North Dakota Law Review

Volume 75 | Number 4 Article 6

1999

Constitutional Law - First Amendment - Freedom of Speech: The National Endowment of the Arts Can Require Consideration of Decency and Respect in Funding Decisions without Abridging Freedom of Speech

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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREEDOM OF SPEECH: THE NATIONAL ENDOWMENT FOR THE ARTS CAN REQUIRE CONSIDERATION OF "DECENCY AND RESPECT" IN FUNDING DECISIONS WITHOUT ABRIDGING FREEDOM OF SPEECH

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

I. FACTS

Four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller (hereinafter "the artists") applied for National Endowment for the Arts (NEA) grants prior to the passage of a series of 1990 amendments adding a "decency and respect" provision to the NEA enabling act.[1] An advisory panel of the NEA initially recommended their applications for approval.[2] The advisory panel then forwarded its approval to the National Council on the Arts; the National Council recommended disapproval, and the NEA informed the four artists in June of 1990 that it had denied their funding requests.[3] The artists then filed a suit alleging that the NEA had violated their First Amendment rights, had not followed the procedures in the enabling statute, and had breached the artists' confidentiality by releases to the press in violation of the Privacy Act of 1974, 5 U.S.C. § 552(a).[4] Congress subsequently enacted the "decency and respect" provision of the 1990 amendment to the NEA enabling act,[5] and the artists then amended their complaint to a facial challenge of that provision on the grounds that it was void for vagueness and impermissibly viewpoint based.[6]

Congress established the NEA in 1965 in order to fulfill a "broadly conceived national policy of support for the . . . arts in the United States."[7] The enabling statute gave the NEA substantial discretion to award grants by identifying broad funding priorities, such as "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and encouragement of "public knowledge, education, understanding and appreciation of the

1. National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2174 (1998).
2. *Id.*
3. *Id.*
4. *Id.*
5. 1990 Amendments, Pub. L. No. 101-512, § 103(b), 104 Stat. 1963 (1990).
6. *Id.*
7. 20 U.S.C. § 953(b) (1994).

arts."[8] The enabling acts also detailed a process by which applicants could qualify for grants.[9]

The first step of the grant review is conducted by advisory panels, made up of experts in the relevant field of the arts, which reflect "diverse artistic and cultural points of view."[10] After the initial review, the panels report to the National Council of the Arts (Council), which makes recommendations to the NEA Chairperson; the Chairperson then makes the final decisions on grant awards, but he or she cannot issue a grant if it has received a negative recommendation from the Council.[11]

Since 1965, the NEA has granted over $3 billion for art funding to individuals and organizations, often providing the stimulus for matching contributions from state and private foundations.[12] During most of this time, the NEA has operated smoothly, with only a few formal complaints about funding decisions.[13] However, in 1989 there was a major controversy concerning the funding of Robert Mapplethorpe's *The Perfect Moment,* which included homoerotic photographs, and Andres Serrano's work *Piss Christ*, a photograph of a crucifix immersed in urine.[14]

When considering the NEA funding for 1990, Congress reacted to this controversy by subtracting from the NEA's budget the exact amount of money awarded to Mapplethorpe and Serrano ($45,000).[15] Congress also adopted an amendment stipulating that no NEA funds

> may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depiction of sado-masochism, 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.[16]

The NEA responded to this mandate by requiring grant recipients to certify that they would abide by these restrictions.[17] This certification

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8. 20 U.S.C. § 954(c)(1)-(10) (1994).

9. *Id.*

10. 20 U.S.C. § 959(c)(1)-(2) (1994). Panels also include "wide geographic, ethnic, and minority representation," as well as "lay individuals who are knowledgeable about the arts." *Id.*

11. *See* 20 U.S.C. § 955(f) (1994).

12. National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998).

13. *Id.*

14. *Id.*

15. *Id.*; *see also* Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, 103 Stat. 738, 738-42 (1990).

16. Department of the Interior and Related Agencies Appropriations Act, 103 Stat. at 741.

17. *Finley*, 118 S. Ct. at 2173.

requirement was later invalidated by a federal district court, and the NEA did not appeal this decision.[18]

Congress also created an Independent Commission, made up of constitutional law scholars, whose goal was to assess possible ways to construct standards for public arts funding more narrowly.[19] While the Independent Commission stated that there was no constitutional obligation to fund the arts, it also recommended that the certification requirement be rescinded.[20] Additionally, it recommended changes in procedure to strengthen the role of advisory panels and to reaffirm in the statute "the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us."[21]

With the Independent Commission's recommendations in mind, Congress considered a variety of amendments to the 1990 appropriations bill, some of which would have nearly eliminated the NEA.[22] Congress finally passed the Williams/Coleman Amendment.[23] This amendment, which became 20 U.S.C. § 954(d)(1), directs the Chairperson to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when establishing procedures to assess the artistic merit of grant applications.[24] In December 1990, the NEA implemented 20 U.S.C. § 954(d)(1) (hereinafter the "decency and respect" provision) by adopting a resolution to ensure that the members of advisory panels would represent geographic, ethnic, and aesthetic diversity.[25]

Finley and the three other artists had filed their initial suit before the passage of the "decency and respect" provision. The initial suit alleged that the NEA had violated the artists' First Amendment rights, had not

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18. Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774, 782 (C.D. Cal. 1991) (invalidating the certification requirement on the grounds that it was unconstitutionally vague).

19. *Finley*, 118 S. Ct. at 2173.

20. *Id.*

21. *Id.*

22. *Id.*

23. 1990 Amendments, Pub. L. No. 101-512, § 102(b), 104 Stat. 1963 (1990).

24. 20 U.S.C. § 954(d) (1994). This section states:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
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> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.

Id.

25. *Id.*

followed the procedures in the enabling statute, and had breached the artists' confidentiality by releases to the press in violation of the Privacy Act of 1974, 5 U.S.C. § 552(a).[26] After Congress enacted the "decency and respect" provision, the artists amended their complaint to a facial challenge of the provision as being void for vagueness and impermissibly viewpoint based.[27]

The District Court for the Central District of California denied the NEA's motion for judgment on the pleadings.[28] After discovery, the NEA agreed to settle the artists' statutory and as-applied constitutional claims, paying the artists the amount of the denied grants, damages and attorney's fees.[29] On the remaining facial constitutional challenge to the "decency and respect" provision, the court granted summary judgment in favor of the artists.[30] The court rejected the argument that structuring the review panels to ensure diversity was adequate to comply with the "decency and respect" provision.[31] It also found that the provision failed to notify applicants adequately of what was required and therefore did not meet Fifth Amendment due process requirements.[32] Since the provision "clearly reaches a substantial amount of protected speech," the court found it to be impermissibly overbroad on its face.[33] The NEA did not seek a stay of this injunction, and it therefore has not applied the "decency and respect" provision since June 1992.[34]

The NEA appealed the decision, and a divided panel of the Ninth Circuit Court of Appeals affirmed the district court's ruling.[35] The majority agreed with the district court that the NEA was compelled by the "decency and respect" provision to do more than use diverse advisory panels.[36] It also held that the "decency and respect" criteria were not "susceptible to objective definition" and were therefore void for vagueness under the First and Fifth Amendments.[37] Third, since the arts occupy a traditional sphere of free expression, the majority held that the "decency and respect" provision was an impermissible viewpoint-based restriction of protected speech for which the NEA had failed to

26. *Id.* at 2174.
27. *Id.*
28. *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1463-68 (C.D. Cal. 1992).
29. *Finley*, 118 S. Ct. at 2174.
30. *Finley*, 795 F. Supp. at 1476.
31. *Id.* at 1471.
32. *Id.* at 1471-72.
33. *Id.* at 1476.
34. *Finley*, 118 S. Ct. at 2174.
35. National Endowment for the Arts v. Finley, 100 F.3d 671, 674 (9th Cir. 1996).
36. *Id.* at 680.
37. *Id.* at 680-81.

articulate a compelling interest.[38] On these bases, the court of appeals declared the "decency and respect" provision facially invalid.[39]

The dissent disagreed, writing that the decency and respect provision did not abridge the First Amendment because it did not prohibit the NEA from funding indecent art,[40] but rather it merely required consideration of "decency and respect."[41] Also, the dissent asserted that vagueness principles do not come into play in selective subsidies by government.[42] Finally, the dissent asserted that the government may draw distinctions based on content and viewpoint in making its funding decisions.[43]

The Supreme Court granted certiorari and reversed the judgment of the court of appeals.[44] The Supreme Court *held* that the "decency and respect" provision is facially valid because it neither interferes with First Amendment rights nor violates constitutional vagueness principles.[45]

II. LEGAL BACKGROUND

The Freedom of Speech Clause of the First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[46] In 1931, during the early development of First Amendment jurisprudence, Chief Justice Hughes observed that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people" was "a fundamental principle of our constitutional system."[47] The First Amendment has since been interpreted by courts "primarily as a guarantor of the ongoing legitimacy of democratic self-governance in the United States."[48] Therefore, from its inception, the First Amendment's primary aim was to protect from government regulation the "independent realm" of speech from which public opinion is forged.[49] As a result of this orientation to preserve public discourse, the First Amendment has traditionally had rather little to say about the speech of the government

38. *Id.* at 682-83.
39. *Id.* at 683.
40. *Id.* at 684.
41. *Id.* at 689-90.
42. *Id.* at 684-88.
43. *Id.*
44. *Finley*, 118 S. Ct. at 2175 (citing National Endowment for the Arts v. Finley, 118 S. Ct. 554 (1997) (granting certiorari)).
45. *Id.* at 2172.
46. U.S. CONST. amend. I.
47. Stromberg v. California, 283 U.S. 359, 369 (1931).
48. Robert C. Post, *Subsidized Speech*, 106 YALE L. J. 151, 151 (1996). In this essay, Post explores the complex constitutional area of government subsidies for speech. *Id.*
49. *Id.*

itself.[50] However, the force of the First Amendment appears to change with the changing role of government in speech-related activities.[51]

A. GOVERNMENT-AS-PATRON

The Court has recognized different levels of First Amendment protection depending upon the role the government is playing. These roles of government include government-as-sovereign, government-as-proprietor, government-as-employer, and government-as-funder/patron. The highest protection afforded speech is when government is acting as a regulator or sovereign.[52] In this role, government actions that abridge speech in a content-based way must pass strict scrutiny; that is, the government action must be necessary for a compelling government purpose.[53] The phrase "content-based" refers to government regulations that aim at the content of the speech itself, in contrast to content-neutral regulations that aim at some other interest such as peace and quiet, the orderly movement of crowds, the aesthetic attractiveness of public spaces, or the economic competitiveness of an industry.[54]

When government is acting as proprietor, the level of First Amendment protection depends upon the nature of the property, calling into play forum analysis.[55] If the property involved is a traditional public forum or a designated public forum, content-based regulations must meet

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50. *Id.*

51. *Id.* at 152.

52. *See* R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992) (holding a city ordinance unconstitutional because it prohibited inflammatory speech on only one side of an issue).

53. *Id.*

54. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1203 (13th ed. 1997). *See also generally* United States v. Grace, 461 U.S. 171 (1983) (holding that the sidewalks around the United States Supreme Court Building are a traditional public forum and therefore the prohibition of the display of banners, flags, etc. was unconstitutional); Adderly v. Florida, 385 U.S. 39 (1966) (upholding convictions of 32 students who protested in the driveway of a county jail that was not a public forum but reserved for jail uses); Brown v. Louisiana, 383 U.S. 131 (1966) (reversing the conviction of young black men arrested for a sit-in in the state library because it was a public facility).

55. GUNTHER & SULLIVAN, *supra* note 53, at 1234-35.

strict scrutiny.[56] If the property is a non-public forum, however, the limitation on speech must be only reasonable and viewpoint neutral.[57]

Government-as-employer invokes a balancing test, dependent on a threshold inquiry, which determines if the speech concerns "a matter in the public interest."[58] If so, the court employs a balancing test to determines which is more weighty, the government's interest in efficient operation of the workplace or individuals' right to express themselves freely.[59]

Government-as-patron or government-as-funder is the final and most nebulous category in this analysis. As two scholars have noted, "Determining the constitutionality of government subsidization of expression is one of the most frustrating tasks facing scholars of the First Amendment."[60] Government subsidization of speech challenges two fundamental assumptions of ordinary First Amendment doctrine.[61] First, the status of the speakers is uncertain.[62] Are the speakers independent participants in the formulation of public opinion, or are they tools of the government?[63] Second, is the government subsidization a regulation imposed on persons, or is it government participation in the marketplace

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56. *See generally* Hague v. CIO, 307 U.S. 496 (1939) (holding invalid a city ordinance that required a permit for access to streets and parks because the permit issuance process allowed too much discretion). The origin of the right to speak in a public forum is traced to Justice Roberts' opinion in this case:

> Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and pubic places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege [to] use the streets and parks for communication of views on national questions may be regulated in the interest of all; [but] it must not, in the guise of regulation, be abridged or denied.

Id. at 516-17. This is a definite break from Justice Holmes' suggestion, in *Massachusetts v. Davis*, that a city is the same as a private proprietor and therefore possesses the right to exclude. *Id.* at 514-17 (citing Massachusettes v. Davis, 167 U.S. 43 (1897)). Justice Roberts responded to this by saying that the public has "a kind of First-Amendment easement" on streets and parks for the purpose of speech. *Id.*

57. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828-29 (1995) (holding a university's denial of publication funding to a Christian newspaper violated the First Amendment because the publishing fund had created a public forum for ideas).

58. *See generally* Pickering v. Board of Educ., 391 U.S. 563 (1968) (holding that it was unconstitutional to dismiss a public school teacher for writing a letter to the newspaper criticizing the school board's allocation of finances).

59. *Id.*

60. Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 544 (1995). Redish and Kessler propose an analytical structure for analyzing which government subsidization decisions are unconstitutional and which should be permitted to stand under the First Amendment. *See generally id.*

61. Post, *supra* note 47, at 152.

62. Post, *supra* note 47, at 152.

63. Post, *supra* note 47, at 152.

of ideas?[64] In a series of cases, the court has attempted to resolve this conflict.

In 1958, the Court in *Speiser v. Randall*[65] struck down a requirement that property tax exemptions for veterans be available only to veterans who declared they did not advocate the forcible overthrow of the government on the basis that the government cannot penalize veterans for such speech.[66] In so doing, the Court wrote that government denial of subsidies cannot be "aimed at the suppression of dangerous ideas."[67]

In 1984, however, the Court in *Regan v. Taxation with Representation of Washington*[68] upheld a provision of the Internal Revenue Code that made nonprofit organizations that do any lobbying ineligible for tax-deductible contributions.[69] The Court distinguished *Speiser*, noting that Congress has generally chosen to subsidize nonprofit organizations by making contributions tax-deductible, and here it simply chose not to subsidize lobbying as extensively.[70] The Court wrote, "Congress has merely refused to pay for the lobbying out of public moneys."[71] Justice Rehnquist went on to state that in situations in which the government "subsidies are not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'"[72] The concurrence stated the nonsubsidy of lobbying organizations was acceptable because the nonprofit organization could establish a separate organization for lobbying that did not receive tax-deductible contributions, meaning its right to speak was not abridged.[73]

That same year, the Court in *FCC v. League of Women Voters*[74] struck down a provision of the Public Broadcasting Act that prohibited editorialization by any noncommercial educational broadcasting stations that received grants from the Corporation for Public Broadcasting.[75]

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64. Post, *supra* note 47, at 152.

65. 357 U.S. 513 (1958).

66. Speiser v. Randall, 357 U.S. 513, 529 (1958).

67. *Id.* at 519.

68. 461 U.S. 540 (1983).

69. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 551 (1983). This case was an appeal of a suit brought by a nonprofit organization seeking a declaratory judgment that it qualified for tax exempt status. *Id.* The Internal Revenue Service had denied its application because its activities included lobbying of legislators. *Id.* The Court held that the internal revenue statute which grants tax exemption for certain nonprofit organizations that do not engage in substantial lobbying activities does not violate the First Amendment. *Id.*

70. *Id.* at 544.

71. *Id.* at 545.

72. *Id.* at 550 (quoting the phrase from *Speiser*).

73. *Id.* at 552.

74. 468 U.S. 364 (1984).

75. FCC v. League of Women Voters, 468 U.S. 364, 402 (1984). Noncommercial educational

The Court seemed to characterize this "no editorializing" condition of the grant as a penalty, as opposed to a mere nonsubsidy, stating that a "station that receives only [one percent] of its overall income from the [Corporation for Public Broadcasting] grants is barred absolutely from all editorializing."[76] Of key importance to the Court was the lack of opportunity for the public broadcasting stations to use other funds for editorializing.[77]

In *League of Women Voters*, after establishing that prohibition of editorializing was a penalty, the Court went on to establish that this restriction was impermissibly content based.[78] The Court applied the intermediate scrutiny standard used for broadcasters, requiring the restriction be narrowly tailored to further a substantial governmental interest.[79] The dissent found *Regan* to be controlling and rejected the Court's use of intermediate scrutiny, arguing that "when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily 'aimed at the suppression of dangerous ideas.'"[80]

In *Rust v. Sullivan*,[81] a 1991 case, the Court upheld a Department of Health and Human Services regulation that forbade any project that received Title X funds from counseling or referring women for abortions or from encouraging, promoting or advocating abortion.[82] Project participants could engage in these activities only if they were kept "physically and financially separate" from the Title X project.[83] The Court held that rights were not being denied; rather, the government was just insisting that its funds be spent for the purposes for which they were authorized.[84] It wrote:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time

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broadcasting stations challenged the section of the Public Broadcasting Act of 1967, which forbade any noncommercial educational station from editorializing if it received any grant from the Corporation of Public Broadcasting. *Id.*

76. *Id.* at 400.

77. *See id.*

78. *See id.* at 402.

79. *Id.* Due to the limited access of broadcast medium, the Court has used an intermediate standard of scrutiny of regulations rather than the usual strict scrutiny standard for content-based regulations. *See id.* at 374-80.

80. *Id.* at 407 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

81. 500 U.S. 173 (1991).

82. Rust v. Sullivan, 500 U.S. 173, 203 (1991). Title X grantees and doctors who supervised Title X funds challenged the facial validity of Section 1008 of the Public Health Service Act, which specified that none of the Title X family-planning services funds could be used in programs where abortion is a method of family planning. *Id.*

83. *Id.* at 196.

84. *See id.* at 194.

> funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[85]

The Court did not see this as "suppressing a dangerous idea," but merely as limiting project grantees to the scope of the project.[86] The dissent disagreed:

> Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech.[87]

In 1995, the Court in *Rosenberger v. Rector of University of Virginia*,[88] a 5-to-4 decision, invalidated the university's denial of funding to a Christian publication.[89] The denial of funding was based on a university guideline that prohibited the use of student activity funds for any "religious activity" that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[90] The Court found that the university printing subsidy was a limited public forum, and the disallowance of religious activity was impermissibly viewpoint based.[91] The dissenters disagreed, noting that since all religions were excluded, this was an acceptable subject-matter-based restriction, not an unacceptable viewpoint-based restriction.[92]

These former cases on government-as-patron bring us to this case, *National Endowment for the Arts v. Finley*.[93] The line of cases contains a recurring theme from *Speiser* that the government, even as a funder, cannot aim at the suppression of dangerous ideas. However, these cases also illustrate that the Court uses a more lax standard when the govern-

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85. *Id.* at 193.
86. *Id.* at 194.
87. *Id.* at 207 (citing Speiser v. Randall, 357 U.S. 513, 518-19 (1958)).
88. 515 U.S. 819 (1995).
89. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 837 (1995). Petitioners brought a suit against the University of Virginia alleging that, by refusing to authorize the payment from the Student Activities Fund for the printing of a Christian newspaper, the university had denied the petitioners' right to free speech. *Id.*
90. *Id.* at 823.
91. *See id.* at 830.
92. *See id.* at 895.
93. 118 S. Ct. 2168 (1998).

ment's denial of funding can be characterized as a nonsubsidy rather than as a penalty. Coupled with the possibility of the government confronting only a lax standard if its action is characterized as a nonsubsidy, the artists in *Finley* had an additional difficulty because they were mounting a facial constitutional challenge, which requires a substantial showing of abridging speech.[94]

B. THE FACIAL CONSTITUTIONAL CHALLENGE

Since 1973, the Court has required that those asserting a facial constitutional challenge show a "substantial" risk that the application of a statute will lead to suppression of free expression in order to invalidate that statute on its face.[95] In 1990, the Court said that challengers of the facial validity of a regulation bear a "heavy burden."[96] In such challenges, the Court wrote, "we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights."[97] Therefore, the facial challenge is the most difficult, because the challenger must show that no situations exist under which the act would be valid.[98] As the Court has noted, "The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."[99]

Even with this difficult test in place, the Court has found some statutes facially invalid.[100] In 1987, for example the court found an ordinance prohibiting all "First Amendment activities" in the Los Angeles airport terminal to be tremendously overbroad and therefore invalid on its face.[101] The Court wrote, "On its face, the resolution [reaches] the universe of expressive activity [and prohibits] all protected expression."[102] Similarly, in 1992, the Court in *R.A.V. v. St. Paul*[103] struck down an ordinance that established a criminal penalty for expression "which one knows or has reasonable grounds to know arouses anger,

94. National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2175 (1998).

95. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (upholding restriction of political activities by classified state civil servants and establishing a requirement for "substantial" overbreadth for facial invalidation).

96. Rust v. Sullivan, 500 U.S. 173, 183 (1991).

97. *Id.*

98. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

99. *Id.*

100. *See generally* Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (striking down as overbroad an ordinance that banned all First Amendment activities at an airport).

101. *Id.*

102. *Id.*

103. 505 U.S. 377 (1992).

alarm or resentment in others on the basis of race, color, creed, religion or gender."[104] The Court found the ordinance facially unconstitutional since the motivation for prohibiting the speech was the disapproval of the ideas expressed.[105]

However, the Court remains reluctant to invalidate legislation "on the basis of its hypothetical application to situations not before the Court," a hesitancy it first stated in *FCC v. Pacifica*.[106] In *Pacifica*, the Court upheld the constitutionality of a prohibition of patently offensive references to excretory and sexual organs and activities.[107] The *Pacifica* holding was consistent with the approach in *Red Lion Broadcasting v. FCC*,[108] in which the court rejected an argument that the regulations were so vague that they would inevitably abridge the broadcasters' freedom of speech.[109] The Court decided that it would "not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with those problems if and when they arise."[110] In conclusion, the *Pacifica* Court noted that invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort," a medicine it declined to administer.[111]

III. CASE ANALYSIS

In *Finley*, the United States Supreme Court reviewed the Ninth Circuit Court of Appeals' determination that the "decency and respect" clause on its face impermissibly discriminated on the basis of viewpoint

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104. R.A.V. v. City of St. Paul, 505 U.S. 377, 379 (1992). R.A.V. was charged, under the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, for allegedly burning a cross on a black family's lawn. *Id.* The city ordinance prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.*

105. *See id.* at 391.

106. 438 U.S. 726 (1978).

107. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978). A Pacifica Foundation radio station made an afternoon broadcast of a satiric monologue by George Carlin, entitled "Filthy Words," which listed and repeated a variety of colloquial uses of "words you couldn't say on the public airwaves." *Id.* at 729-30. A father complained to the Federal Communications Commission (FCC) after hearing the broadcast while driving with his young son. *Id.* at 730. The FCC issued a declaratory order granting the complaint. *Id.* The FCC found a power to regulate indecent broadcasting in 18 U.S.C. § 1464, which forbids the use of "any obscene, indecent, or profane language by means of radio communications." *Pacifica*, 438 U.S. at 731. The FCC characterized the language of the monologue as "patently offensive," though not necessarily obscene. *Id.*

108. 395 U.S. 367 (1969).

109. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969) (upholding, on the basis of scarcity of broadcast spectrum, the FCC's "fairness doctrine," which mandated that stations provide free reply time to individuals who had been personally attacked on the air).

110. *Id.*

111. *Pacifica*, 438 U.S. at 743 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

and was void for vagueness under the First and Fifth Amendments.[112] The Court concluded that the "decency and respect" clause was facially valid, as it neither inherently interfered with First Amendment rights nor violated constitutional vagueness principles.[113]

A. THE MAJORITY OPINION

1. *Addressing the Facial Challenge*

Justice O'Connor, writing for the Court, began by noting that because the artists raised a facial constitutional challenge to the "decency and respect" clause, they confronted "a heavy burden" in advancing their claim.[114] Calling facial invalidation "manifestly strong medicine," she stated the Court had used it sparingly and "only as a last resort."[115] In order to prevail on their facial challenge, the artists needed to demonstrate a substantial risk that the application of the "decency and respect" provision would lead to suppression of speech.[116] The artists argued that this requirement for facial invalidation was met because the "decency and respect" provision is a paradigmatic example of viewpoint discrimination since it rejects artistic speech that is indecent or disrespectful of mainstream values.[117]

The NEA argued that the provision is merely "hortatory" or advisory and stops well short of an absolute restriction; rather, it merely adds "considerations" to the grant-making process and does not preclude awards to projects that might be considered disrespectful or indecent.[118] Also, the NEA argued that the provision neither puts conditions on the grants awarded nor requires the "decency and respect" factors be given any particular weight in the grant reviewing process.[119] In fact, the NEA emphasized, it had implemented this provision merely by ensuring that the advisory panels that review the applications include representation of various backgrounds and points of view.[120]

The Court did not ultimately decide whether the NEA's approach to Congress' mandate was a reasonable reading of the statute or not.[121] However, the Court did hold that it was clear that the text of the provision

112. National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2171-72 (1998).
113. *Id.* at 2172.
114. *Id.* at 2175 (citing Rust v. Sullivan, 500 U.S. 173, 183 (1991)).
115. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).
116. *Id.* at 615.
117. *Finley*, 118 S. Ct. at 2175.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

imposed no categorical requirement.[122] It held that the "decency and respect" provision was just advisory language, in sharp contrast to the language Congress uses when it really intends to constrain affirmatively the NEA's grant-making authority, as in the obscenity section of the same act, which states: "Obscenity is without artistic merit, it is not protected speech, and shall not be funded."[123]

After this examination of the plain language of the statute, the Court looked to the political context surrounding the adoption of the "decency and respect" provision.[124] The Court found that the political context did not lend support to the artists' contention that the NEA was compelled to deny funding on the basis of viewpoint-discriminatory criteria.[125] Instead, it found that Congress adopted a bipartisan proposal to counter amendments aimed at eliminating or sharply curtailing the NEA's grant-making authority.[126] The Independent Commission cautioned against distinct viewpoint-based standards and suggested as an alternative that "additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as part of a definition of 'artistic excellence')."[127] The sponsors of the "decency and respect" clause followed this advice and took the approach of just adding criteria to the assessment of artistic merit, but not disallowing any particular viewpoints; this was in contrast to the alternative Rohrabacher Amendment, which arguably would have prevented the funding of works such as "Merchant of Venice" and "Grapes of Wrath."[128] The Court also noted that one of the sponsors even said Congress had maintained the integrity of freedom of expression by the "decency and respect" amendment.[129]

The Court concluded that the "decency and respect" provision was aimed at reforming procedures rather than precluding speech, and this distinction undercut the artists' contention that the provision would inevitably be used as a tool for invidious viewpoint discrimination.[130] The Court clarified that cases that have struck down provisions for being facially unconstitutional included dangers that were both more evident and more substantial.[131] For example, in *R.A.V.*, the provision set forth a

122. *Id.* at 2176.
123. *Id.*; *see also* 20 U.S.C. § 954(d)(2) (1994).
124. *Finley*, 118 S. Ct. at 2176.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* The dissent found congressional intent to be of little value, stating it constitutes no more than Congress' "hope" that the provision is not unconstitutional. *Id.* at 2187 n.3 (Souter, J., dissenting).
129. *Id.* at 2176.
130. *Id.*
131. *Id.* (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992) (invalidating on its face a municipal ordin

clear criminal penalty for proscribed views on particular "disfavored subjects" and suppressed "distinctive ideas[s], conveyed by a distinctive message."[132] In contrast, the "decency and respect" criteria do not silence speakers by expressly "threaten[ing] censorship of ideas."[133] The Court therefore did not perceive a realistic danger that the "decency and respect" clause would compromise First Amendment values.[134] In fact, pulling from both the artists' and the NEA's statements that criteria of decency and respect are open to multiple interpretations, the Court wrote that because of the imprecise character of the criteria, the provision did not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views.[135] In other words, the Court was saying the criteria were too imprecise to be effective as a discriminatory tool and therefore did not necessarily infringe on First Amendment rights.[136]

The Court asserted that the artists' claim that the provision was unconstitutional could be reduced to a single argument.[137] That argument is that the "decency and respect" criteria are sufficiently subjective that the NEA could utilize them to engage in viewpoint discrimination.[138] The Court decided that, given the varied interpretations of the criteria and the direction just to "take them into consideration," it seemed "unlikely that this provision will introduce any greater element of selectivity than the determination of 'artistic excellence' itself."[139] The Court added that it was reluctant to invalidate legislation "on the basis of hypothetical application to situations not before the Court."[140]

The Court agreed that the statute contemplated indisputably constitutional applications for both the "decency" prong and the "respect" prong.[141] For example, the NEA grants to art for education could use "decency" as a permissible factor.[142] Permissible applications of the "respect" prong are the NEA grants to projects to honor and preserve

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ance that defined as a crime the placement of a symbol on public or private property "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender'")).

132. *R.A.V.*, 505 U.S. at 393.

133. *Id.*

134. *Finley*, 118 S. Ct. at 2176.

135. *Id.* at 2177.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978).

141. *Finley*, 118 S. Ct. at 2177.

142. *Id.* (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (recognizing an acceptable inculcative role of government-as-educator)).

America's multicultural artistic heritage.[143] However, the Court conceded that finding permissible applications is not enough to sustain the statute.[144] Here, the Court was also not persuaded that other applications would give rise to the suppression of protected expression.[145] The content-based considerations are a consequence of the nature of arts funding.[146] Since the NEA has limited resources, the Court noted, it therefore must deny the majority of the grant applications that it receives, including many that propose "artistically excellent" projects.[147] Citing the dissent in the decision below, the Court said it would be "impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression."[148] Absolute neutrality is therefore "inconceivable" when awarding grants according to "artistic worth of competing applications."[149]

The Court determined that the artists' reliance on *Rosenberger* was misplaced because of this particular nature of arts funding.[150] It is not the scarcity of funds, because that is common to both *Rosenberger* and this case, but rather the competitive process by which the funds are allocated by the NEA that distinguishes this case from *Rosenberger*.[151] In *Rosenberger*, the Court held that a limited public forum had been created with funds available to all student organizations that were "related to the educational purpose of the University," in sharp contrast to the NEA's mandate to make aesthetic judgments.[152] It is this inherently content-based "excellence" threshold that must be passed in order to receive NEA support that sets it apart from the subsidy at issue in *Rosenberger*.[153] This also sets the NEA apart from other comparably objective decisions on allocating public benefits such as access to a school auditorium, a municipal theater, or second class mailing privileges.[154]

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143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 2178.
148. *Id.* (citing National Endowment of the Arts v. Finley, 100 F.3d 671, 685 (9th Cir. 1996) (Kleinfeld, J., dissenting)).
149. *Id.* (citing Advocates for the Arts v. Thomson, 532 F.2d 792, 795-96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976) (stating that funding decisions based on artistic value are unavoidably based on subject matter or content to some extent)).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 386 (1993) (holding that by denying a church access to school premises just because a film it planned to show dealt with subject from a religious perspective, the school district violated the Speech Clause of the First Amendment); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (holding unconstitutional a municipal theater's denial of application for the musical "Hair"); Hannegan v. Esquire, Inc., 327 U.S. 146, 148 n.1 (1946) (holding that the power of the Postmaster General to

The Court noted that the artists did not allege discrimination in any particular funding decision; in fact, two of the individual respondent artists received NEA grants after filing the suit.[155] Since no particular artist had been denied funding, this was not an occasion to address an as-applied challenge to the statute where such a denial of a grant may be shown to be a product of invidious viewpoint discrimination.[156] However, the Court stated that if the NEA were to "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case."[157] The Court stated its position that even when providing subsidies, the government may not "ai[m] at the suppression of dangerous ideas," and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate.[158] The Court went on to emphasize that a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive "certain ideas or viewpoints from the marketplace."[159]

The Court then closed the door on this discussion of facial invalidity, but it left the door unlocked for as-applied challenges.[160] The Court wrote that "unless and until" the "decency and respect" provision was applied in a way that raised concerns about suppression of viewpoints, its constitutionality would be upheld.[161]

Before leaving the issue of the facial discriminatory challenge, the Court clarified that the First Amendment does apply to subsidy grants, but "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[162] The Court noted, "So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."[163] Here, along with the addition of the "decency and respect" provision, a declaration of purpose in the NEA's enabling act was also modified.[164] This modification provided

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determine if a periodical is mailable does not include the power to determine if the contents of the periodical meet a standard of the public good or welfare)).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or view points"); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983)).

159. *Id.* at 2178-79 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (invalidating the "Son of Sam" law enacted to prevent serial killers from profiting from books about their crimes because the statute was impermissibly content-based)).

160. *Id.* at 2179.

161. *Id.* (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969)).

162. *Id.*

163. *Id.* (citing *Regan*, 461 U.S. at 549).

164. *Id.*

that funding of the arts should "contribute to public support and confidence in the use of taxpayer funds," and that "[p]ublic funds . . . must ultimately serve public purposes the Congress defines."[165] The Court established in *Rust* that it is permissible for Congress "selectively to fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[166] By choosing to fund selectively in this way, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity at the exclusion of the other."[167]

2. *Addressing the Vagueness Challenge*

In addition to the facial challenge, the artists also challenged the unconstitutionality of the "decency and respect" clause because it was vague.

The Court held that the "decency and respect" provision of the NEA funding act was not unconstitutionally vague.[168] Undeniably, the Court stated, the terms of the provision are opaque and would raise substantial vagueness concerns if they were in a criminal statute or regulatory scheme, but this is a selective subsidy, and in this context there is not the same risk of speakers being compelled to steer far clear of any "forbidden area."[169] The Court recognized that artists may conform their speech to what they believe to be the decision-making criteria in order to get funding.[170] However, this had limited consequences, because this was a selective subsidy.[171] The Court distinguished between when the government is acting as a patron rather than as sovereign, noting that when the government is acting as a patron "the consequences of imprecision are not constitutionally severe."[172]

Making the clear distinction that the selective subsidy context is unique, the Court noted that with selective subsidies it is "not always

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165. *Id.* (quoting 20 U.S.C. § 951(5) (1994)).

166. *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

167. *Id.* (citing *Rust*, 500 U.S. at 193); Maher v. Roe, 432 U.S. 464, 475 (1977) (stating "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy")).

168. *Id.*

169. *Id.* (citing Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574 (1987); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (finding the "prohibitory and stigmatizing effect" of a "quasi-criminal" ordinance relevant to the vagueness analysis); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (requiring clear lines between "lawful and unlawful" conduct); NAACP v. Button, 371 U.S. 415, 432-33 (1963)).

170. *Id.*

171. *Id.*

172. *Id.*

feasible for Congress to legislate with clarity."[173] If the Court were to find this statute unconstitutionally vague, it would also have to strike down all government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence."[174] In conclusion, the Court held that the "decency and respect" provision does not, on its face, impermissibly infringe on First or Fifth Amendment rights but instead "merely adds some imprecise considerations to an already subjective selection process."[175]

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia's concurrence agreed that the provision is not unconstitutional, but his reasons differed from the majority's. He reasoned that the "decency and respect" provision was viewpoint-based, but that this was not unconstitutional because the government was acting as a patron, not as regulator.[176] Justice Scalia compared the majority's opinion to a procedure in medicine, stating "[t]he operation was a success, but the patient died."[177] Justice Scalia noted that opponents of this provision could not have asked for more, since the Court "sustains the constitutionality" of the provision "by gutting it."[178] He took exception to the approach by the Court; he thought the provision must be evaluated "as written, rather than as distorted by the agency it was meant to control."[179] Justice Scalia stated that, as written, the "decency and respect" provision establishes a content- and viewpoint-based criteria for evaluation of grant applications and "that is perfectly constitutional."[180] He then expanded on two points: The statute is viewpoint based and viewpoint-based criteria for government funding are not unconstitutional.

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173. *Id.*

174. *Id.* at 2179-80. In *Finley*, the Court listed examples of subjective subsidies. *Id.* (citing 2 U.S.C. § 802 (establishing the Congressional Award Program to "promote initiative, achievement, and excellence among youths in the areas of public service, personal development, and physical and expedition fitness"); 20 U.S.C. § 956(c)(1) (providing funding to the National Endowment for the Humanities to promote "progress and scholarship in the humanities"); 20 U.S.C. § 1134h(a) (authorizing the Secretary of Education to award fellowships to "students of superior ability selected on the basis of demonstrated achievement and exceptional promise"); 22 U.S.C. § 2452(a) (authorizing the award of Fulbright grants to "strengthen international cooperative relations"); 42 U.S.C. § 7382c (authorizing the Secretary of Energy to recognize teachers for "excellence in mathematics or science education")).

175. *Id.* at 2180.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

First, Justice Scalia interpreted the statute to mean that decency and respect for Americans' beliefs and values *must* be taken into account and therefore is not "merely advisory," as the majority claimed.[181] Scalia wrote that "this does not mean that those factors must always be dispositive, but it *does* mean that they must always be considered."[182] Therefore, he determined that the way that the NEA has chosen to comply, by simply formulating diverse review panels, "is so obviously inadequate that it insults the intelligence," since it does not ensure that the factors of "decency and respect" will be taken into account.[183] Also, Justice Scalia asserted that the NEA's "fanciful reading" of the statute made the "decency and respect" clause superfluous, since the diverse panels are already required in the statute.[184]

Justice Scalia did agree with the Court that the "decency and respect" clause "imposes no categorical requirement," because it does not require that applications that are indecent or disrespectful be denied.[185] He then stated, however, that "factors need not be conclusive to be discriminatory."[186] The factors are not without meaning; they mean something, and that something is that those who are deemed indecent will be disfavored.[187]

Justice Scalia then stated this is "unquestionably" viewpoint discrimination,[188] and the fact that the decency clause does not compel the denial of funding does not change the fact that it is viewpoint discriminatory.[189] Justice Scalia also did not agree with the majority's conclusion that the decency clause was nondiscriminatory because it was hard to pin down, "any more than a civil-service preference in favor of those who display 'Republican-party values' would be rendered nondiscrimi-

181. *Id.* at 2180-81. Justice Scalia looked to the plain language of the statute and interpreted the phrase "the Chairperson shall ensure" to mean that decency and respect for Americans' beliefs and values must be taken into account and therefore was not "merely advisory," as the majority claimed. *Id.*

182. *Id.* at 2181.

183. *Id.*

184. *Id.* (noting that 20 U.S.C. § 959(c) "already requires the Chairperson to 'issue regulations and establish procedures . . . to ensure that all panels are composed, to the extent practicable, of individuals reflecting . . . diverse artistic and cultural points of view'").

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* Despite this "unquestionabl[e]" status, Justice Scalia then added a footnote in which he stated that the provision may be just content discrimination, not viewpoint discrimination, and therefore easier to uphold; since he believed this statute could be upheld either way, however, he decided to "pass over this conundrum and assume the worst" and proceed with the label of viewpoint discrimination. *Id.* at 2181 n.1.

189. *Id.*

natory by the fact that there is plenty of room for argument as to what Republican-party values might be."[190]

Justice Scalia viewed the discussion of the amendment's political context as having "no valid claim upon our attention at all."[191] Discounting the value of legislative history, Justice Scalia noted it does not matter if this statute was a result of the "most partisan alignment in history" or whether members of Congress "all linked arms and sang, 'The more we get together, the happier we'll be.'"[192] Justice Scalia asserted it is the text that was passed and signed that matters, and that text discriminates against indecency and disrespect.[193] The next question was whether or not this discrimination is unconstitutional.[194]

Justice Scalia answered this question by determining that the statute was constitutional.[195] He argued that denial of funding for indecent speech is not abridgment, since those denied speakers are as unconstrained with the statute as without it.[196] The statute does not abridge or deprive artists, since they are still free to express themselves; they just cannot express themselves and have taxpayers pay for it.[197] Justice Scalia then clarified that it is "preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the *suppression* of dangerous ideas,'" because denial of a discretionary subsidy is not suppression when the speaker can still speak.[198]

Justice Scalia also noted that since the NEA is not the sole source of funding for art, the government is free to earmark NEA funds for projects it deems are in the public interest without abridging speech.[199] Such decisions abridge speech no more than every other funding legislation Congress enacts.[200] In fact, Justice Scalia viewed this funding discretion as similar to the discretion to use the NEA funds to fund art, rather than science or some other form of expression.[201] Just as it is acceptable to favor art, it is also acceptable to favor decency and respect

190. *Id.* at 2182.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* Justice Scalia referred to the First Amendment text which reads: "Congress shall make no law . . . *abridging* the freedom of speech." *Id.* (quoting U.S. CONST. amend. 1 (emphasis added)).
196. *Id.*
197. *Id.* at 2183.
198. *Id.*
199. *Id.* (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983)).
200. *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 193 (1991)).
201. *Id.*

for certain beliefs and values.[202] Justice Scalia concluded that such favoritism was constitutional because it does not abridge anyone's speech.[203]

Justice Scalia also took exception to the artists' reliance on *Rosenberger*.[204] The artists relied on *Rosenberger* to argue that viewpoint-based discrimination is impermissible unless the government is the speaker or the government is disbursing public funds to private entities to convey a governmental message.[205] Scalia countered that when considering the constitutionality of government action, it does not make any difference whether the government favors a viewpoint directly by having government-employed artists paint pictures, or if the government advocates it officially by establishing an Office of Art Appreciation, or if the government gives money to others by funding private art classes.[206] Regardless of the method government uses to fund art, it still has nothing to do with abridging anyone's speech.[207]

Justice Scalia contrasted his opinion and the majority's opinion by arguing that there is a fundamental divide between "abridging" speech and funding it.[208] The majority held that there is a First Amendment effect on funding but that it is not violated by this statute, while Justice Scalia would have held that there is no First Amendment effect on government funding and that the government can fund as it wishes without implicating the First Amendment.[209] Justice Scalia found the same is true of the constitutional rule against vagueness; it has no application to funding.[210] In summary, Justice Scalia concluded that Congress had problems with some of the NEA projects and instead of banning them entirely it took the permissible lesser step of requiring indecency to be disfavored, but the majority's opinion "renders even that lesser step a nullity."[211]

C. JUSTICE SOUTER'S DISSENT

While Justice Scalia concluded that the decency clause was constitutional despite its discriminatory effect because the First Amendment is

202. *Id.* at 2184.
203. *Id.*
204. *Id.* (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 833 (1995)).
205. *Id.* In *Rosenberger*, university publishing funds were not to fund private entities to convey a governmental message but were used to open a public forum of university publications. *Rosenberger*, 515 U.S. at 833.
206. *Finley*, 118 S. Ct. at 2184.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 2185.

not implicated by government discretionary funding for the arts, Justice Souter determined that the decency clause was unconstitutional on its face.[212] He viewed the decency provision as mandating viewpoint-based decisions.[213] Justice Souter did not agree with the majority's development of an exception to the fundamental rule of the First Amendment "that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional."[214] Lastly, Justice Souter argued the majority's application of the overbreadth doctrine was irreconcilable with precedent.[215]

Justice Souter first quoted the "bedrock" principle of the First Amendment that government cannot prohibit an idea because society finds it offensive.[216] Justice Souter viewed this principle as applying to disqualification of government favors equally as it does for affirmative suppression of speech,[217] and he stated that art is speech and as such is entitled to full protection.[218]

Justice Souter then pointed to the importance of determining the purpose of the government action in order to ascertain if the motivation disagrees with the message it conveys.[219] He concluded that the "answer in this case is damning."[220] The plain language of the decency and respect provision revealed to Justice Souter a purpose on the part of Congress to prevent the funding of art that conveys an offensive message.[221] Justice Souter found that the legislative history confirmed this obvious legislative purpose.[222]

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212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 414 (1989) (determining that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984) ("[t]he principle of viewpoint neutrality . . . underlies the First Amendment"); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas")).
217. *Id.* (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Leathers v. Medlock, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) ((holding that government-mandated access to public utility's billing envelopes must not be viewpoint based); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others")).
218. *Id.* at 2186.
219. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
220. *Id.*
221. *Id.*
222. *Id.* Justice Souter quotes the words of the cosponsor of the bill: "Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." *Id.* (citing 136 CONG. REC. 28624 (1990)).

In a footnote, Justice Souter also found fault in the majority's use of legislative history to support the holding that the provision is constitutional because the Congress said it hoped it to be.[223] While agreeing that Congress does take an oath to support the Constitution and tries to follow it, Justice Souter nevertheless quoted *Marbury v. Madison*[224] to illustrate that the legislature's conclusory belief in a law's constitutionality does not make it so.[225]

Justice Souter also disagreed with the majority's view that the decency and respect provision only amounted to an additional consideration that did not make the provision unconstitutional.[226] He wrote instead that "[u]nquestioned case law . . . is clearly to the contrary."[227] Restrictions turning on decency are viewpoint based, as is a statute disfavoring disrespectful speech.[228] Also, Justice Souter disagreed with the majority's reliance on the NEA's application of the provision by merely establishing diverse panels to "avoid unconstitutionality."[229] He said this application of the provision defied the plain language and left impermissible viewpoint discrimination in favor of decency and respect, even though it was done "derivatively through the inclinations of the panel members."[230]

Expanding more on his opinion of the majority's view that the decency clause just adds "considerations" and is therefore permissible, Justice Souter wrote that this was not a fair reading of the clause.[231] He did not see how the provision could be seen as tolerating awards to indecency as long as the panel considered it.[232] Even if this was plausible, it still would not change Justice Souter's mind on the statute's constitutionality, because if the statute required something else, like "taking into consideration the superiority of the white race," he thought the Court would not find it facially constitutional.[233]

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223. *Id.* at 2187 n.3.

224. 1 Cranch 137 (1803).

225. *Id.* (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803) (stating "[i]t is emphatically the province and duty of the judicial department to say what the law is")).

226. *Id.*

227. *Id.* at 2187. Justice Souter quoted *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989): "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Finley*, 118 S. Ct. at 2187. Justice Souter went on to say that except when protecting children from exposure to indecent material as in *Pacifica*, the First Amendment has never been read to allow the government to rove around imposing general standards of decency. *See, e.g.*, Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997) (holding facially invalid a statute that regulated "indecency" on the internet).

228. *Finley*, 118 S. Ct. at 2188.

229. *Id.* at 2189.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 2190.

Justice Souter next countered the proposition that even if the statute was viewpoint-based it was not unconstitutional because "government art subsidies fall within a zone of activity free from First Amendment restraints."[234] Justice Souter stated that the NEA's argument looked at two categories in which the government can make viewpoint-based decisions, government-as-buyer and government-as-speaker, then created a third category of government-as-patron and claimed that it falls between these two.[235] Justice Souter saw this as a poor analogy, noting that "this patronage falls embarrassingly on the wrong side of the line between government-as-a-buyer or -speaker and government-as-regulator-of-private-speech."[236]

In contrast to the majority, which distinguished *Rosenberger* from this case because the government created a limited public forum with the university newspaper, Justice Souter stated that *Rosenberger* controls here.[237] Justice Souter read *Rosenberger* as a subsidy scheme to encourage expression of private speakers, the same as the NEA.[238] Therefore, the government "may not use the NEA's purse to 'suppres[s] . . . dangerous ideas.'"[239] Even without *Rosenberger*, and even if Justice Souter agreed that the NEA's program of patronage was singular, he would reject a new categorical patronage exception from viewpoint neutrality because the government has offered nothing to justify a new exempt category.[240]

Finally, Justice Souter's treatment of facial challenges began on common ground with the majority. They both recognized that facial challenges are generally disfavored.[241] However, that is where the similarity ends.[242] In Justice Souter's view, the majority relied on the general rule that in order to be successful in a facial challenge there must exist no set of circumstances under which the Act could be valid.[243] In contrast, Justice Souter found it to be well settled that challenges brought under the First Amendment's Speech Clause are not limited by this general rule, but instead the overbreadth doctrine applies.[244] Justice Souter determined that the overbreadth doctrine renders a statute invalid

234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 2191.
238. *Id.*
239. *Id.* at 2192 (quoting Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983) (internal quotation marks omitted)).
240. *Id.* at 2193.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

in all its applications if it is invalid in any of them.[245] Finally, he asserted that the prospect of denial of funding from the government also has significant potential to chill expression and therefore, coupled with the fact that the decency provision is overbroad, it should be struck down on its face.[246]

IV. IMPACT

The specific impact of the *Finley* decision is that the NEA will be able to resume the reading of the "decency and respect" clause to the review panels, a practice that had been discontinued since 1992.[247] It will also be able to continue instituting the statute's requirement to "take into consideration" by formulating a diverse panel for review of grants.[248] Notably, the Court did not explicitly hold that the NEA's application of the "decency and respect" clause was a fair reading.[249] In fact, the Court explicitly declined to decide that issue.[250] However, the Court did accept the NEA's application of the provision and evaluated the facial challenge on the basis of this application.[251]

In a broader sense, *Finley* will have far reaching effects in what the Court holds the government-as-patron can do and cannot do.[252] Interpretations of the case range from the view expressed by the San Francisco Chronicle that *Finley* will permit Congress to "sanitize the arts before anybody is awake enough to notice," to the ACLU's opinion that the "Court's decision does relatively little damage to the First Amendment principle that when the government is supporting free expression . . . it cannot discriminate in its funding decisions against unconventional or controversial ideas."[253] Combining the allowance of "criteria" for funding with the enduring prohibition against leveraging this criteria to disfavor ideas means that both predicted results are likely, as discussed below.

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245. *Id.* at 2194.
246. *Id.* at 2196.
247. *Id.* at 2174.
248. *Id.* at 2175.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 2174-83.
253. *ACLU Sees Silver Lining in Court's Ruling on Funding for the Arts*, ACLU PRESS RELEASE, June 25, 1998, *available at* http://www.aclu.org/news/n062598b.html; Patricia Holt, *No Decency in Supreme Court's Ruling*, S.F. CHRON., July 5, 1998, *available at* http://www.sfgate.com/cgibin/article.cgi?file=/chronicle/archive/1998/07/05/RV22780.DTL.

A. WHAT THE GOVERNMENT-AS-PATRON CAN DO

The Court decided this case not on the basis of whether or not the "decency and respect" provision was viewpoint based, but instead on the basis that the "decency and respect" provision was aimed at "reforming procedures" for funding, not "precluding speech," enabling the Act to withstand the facial challenge.[254] Since the provision applies to "reforming procedures" only and constitutes "no categorical requirement," the Court found that it therefore cannot support the contention that the provision will inevitably be used as a tool to discriminate on the basis of viewpoint.[255] By taking this approach to decide this case, the Court emphasized the enduring importance of not "precluding speech" even when the government is acting as a patron or funder.[256] Carefully worded statutes that limit any content-based criteria to reforming procedures and that fall short of an "absolute restriction" can thus withstand facial constitutional challenge in discretionary funding decisions.[257]

B. WHAT THE GOVERNMENT -AS-PATRON CANNOT DO

The majority explicitly did not agree with Justice Scalia that the First Amendment does not have a role in funding.[258] In fact, it invited parties to return to court by noting that "[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 we would confront a different case."[259]

This invitation may be the source of *Finley's* biggest legal impact. The Court distinguished the as-applied situation, even in funding decisions, as being capable of violating the First Amendment if aimed at suppression of ideas.[260] An example of the legal impact is a suit filed in United States District Court in August of 1998.[261] A San Antonio arts center claimed that the San Antonio City Council decreased its funding by $75,000 because of the group's non-traditional viewpoints.[262] In this

254. *Finley*, 118 S. Ct. at 2175.
255. *Id.* at 2176.
256. *Id.*
257. *Id.* at 2175.
258. *Id.* at 2176.
259. *Id.* at 2178. This is in contrast to Justice Scalia who called it "preposterous" to think of funding as being capable of being "aimed at the suppression of ideas," since one cannot "suppress" by just deciding to not fund. *Id.* at 2183. The speaker is not forbidden to speak, and her speech is therefore not "abridged." *Id.*
260. *Id.* at 2178.
261. Esperanza Center Homepage (visited Jan. 06, 1999) <http://www.esperanzacenter.org>.
262. *Finley*, 118 S. Ct. at 2178.

way First Amendment challenges to government funding may retain vitality, but it may be difficult to show the discretion was based on the disagreement with viewpoints instead of some other acceptable subjective criteria for arts funding. In summary, although the "decency and respect" provision is an acceptable criteria for reforming procedures of arts funding, such provisions cannot be used to aim at the suppression of dangerous ideas and cannot have any "significant coercive effect."[263]

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263. *Id.* at 2183.