s decision lies with precedent found in a similar case from eight years prior. *Cuban Museum of Arts and Culture, Inc. v. City of Miami* 766 F. Supp. 1121 (1991) found that the City of Miami could not terminate the lease with the Cuban Museum after works by Cuban supporters of Castro were included in the collection. While this greatly offended the Cuban-American community, the Federal District Court for Southern Florida decided that the “City would not have acted to deny the plaintiffs’ continued use and possession of the premises but for the plaintiffs’ controversial exercise of their First Amendment rights” (*Cuban Museum v. Miami*). Judge Gershon equated this situation with the one affecting the Brooklyn Museum and ruled that Giuliani was infringing on the freedom of speech of the Museum. The city could not withhold or withdraw any funds which were appropriated to the museum, evict or otherwise alter the lease to seek to evict the museum from the city-owned

building, interfere with the museum's administration or Board of Trustees, or attempt to punish the museum in any way in the future due to the controversy surrounding "Sensation."

Giuliani would file an appeal and continue to fight this case in the media for the next four months. However, this case was never heard in appellate court, and at the end of March 2000, nearly six months after "Sensation" first opened, Giuliani abandoned his attacks on the museum. The city dropped its suit to evict the museum in exchange for the concession that the museum would not sue the city again for First Amendment violations.

Like *Finley*, the effects of *Brooklyn v. Giuliani* are complex and deal with a host of political and cultural issues. Giuliani lost his fight on First Amendment grounds, but he gained significant political support among conservatives in New York City and the greater New York area. During this entire controversy, Giuliani had been preparing to run for the United States Senate. As a Republican, he used this legal value debate to secure his conservative base for the primaries and eventually for the general election. Hillary Clinton, at that time the First Lady, had also declared her candidacy for U.S. Senator from New York and clashed with Giuliani over this issue.⁵

Giuliani's six-month long pursuit of the Brooklyn Museum seemed only to pique interest in the so-called "offensive" exhibit. "Sensation" brought in over 13,000 people in the first two days. The opening on the first Saturday of October was met with crowds of protesters. The next day, however, had just one protester holding a sign denouncing the exhibit.

David Strauss wrote, "The battle over government funding of disturbing or unconventional art must ultimately be won in the court of public opinion, not in courts of law enforcing the First Amendment" (Strauss 44-45). The courts of law had decided that the First Amendment protected the Brooklyn Museum in this case and, as a survey of those who attended the exhibition

⁶ While Giuliani successfully gained conservative support in New York for the Senate race, he dropped out on May 19, 2000 due to his diagnosis of prostate cancer.

demonstrates, the court of public opinion also ruled in the museum's favor. The survey, conducted by the UCLA LeRoy Neiman Center for the Study of American Society and Culture, explores the museum visitors' responses to the art that Giuliani labeled "offensive" and "disgusting."

While the overall response to the exhibit was highly positive, the audience was definitely self-selective. Conservatives and Republicans, most likely to be offended by or dislike the show, were only 6.1 percent of the sample. Though this does skew the data somewhat, this method remains the only way to determine if people were offended by the works without the political context of the funding and the First Amendment fight.

The most overwhelming statistic exemplifying the viability of art that some claim to be offensive is that half of the visitors to the Brooklyn Museum who came to see "Sensation" were there for the first time. Giuliani's attacks on the exhibit may have prompted curiosity to see what the controversy was about; the nature of the exhibit, as provocative and unique, might have drawn the thousands of patrons. In any case, 73.9 percent of the survey's respondents had a positive to very positive reaction to the exhibit. A mere 6.2 percent found it offensive or had a negative response. "Sensation" encouraged those who had not been to the museum before to explore not just the controversial works, but also the entire collection, which is the second largest in the country. Such a positive reaction and widespread support for the exhibit demonstrate that Giuliani was very out of touch with the desires of his constituents.

The mayor's contention that the show as a whole was offensive is undermined again by the survey. An overwhelming majority found "Sensation" not offensive. On a scale from one to five (with one being "not at all offensive" and five as "very offensive"), 84.6 percent chose one or two. Only 7.1 percent said they were offended. When asked specifically about Chris Ofili's *The Holy Virgin Mary*, which was the target of the majority of Giuliani's furor, museum visitors were even less offended than they were by the exhibit as a whole, with 89.5 percent being "not offended" or "not

at all offended.” Ironically, the only other possibly anti-Catholic piece in the exhibit, Sam Taylor-Wood’s *Wrecked* (1996), which depicted a naked woman as Jesus in a contemporary rendition of the Last Supper, also failed to offend museum-goers (Halle et al. 134-142).

A nationwide phone survey conducted during the Brooklyn Museum debates found majority support for the funding of the arts. Overall, 60.8 percent of the respondents “strongly” or “mildly” supported the government funding of the arts. About half of that number, 31.9 percent opposed public funding in some way. When asked whether the government should be allowed to ban possibly offensive works from public museums, a situation very similar to the Brooklyn case, 67.7 percent of respondents responded with a ‘no’ (Halle et al. 147). Despite the political battles threatening the future of government funding and the reductions in support over the years, Americans support the public funding of the arts. There is also widespread opposition to the government attempting to infringe upon First Amendment rights in museums.

CONCLUSION

Finley and *Brooklyn* result in different interpretations of how the First Amendment can be applied to public arts funding in a highly politicized setting. The Court read §954(d) to guide the NEA’s decisions, but not to limit them. Any move by the NEA to use the provision to stifle speech or discriminate based on the views of the artists applying would be considered unconstitutional. The ruling against the artists in *Finley* is ambiguous at best since it supported the “decency and respect” clause, but also, as Justice Scalia noted in his dissent, gutted it to make it irrelevant.

The ruling represents the true nature of national level arts funding policies. Politically sensitive issues tend to be handled with a delicate compromise. Any further restrictions on grants would adversely affect the state of the arts. On the other hand, if the artists had pushed for a more lenient grant distribution sys-

tem, the reaction in Congress may have resulted in finally abolishing the Endowment altogether or severely slashing its budget. *Finley* provides ease to both parties and bolsters the status quo in selective arts grants.

First Amendment rights are much more clearly defended in public arts funding in *Brooklyn*. Judge Gershon squarely ruled against Giuliani's threats to remove promised subsidies to the Brooklyn Museum by calling them an unconstitutional breach of the First Amendment. What distinguishes this case is that the mayor sought to discriminate based on viewpoint and content after both the funds had been appropriated in the city budget and the offending exhibit was set up and prepared to open. Giuliani made very public his personal disgust with the religious-themed works and began his quest to close the exhibit down on those grounds. Only after the museum defended itself on First Amendment grounds did the city switch its attack on the lease violation. The mayor's argument had already been undercut by his obsession with calling the art offensive and personally repulsive. *Brooklyn*, and *Cuban Museum* before it, ensured that morality judgment so explicit in its viewpoint discrimination has no place in determining government arts funding.

National v. Local

These two cases may also be analyzed by comparing the debates on the national and local levels. As previously mentioned, the NEA exists based on compromise on the national stage. The Endowment's budget is determined through negotiations with the administration in the House and the Senate across party and ideological lines and approved through the complex Appropriations Committee. In the process, congressmen and senators must give back to their constituent bases by providing funding for programs within the NEA that would help their homes, like favoring the Local Arts and Heritage programs over grants to avant-garde performance art or large-scale arts organizations in urban centers.

Finley showed the controversial methods a national arts funding agency must take to selectively award grants from a shrinking budget. This is inevitable, though, for such an all-encompassing agency to fulfill its mandate to promote the arts in the entire country. The highly decentralized arts funding model, with a focus on local funding, causes the federal grant level to be small enough to not establish any sense of a national cultural policy but substantial enough to spur matching grants in lower government arts agencies. Since the funding in *Finley* was based on a selective process determining to whom the grants went for what types of projects, First Amendment concerns are relevant to ensure the federal government is not using the grants to limit speech or expression.

Local arts agencies, like the New York City Department of Cultural Affairs, tend to fund organizations and institutions rather than providing small grants to individual artists or projects. The NEA does not fund, run, and own museums but the City of New York is the owner of the Brooklyn Museum building and funds over one third of its annual budget. First Amendment rights apply through the Fourteenth Amendment and protect the arts organizations from undue coercion by the local government through the removal of funds, which, unlike the grants from the NEA, are necessary for regular operation.

National funding differs in its selection-making process as well. The NEA employs scores of expert peer panels to evaluate the artistic excellence of grant applications and acts on their advice. When the panels and politics collide, such as in the situation that sparked *Finley*, problems arise that often have nothing to do with the art itself, but with the greater debate of public arts funding. Arts funding on the local level often does not use peer panels and the local government sponsors arts institutions based on economic viability or importance to the community. The key difference in First Amendment issues has to do with public perception of funding. While peer panels provide a politics-free environment, final approval for grants rests in a political appointee's hands. Local cultural agencies made up of arts administrators and

bureaucrats could involve politics in their decisions, but a closer relationship, both geographically and administratively, tends to lessen funding issues that emerge in the national model.

The Future of Public Arts Funding and the First Amendment

The result of the recent decade-long arts funding fracas is inconclusive at best. Since the federal budget battles of the early 1990s, the NEA has had to work with significantly less controversy. Added limitations, no matter how strictly they are enforced, provide the government with too much of an opportunity to use the Endowment for political purposes. Given the tiny budget of the NEA, just \$121 million for 2005, some selective process must be used, and though the grants are not substantial, they do provide the recipients security and the ability to gain funding from other sources.

Finley and *Brooklyn* present two perspectives of First Amendment challenges to the public funding of the arts. While the content restriction in §954(d) was deemed constitutional, the future of arts funding is not truly in danger. *Brooklyn* shows that the government can effectively fund art which some people, public officials or not, find offensive and remain well within the First Amendment. The recent court decisions provide that while the government acts differently when serving as patron and sovereign, its decisions are all subject to the same rights. The current model seems to be the political equilibrium based on compromise. Public support of the arts and politics will continue to clash with the First Amendment. The status quo of a decentralized funding mechanism, funneling money to the local level and relying on high levels of private support, however, is the most stable compromise within American politics.

References

- A Brief Chronology of Federal Support for the Arts*. Washington: The National Endowment for the Arts, 2000.
- Barry, Dan and Carol Vogel. "Giuliani Vows To Cut Subsidy Over 'Sick' Art." *The New York Times*. 23 Sept. 1999: A1.
- Bella Lewitzky Dance Foundation v. Frohnmayer. No. CV 90-3616. United States District Court, C.D. California. 754 F.Supp. 9 Jan. 1991.
- Benedict, Stephen. *Public Money and the Muse: Essays on Government Funding for the Arts*. W.W. Norton: New York, 1991.
- Bolton, Richard. *Culture Wars: Documents from the Recent Controversies in the Arts*. New York: New Press, 1992.
- Brooklyn Institute of Arts and Sciences v. The City of New York and Rudolph Giuliani, Mayor. No. 99-CV-6071. United States District Court, E.D. New York. 64 F. Supp.2d 184. 1 Nov. 1999.
- "Conversation: William Ivey." 25 Jun. 1998. *Newshour with Jim Lehrer*. Public Broadcasting System. 26 Feb. 2005 <http://www.pbs.org/newshour/bb/entertainment/jan-june98/ivey_6-25.html>.
- David Barstow. "Brooklyn Museum Sues to Keep Mayor From Freezing Its Funds." *The New York Times*. 29 Sept. 1999: A1.
- Evans, Rowland and Robert Novak. "The NEA's Suicide Charge." *Culture Wars: Documents from the Recent Controversies in the Arts*. Ed. Richard Bolton. New York: New Press, 1992.
- Feurer, Alan. "Giuliani Dropping His Bitter Battle With Art Museum." *The New York Times*. 28 Mar. 2000: A1.
- Finley, et al. v. National Endowment for the Arts, et al. Nos. 92-56028, 92-56387, 92-55089. United States Court of Appeals, Ninth Circuit. 100 F.3d 671. 5 Nov. 1996.
- Finley, et al. v. National Endowment for the Arts, et al. No. CV 90-5236 AWT. US District Court, C.D. California. 795 F. Supp. 1457. 9 June 1992.
- Freeman, Michelle. "Administrative Law Discussion Forum: First Amendment Protection for the Arts after NEA v. Finley." *Brandeis Law Journal*. Vol. 38, No. 2, 2000: 405-22.
- Giuliani, Rudolph W. "Freedom of Expression Does Not Require Government Subsidization." New York. 26 Sept. 1999.
- Glaberson, William. "Hazy Legal Terrain." *The New York Times*. 30 Sept. 1999: B12.
- Goodnough, Abby. "Mayor Threatens to Evict Museum Over Exhibit He Dislikes." *The New York Times*. 24 Sept. 1999: B6.
- Halle, David, Elisabeth Tiso, and Gihong Yi. "The Attitude of the Audience for 'Sensation' and of the General Public toward Controversial Works of Art." *Unsettling "Sensation"*. Ed. Lawrence Rothfield. New Brunswick, NJ: Rutgers University Press, 2001.
- Levy, Alan Howard. *Government and the Arts: Debates over Federal Support of the Arts in America from George Washington to Jesse Helms*. Lanham, MD:

- University Press of America, 1997.
- National Endowment for the Arts, et al. v. Finley, et al. No. 97-371. US Supreme Court. 524 U.S. 569. 25 Jun. 1998.
- National Foundation on the Arts and the Humanities Act of 1965. Amended 1991. US Code. Title 20, Chapter 26, Subchapter I. §951-54.
- Rosenberger v. Rector and Visitors of University of Virginia. No. 94-329. US Supreme Court. 515 U.S. 819. 29 Jun. 1995.
- Rust v. Sullivan. No. 89-1391. US Supreme Court. 500 U.S. 173. 23 May 1991.
- Siegal, Norman, et al. "Letter from the ACLU and NYCLU to Mayor Giuliani." 24 Sept. 1999. *New York Civil Liberties Union*. 1 Feb. 2005 <<http://www.nyclu.org/brooklynmuseum.html>>
- Strauss, David. "The False Promise of the First Amendment." *Unsettling Sensation*. Ed. Lawrence Rothfield. New Brunswick, NJ: Rutgers University Press, 2001.
- "The Adams Family." 30 April 2005. *The Massachusetts Historical Society*. 20 Feb. 2005 <<http://www.masshist.org/adams/quotes.cfm>>.
- "The Art of Controversy." 8 October 1999. *Newshour with Jim Lehrer*. Public Broadcasting System. 1 Feb. 2005 <http://www.pbs.org/newshour/bb/entertainment/july-dec99/art_10-8.html>.
- Zeigler, Joseph Wesley. *Arts in Crisis: The National Endowment for the Arts Versus America*. Pennington, NJ: A Cappella Books, 1994.