DECENCY v. THE ARTS: AND THE WINNER IS . . . THE NATIONAL ENDOWMENT FOR THE ARTS?

Art has the power to provoke laughter, anger, joy, and disgust.[1] Art has the power to open one's mind and perhaps the power to

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[1] *See* Neil Kendricks, *Intentions Good on Road to "Happiness,"* SAN DIEGO UNION-TRIB., Oct. 18, 1998, at E10 ("Solondz's new tragic comedy ['Happiness'] simultaneously pours salt into an open wound and provokes bursts of nervous laughter."); Steven Henry Madoff, *"Pop Surrealism,"* ARTFORUM, Oct. 1, 1998, at 120 (reviewing an exhibit at the Aldrich Museum of Contemporary Art where "so much of this art smirks as it bleeds, prompting laughter of disbelief and a lacerating mordancy in equal measure"); Elisabeth Mahoney, *Streetworks, Streetlevel, Glasgow,* SCOTSMAN (Glasgow), Nov. 5, 1998, at 14 ("What this exhibition captures in a way individual performances can't, is the wonderful range of responses from spectators. Usually this is laughter . . . ."); Slamet A. Sjukur, *Musicatreize Sings at Thirteen to the Dozen During Art Summit,* JAKARTA POST, Oct. 10, 1998, (describing the contemporary music ensemble as "so unbelievably crazy that the audience . . . fell into convulsions of laughter").

See Donald Lyons, *It's Betty Buckley's Turn in 'Gypsy,'* WALL ST. J., Oct. 9, 1998, at W12 (describing the fury, anger, and resentment portrayed in Betty Buckley's performance of "Rose's Turn" in the musical "Gypsy"); Cate McQuaid, *Still Lifes with Secrets,* BOSTON GLOBE, Nov. 20, 1997, at D1 (describing photographer Benjamin Incerti as capturing the anger of the AIDS activist group, ACT UP, through his work); Deborah Voorhees, *John Biggers: An Artist Whose Works Embody the Pain and Passion of Life,* DALLAS MORNING NEWS, Dec. 28, 1997, at 1E (describing painter John Biggers's early works as displaying bitterness and anger to the bigotry and poverty he had experienced); *The Wall Street Journal Europe's Guide to Leisure Time,* WALL ST. J., Mar. 19, 1999, at 12 (commenting that the Nuevo Ballet Espanol's production of "Sangre" presents the passions of love, anger, and peace within the first act).

See Donald Lyons, *Jungle King; Camelot Queen,* WALL ST. J., Nov. 14, 1997, at A16 (describing the Broadway hit, *The Lion King*: "Right at the start, the whole building explodes into joyous life"); Mervyn Rothstein, *After 15 Years (15!), 'A Chorus Line' Ends,* N.Y. TIMES, Apr. 30, 1990, at C3 ("In an evening filled with joy and sadness, nostalgia and celebration, a capacity audience of 1,500 said farewell . . . to 'A Chorus Line,' as the curtain came down . . . for the 6,137th and final time . . . .").

See C. Carr, *A Brief History of Outrage,* VILLAGE VOICE, Sept. 22, 1998, at 57 (listing "avant-garde manifestations that changed the world because they stretched the boundaries of what art can be"); Richard Dorment, *The Arts: The Art of the Extreme,* DAILY TELEGRAPH (London), Sept. 6, 1995, at 16 ("Works of art are not always easy to look at. Disgust and revulsion are as much the artist's province as beauty . . . ."); Brandon Griggs, *Ballet to Belly Dancers Will Shimmy, Shake at Liberty Park Belly Dancing: Art Form, Not a Flesh Forum,* SALT LAKE TRIB., Aug. 25, 1995, at E1 (quoting a dancer as saying, "[p]eople who haven't seen it think it's sort of like stripping. That either intrigues them or disgusts them . . . ."); *Is Tower a Beauty or Beast?,* NEWS & OBSERVER (Raleigh, N.C.), Aug. 27, 1995, at B2 (discussing public reaction to the new sculpture on Raleigh's Capitol Boulevard by indicating that "art lovers and Philistines

heal.[2] Art even has the power to demand the protection of the First Amendment.[3] But does art have the power to demand money from

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alike were professing their admiration and disgust for the sculpture . . . ."); Deborah Jowitt, *Engaging the Darkness*, VILLAGE VOICE, Aug. 29, 1995, at 81 (describing a Japanese Butoh performance in which "[the dancers] madden some spectators, frighten or disgust some, exalt others"); Thomas Sowell, *Random Thoughts on Slick Willy Nilly, German Beer and Diversity*, ATLANTA J.-CONST., July 19, 1995, at A14 (opining that art, music, and literature have been treasured for their artistic beauty, "[b]ut add the word 'modern' to art, music or literature and these things are far more likely to produce puzzlement, boredom or disgust").

[2] *See* Ann Brown, *Expo Explores Utilizing Arts in Physical Healing*, ARIZONA DAILY STAR, Oct. 23, 1998, at 10E (describing how participation in the arts can provide inspiration to an individual's spirit and improve one's health, and further quoting arts therapist Sandra Wortzel as saying that "[u]sing the arts to access feeling and images helps express what's inside that's creative and powerful . . . . The outcome could be a dance of sadness, a song of anger or a painting of grief"); Soljane Martinez, *Festival Celebrates Women as Artists and Healers*, PROVIDENCE J., Nov. 5, 1998, at D1 (quoting art therapist and historian Chris McCullough as saying, "Art heals. It goes beyond race, class and gender . . . . There's no face on art. I can't tell if a Chinese, black or white person created the art, but it touches the soul . . . ."); Jacqueline Trescott, *Arts and Letters Have Their Day at White House*, WASH. POST, Nov. 6, 1998, at D1 (quoting President Clinton's tribute to actor Gregory Peck: "[H]is performances have helped to heal some of our country's deepest wounds"); *see also* John E. Frohnmayer, *Giving Offense*, 29 GONZ. L. REV. 1, 7 (1993/94). Frohnmayer argues that arts are important to society because

> [e]very child who has ever honestly written a poem or performed a song or dance has been forever changed. That child has made a covenant of honesty and risk — of communication and commitment to a community. That child has laid vulnerable a part of the self and has placed faith in the audience to respond. That child has become a citizen.

Id. Frohnmayer further professes that art helps communities to grow. *See id.* ("We have to rediscover the common ground among our 170 different ethnic and racial groups. Art can help us do this. It can be a healer. It can be a window to understanding of other people, other cultures, other human beings.").

[3] *See* U.S. CONST. amend. I. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." The reasons behind this guarantee of free speech have enjoyed seemingly endless debate. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (declaring that "public discussion is a political duty; and that this should be a fundamental principle of the American government"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (emphasizing that freedom of expression "promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process"); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948) (arguing that truth must be available to all citizens in a self-governed community and that the purpose of the First Amendment "is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which . . . [they] must deal"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 (2d ed. 1988) (declaring that the First Amendment's protection of the freedom of speech is a "basic element of our fundamental law. . . ."); C. Edwin Baker, *Scope of the*

the taxpayers' pockets?[4] Not only has this question fueled the long-standing debate over the role of government subsidies in the arts, but it threatens to disturb the Supreme Court's delicate balance of First Amendment rights with the censorship of indecent ideas.[5]

First Amendment Freedom of Speech, 25 UCLA L. REV. 964, 966 (1978) (reasoning that "[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual"); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (noting that "the significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music . . . .").

The Supreme Court has afforded artistic expression First Amendment protection. *See* Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of* Rust v. Sullivan, 45 AM. U. L. REV. 353, 393 (1995) (stating that "First Amendment protection for artistic expression [has] developed in a piecemeal and haphazard fashion, often one artistic medium at a time"); *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552 (1975) (holding that a public auditorium's refusal to present the musical "Hair" was an unconstitutional prior restraint); Miller v. California, 413 U.S. 15, 36 (1973) (holding that all artistic expression, unless obscene in a legal sense, is protected by the First Amendment); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952) (invalidating a statute that banned "sacrilegious" motion pictures).

[4] *See* Frohnmayer, *supra* note 2, at 2 ("[T]he Savings and Loan scandal will cost each [taxpayer] $2,000 at least. The arts cost $.68 per year for everything we do. The amount that you will have to pay for 'controversial art' is a microcent."). Frohnmayer, Chairman of the National Endowment for the Arts (NEA) from 1989 to 1992, also argues that offensive art deserves taxpayer funds:

> Can citizens be compelled to pay for [offensive art]? . . . Nothing in the Constitution says that there shall be a National Endowment for the Arts. If, however, the United States wants to be a leader in the realm of ideas and of the spirit, to help us as citizens to understand who we are, to humanize society, and to give to citizens, not just the right of physical protection from enemies, but the environment in which they can fulfill themselves in all of their intellectual, emotional and spiritual selves, then the government absolutely should promote the arts.

Id. *But see* ALL THINGS CONSIDERED (Transcript of National Public Radio, Inc., Apr. 2, 1997) (David Brooks, arts funding commentator, stated, "Surely the founding fathers would be horrified to find the federal government funding a bunch of artists . . . . Taxpayers shouldn't have to fund art that assaults their values."); Matthew Carolan & Raymond J. Keating, *Funding the NEA: Affluent Art Pork*, NEWSDAY, July 22, 1997, at A31 (arguing that taxpayers' money used to support the NEA is "redistributing income from the less well off to entertain the more affluent in the cities . . . .").

[5] The Supreme Court has interpreted the First Amendment as protective of indecent speech. *See* Reno v. ACLU, 117 S. Ct. 2329, 2346, 2348 (1997) (holding that the Communications Decency Act, which banned the dissemination of indecent materials to minors, was void for vagueness and overbroad); Sable v. FCC, 492 U.S. 115, 126 (1989) (holding that legislation prohibiting indecent commercial phone messages was not narrowly tailored); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (holding that a public indecency statute requiring nude dancers to wear G-strings and pasties was not violative of the First Amendment).

Although indecent speech receives protection under the auspices of the First Amendment, there is no constitutional right to receive a government subsidy. *See*

In protecting the guarantee of free expression, the Supreme Court has utilized constitutional doctrines to shield individuals from government restrictions that may have a "chilling effect" on speech.[6] For instance, statutes that prohibit constitutionally forbidden speech, but also deter protected speech, will be struck down as overbroad.[7] Laws that are drafted unclearly are in danger of vagueness challenges.[8] Additionally, restrictions that target a particular viewpoint discriminate impermissibly when the government is funding and en-

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Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that a state college professor's lack of tenure, taken alone, did not refute his claim that his free speech rights were violated when his contract was not renewed). Nonetheless, the government may not deny an individual a subsidy based on reasons that would infringe upon a constitutionally protected interest, especially First Amendment interests. *See id.* To do so would "produce a result which the State could not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958) (holding that a refusal to grant a tax exemption because of engaging in proscribed speech would coerce the claimants to refrain from such speech). *But see* Regan v. Taxation With Representation of Washington, 461 U.S. 540, 549 (1983) (establishing that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe upon the right . . . ."); Maher v. Roe, 432 U.S. 464, 466, 474 (1977) (holding that a Connecticut statute that does not fund nontherapeutic abortions but provides money for childbirth does not violate the Constitution); Buckley v. Valeo, 424 U.S. 1, 105-06 (1976) (holding that a statute providing federal subsidies to candidates who enter primary campaigns, but does not offer funds to candidates who do not participate in primaries, does not infringe upon First Amendment rights). *See generally* Thomas Peter Kimbis, *Planning to Survive: How the National Endowment for the Arts Restructured Itself to Serve a New Constituency*, 21 COLUM.-VLA J.L. & ARTS 239 (1997) (providing a historical summary of the NEA's restructuring process and its political context); Leff, *supra* note 3 (discussing the debate over federal funding of the arts and the constitutional limits of funding restrictions); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996) (discussing First Amendment challenges to subsidized speech).

[6] *See* BLACK'S LAW DICTIONARY 240 (6th ed. 1990). A statute that has a chilling effect "seriously discourag[es] the exercise of a constitutional right, *e.g.* the right of appeal" or the right of free speech. *Id.*; *see also* TRIBE, *supra* note 3, § 12-31, at 1034 (describing the chilling effect of vague laws not as a lack of fair notice, but as overly effective, because individuals will curtail their expression to speech that is undeniably safe under the statute); Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 519 (1970) (discussing how procedural guarantees, like substantive rules, can "chill" free expression).

[7] *See* Thornhill v. Alabama, 310 U.S. 88, 104 (1940). The overbreadth doctrine applies to statutes that prohibit activities that may be constitutionally forbidden but also prohibit activities that are protected by the First Amendment. *See id.* Essentially, statutes that are overbroad may deter a speaker from exercising his constitutionally protected right of free speech. *See id.*; *see also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853-58 (1970) (discussing the rationale of the "chilling effect").

[8] *See* BLACK'S LAW DICTIONARY, *supra* note 6, at 1549. The vagueness doctrine requires that statutes explicitly define what conduct is proscribed so that the danger of arbitrary and discriminatory enforcement is avoided. *See id.*; Anthony G. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960) (arguing that the void-for-vagueness doctrine determines how far a public order can deprive citizens' rights).

couraging a variety of messages, yet when the government passes regulations to further its own message, such discrimination is constitutional.[9]

Though art has been a significant influence in American history, the primary source of funding for artists prior to the twentieth century was the benevolence of wealthy patrons.[10] Despite the efforts of several presidents to provide federal support for the arts,[11] it was not until Congress created the National Endowment for the Arts (NEA), brandishing noble goals of creative and cultural diversity, that the first federal agency dedicated to the support of the arts was established.[12]

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[9] *See infra* notes 71-72 and accompanying text (discussing the Supreme Court's position in *Rosenberger v. Rector and Visitors of the University of Virginia* that when the government is disseminating its own message it may engage in viewpoint discrimination, but the government must remain viewpoint-neutral when funding individual speakers to encourage a diversity of views).

[10] *See* Leff, *supra* note 3, at 361-62. Leff indicates that although artistic works were often commissioned by government entities and music was a longstanding tradition in the American military, sponsorship of artistic events was primarily provided by "aristocrats and the newly emerging bourgeoisie." *Id.* at 362. Leff notes that Benjamin Franklin was a lifelong patron of the arts, creating the country's first library, the first hospital, and the Pennsylvania Academy of the Arts. *See id.* at n.33. Additionally, Leff observes:

> Such figures as Peter Cooper, Cornelius Vanderbilt, Andrew Mellon, J.P. Morgan, Andrew Carnegie, John Rockefeller, Thomas Corcoran, John Hay Whitney, and Solomon R. Guggenheim built theaters and museums, created symphony orchestras, and supported the founding of art academies.

Id. (citing ALVIN TOFFLER, THE CULTURE CONSUMERS 170 (1964)).

[11] *See id.* at 361 n.32. Presidents Buchanan, Roosevelt, and Taft unsuccessfully attempted to establish agencies devoted to arts funding. *See id.* Congress took steps to support unemployed artists during the New Deal era by establishing arts programs within the Works Progress Adminstration. *See id.* at 362. The success of these projects, which helped such artists as Jackson Pollack, Orson Welles, and Aaron Copeland, was curtailed by World War II. *See id.* In 1955, President Eisenhower unsuccessfully attempted to create a federal arts organization, and both President Kennedy and President Johnson included arts advisors on their staffs. *See id.* at 363.

[12] *See id.* at 364. By establishing the National Foundation on the Arts and Humanities in 1965 (codified at 20 U.S.C. § 951 (1994)), which is devoted to the education, support, and advancement of the arts and humanities, Congress demonstrated its commitment to arts education and the need to foster artists with public sponsorship. *See* Leff, *supra* note 3, at 363-64. The NEA serves as a subgroup within the National Foundation on the Arts and Humanities and is designated to fulfill Congress's promise of arts sponsorship. *See* 20 U.S.C. § 954(a). In explaining the role of the National Foundation on the Arts and Humanities, Congress stated:

> (10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.
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> (11) To fulfill its educational mission, achieve an orderly continuation

The NEA accomplishes its goal of promoting excellence in the arts by awarding grants to individuals or private groups that are traditionally overlooked for financial assistance.[13] Although the NEA's grant-evaluation process had proven successful in the past, the agency became embroiled in a heated controversy when it provided funds to two artists whose work was deemed obscene by members of Congress.[14] A battle ensued as to the appropriate balance of federal support for artists and trepidation toward government censorship.[15]

> of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

20 U.S.C. § 951.

[13] *See* 20 U.S.C. § 954(c). Section 954(c) emphasizes the importance of supporting artists who achieve artistic and cultural significance, especially those who "would otherwise be unavailable to our citizens for geographic or economic reasons." *Id.* at (c)(2). Support for the local arts initiative is also a goal of the NEA. *See id.* at (c)(4) ("[support for projects] that reach, or reflect the culture of, a minority, inner city, rural, or tribal community").

[14] *See* NEA v. Finley, 118 S. Ct. 2168, 2172 (1998) ("Throughout the NEA's history, only a handful of the agency's roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public's trust."); *see also* 136 CONG. REC. S17,979 (daily ed. Oct. 2, 1990) (statement of Sen. Jeffords) ("The national attention focused on the NEA involved two particular artists. Together these grants account for less than 3/100 of 1 percent of the total 1988 Arts Endowment budget."); S. REP. NO. 101-472, at 2 (1990) (commending the NEA's contributions to America's cultural and economic progress and stating that prior to 1990, approximately 85,000 grants had been awarded to nonprofit organizations and individuals).

With the NEA's authorization due to expire in 1990, controversy arose in 1988 when two NEA grants funded photo exhibitions of Andres Serrano's "Piss Christ" (portraying a crucifix immersed in Serrano's urine) and Robert Mapplethorpe's work entitled "Robert Mapplethorpe: The Perfect Moment" (displaying homoeroticism, sadomasichism, and naked children). *See* Raleigh Douglas Herbert, Survey, *National Endowment for the Arts — The Federal Government's Funding of the Arts and the Decency Clause — 20 U.S.C. § 954(d)(1) (1990)*, 18 SETON HALL LEGIS. J. 413, 415-16 (1993). Members of Congress criticized the NEA for subsidizing these works, including Senator Jesse Helms, who introduced an amendment disallowing the use of NEA funds to subsidize obscene or indecent art. *See id.* A revised amendment prohibiting subsidies to obscene projects lacking "serious literary, artistic, political or scientific value" was eventually passed. *See id.* at 417. This amendment was later found unconstitutional. *See* Bella Lewitsky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991).

Congress also created an Independent Commission to review the NEA's grant-making procedures. *See* Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(b)(2)(D), 103 Stat. 701, 742 (1989).

[15] *See* Leff, *supra* note 3, at 369 (discussing the tension between supporting artists' creative talents and the fear of government censorship). The fight to find an acceptable balance between creative freedom and censorship was waged in Congress, where both the House and the Senate drafted amendments to the NEA's upcoming reauthorization. *See* 136 CONG. REC. H9406-07 (daily ed. Oct. 11, 1990)

Amidst this struggle, the United States Supreme Court recently considered whether the government should take into account general standards of decency when awarding federal subsidies to the arts in *National Endowment for the Arts v. Finley*.[16] In this case, the Court upheld a 1990 amendment requiring the NEA to contemplate decency criteria when evaluating grant applications, thereby holding that the provision did not restrict First Amendment liberties nor was it unconstitutionally vague.[17]

Karen Finley,[18] along with John Fleck,[19] Holly Hughes,[20] and Tim Miller,[21] applied for NEA grants as solo performance artists.[22] Despite

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(statement of Rep. Beilenson) (reviewing the five proposed amendments to the NEA appropriations bill). Congress eventually compromised by ratifying the Williams-Coleman Amendment, requiring the chairman to consider general standards of decency in funding decisions. *See* 136 CONG. REC. H9681 (daily ed. Oct. 15, 1990) (statement of Rep. Weiss) (discussing how the Williams-Coleman Amendment was preferable to the other proposed amendments). This amendment was included in the NEA's reauthorization legislation. *See* 20 U.S.C. § 954(d) (1994).

[16] 118 S. Ct. 2168 (1998).

[17] *See Finley*, 118 S. Ct. at 2171-72 (citing 20 U.S.C. § 954(d)(1)).

[18] *See id.* at 2174. Finley is a performance artist who focuses her work on feminist themes. *See* Mike Steele, *Finley Ready to Make Another Scene*, STAR-TRIB. (Minneapolis-St. Paul), Mar. 25, 1998, at 4E (observing that Finley's work tackles tough issues and is gaining acceptance in the art world). Finley is best known for the part of her show "We Keep Our Victims Ready" in which she strips to the waist and smears chocolate syrup and alfalfa sprouts over her body. *See* Peter Parisi, *Comeuppance for Trash Art*, WASH. TIMES, July 17, 1998, at A17. The chocolate symbolizes feces, the sprouts represent sperm, and together they protest society's degradation of women. *See id.*

Finley's recent works include "The American Chestnut," which uses video clips to complement her monologue about life in a small town. *See* Neil Kendricks, *Finley Throws Her 'Chestnuts' into the Fire of Social Commentary*, SAN DIEGO UNION-TRIB., May 14, 1998, at 19 (describing one video segment in which Finley squirts her breast milk onto black velvet and another clip wherein she runs nude through a museum and poses with nude statues). In her newest show, "The Return of the Chocolate-Smeared Woman," Finley once again smears chocolate on her body, bathes on stage, and describes imaginary sexual encounters with Bill Clinton, Kenneth Starr, Jesse Helms, and others. *See* Christopher Rapp, *Chocoholic*, NAT'L REV., July 20, 1998, at 35.

[19] *See Finley*, 118 S. Ct. at 2174. Fleck is a performance artist and actor best known for urinating into a toilet bowl containing a picture of Jesus. *See* 136 CONG. REC. E2673 (daily ed. Aug. 3, 1990) (statement of Rep. Dornan) (citing David Gergen, *Who Should Pay for Porn?*, U.S. NEWS & WORLD REP., July 30, 1990, at 80).

[20] *See Finley*, 118 S. Ct. at 2174. Hughes is a performance artist and playwright whose work focuses on lesbian themes. *See* 136 CONG. REC. E2673 (daily ed. Aug. 3, 1990) (statement of Rep. Dornan) (citing Gergen, *supra* note 19). Hughes's show includes a scene in which she states that she saw "Jesus between Mother's hips" while inserting her hand in her vagina. *See id.*

[21] *See Finley*, 118 S. Ct. at 2174. Miller explores homosexual themes in his work as a performance artist and author. *See* 136 CONG. REC. E2673 (daily ed. Aug. 3, 1990) (statement of Rep. Dornan) (citing Gergen, *supra* note 19).

[22] *See Finley*, 118 S. Ct. at 2174. At the time, § 954(d) had yet to be amended to include the "decency and respect" clause. *See id.*

a positive recommendation by the advisory panel,[23] the NEA ultimately denied funding to these artists in June 1990.[24] The artists filed suit, claiming that the NEA rejected their applications for political reasons[25] in violation of their First Amendment rights and that the NEA failed to follow proper statutory procedure.[26] Further, the artists alleged that the NEA violated the Privacy Act by releasing confidential information from their grant applications to the press.[27]

In December 1990, Congress enacted 20 U.S.C. § 954(d), an amendment to the NEA's reauthorization statute, to provide that the NEA consider "general standards of decency and respect for the diverse beliefs and values of the American public"[28] when evaluating

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[23] *See id.* Applications are first reviewed by an advisory panel comprised of experts in the particular field. *See* 20 U.S.C. § 959(c)(1)-(2) (1994). After an advisory panel unanimously recommended approval of the four artists' projects, NEA Chairperson John E. Frohnmayer asked the panel to reconsider its decision in May 1990. *See* NEA v. Finley, 795 F. Supp. 1457, 1462 (C.D. Cal. 1992). The panel once again unanimously recommended approval. *See id.*

[24] *See Finley*, 118 S. Ct. at 2174. The advisory panel reports to the National Council on the Arts (Council), which in turn makes recommendations to the Chairperson on funding decisions. *See* 20 U.S.C. § 955(f) (1994). The Chairperson is appointed by the President with the approval and consent of the Senate. *See id.* § 954(b)(1). The Council recommended disapproval of the four artists' applications to Chairperson Frohnmayer. *See Finley*, 118 S. Ct. at 2174.

[25] *See Finley*, 118 S. Ct. at 2174. The NEA was embroiled in a political controversy that began in 1989 when grants were given to institutions sponsoring works from Robert Mapplethorpe and Andres Serrano. *See id.* at 2172; *see also* 135 CONG. REC. S12,116 (daily ed. Sept. 18, 1989) (statement of Sen. Danforth) ("I am not for Mapplethorpe. I am sick that a dollar of taxpayer money went to pay for this kind of junk."). The controversy over the NEA's grant-making process continued through 1990 when Congress considered the NEA's reauthorization. *See Finley*, 118 S. Ct. at 2172. During this tumultuous period in arts funding, the four artists applied for and were subsequently denied NEA grants. *See* Finley v. NEA, 795 F. Supp. at 1462.

The artists' initial complaint alleged that the NEA did not provide a written explanation of its denial and further alleged that the NEA based the denial on their past artistic expressions in violation of their First Amendment rights. *See id.* at 1463.

[26] *See Finley*, 795 F. Supp. at 1462-63. The complaint alleged that the NEA relied on political criteria outside the scope of § 954(c). *See id.* The artists further claimed that the NEA denied their grant applications to appease members of Congress, despite the panel's finding of artistic merit. *See id.* at 1465. Finally, the complaint alleged that Frohnmayer violated procedures set forth in 20 U.S.C. § 955(f) by polling Council members individually for their recommendations on the artists' applications. *See id.*

[27] *See id.* at 1466. The artists alleged that the NEA leaked information from their grant applications to the press in violation of 5 U.S.C. § 552(a). *See id.*

[28] 20 U.S.C. § 954(d). The amendment provides in relevant part:

> 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

grant applications.[29] The artists subsequently amended their complaint to attack this new provision as impermissibly viewpoint-based in violation of the First Amendment because it hinders the NEA from funding art that is categorized as "indecent" or "disrespectful."[30] The artists further alleged that the subjective terminology of § 954(d)(1) does not definitively notify applicants of NEA requirements and, therefore, it is void for vagueness in violation of the First and Fifth Amendments.[31] Additionally, the artists added the National Association of Artists' Organizations (NAAO) as a plaintiff.[32] The United States District Court for the Central District of California granted summary judgment in favor of the artists, holding that § 954(d)(1) is overbroad on its face in violation of the due process requirement of the Fifth Amendment.[33]

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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.

[29] *See Finley*, 118 S. Ct. at 2173.

[30] *See id.* at 2174. A government regulation cannot restrict speech by preferring some messages over others. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993) (holding that a school district's refusal to allow a religious group to use school property after hours, even though the school was available for "social, civic and recreational meetings," was impermissibly viewpoint-based). Moreover, the government may not choose to fund some types of speech and not others based on the viewpoints expressed. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995) (holding that a public university's decision to fund certain student publications, but not publications with a religious perspective, is a viewpoint-based policy and violative of the First Amendment). The artists claimed that § 954(d)(1) forces the NEA to deny funds to artists expressing an indecent message and that such disfavorable treatment amounts to an impermissibly viewpoint-based policy. *See Finley*, 118 S. Ct. at 2175.

[31] *See Finley*, 795 F. Supp. at 1471. The due process clause of the Fifth Amendment mandates that a statute must be "clearly defined so as not to cause persons 'of common intelligence — necessarily [to] guess at its meaning and [to] differ as to its application.'" *Id.* (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)) (alterations in original). Vague laws can impair expression by (1) failing to provide adequate warning, thereby punishing innocent people; (2) failing to provide objective standards, thus leading to arbitrary and discriminatory enforcement; and (3) inhibiting the exercise of free speech by leading people away from an "unlawful zone." *See id.* Because of subjective terms like "decency" and "respect," the artists claimed that § 954(d)(1) does not inform applicants of NEA requirements. *See id.* at 1472. One of the artists' main concerns was that an individual might steer away from creating a work that is potentially indecent in the eyes of the NEA, thereby amounting to self-censorship. *See id.*

[32] *See Finley*, 118 S. Ct. at 2174.

[33] *See id.* Initially, the NEA moved for judgment on the pleadings. *See Finley*, 795 F. Supp. at 1460. The district court denied the motion and subsequently granted the artists' motion for summary judgment. *See id.* at 1476. The district court held

On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court.[34] The circuit court held that the "decency and respect" criteria in § 954(d)(1) are difficult to define objectively and further held that the risk of arbitrary and discriminatory application of this provision violates both the First and Fifth Amendments.[35] In the alternative, the circuit court concluded that § 954(d)(1) constitutes a viewpoint-based restriction on protected speech in violation of the First Amendment.[36]

To determine the constitutionality of § 954(d)(1) and the NEA's amended grant-evaluation process, the United States Supreme Court granted certiorari.[37] The Court reversed the decision of the Ninth

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that § 954(d)(1) was void for vagueness under the Fifth Amendment because it does not notify applicants of the requirements necessary to comply with decency standards. *See id.* at 1472. The district court further professed that there are no "general standards of decency." *See id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1926)).

The court's First Amendment analysis also focused on the overbreadth of § 954(d)(1). *See id.* at 1476. A statute is overbroad if it not only prohibits speech that is constitutionally forbidden, but also prohibits speech that is constitutionally protected. *See* Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940) (invalidating a statute proscribing loitering as overbroad because it embraced almost all means for interested parties to inform the public about a labor dispute). The district court opined that § 954(d)(1) is overbroad on its face because it discourages the NEA from funding indecent speech, thereby constraining a significant amount of protected speech. *See Finley*, 795 F. Supp. at 1476.

[34] *See* Finley v. NEA, 100 F.3d 671, 683-84 (9th Cir. 1996).

[35] *See id.* In so holding, the court concluded that § 954(d)(1) forces the NEA to judge grant applications based on "'general standards of decency and respect for the diverse beliefs and values of the American public.'" *Id.* at 680 (quoting 20 U.S.C. § 954(d)(1) (1994)). The court explained that the statute's failure to define this standard of decency causes ambiguity and forces ordinary people to speculate about the meaning of the terms, leading to different interpretations as to how these terms should be applied. *See id.* at 680 (citing *Connally*, 269 U.S. at 391). According to the court, this vagueness may lead to arbitrary and discriminatory enforcement of § 954(d)(1) because the NEA's decision will partially depend on the views of the individuals judging the applications. *See id.* at 680-81. The court determined that the "decency" criterion is vague under the due process clause of the Fifth Amendment and could have a "chilling effect" on speech protected by the First Amendment. *See id.* at 681.

[36] *See id.* at 681. The court stressed that governmental funding of arts cannot be viewpoint discriminatory. *See id.* at 683. The court said that government neutrality is required because this area is both a "traditional sphere of free expression" and an area that the government has intended to "encourage a diversity of views from private speakers." *Id.* at 681-82 (quoting Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995); Rust v. Sullivan, 500 U.S. 173, 200 (1991)). The court found that by requiring applicants to comport with the "decency" and "respect" standards of § 954(d)(1), the government is viewpoint discriminatory because it treats indecent art disfavorably. *See id.* at 682.

[37] *See* NEA v. Finley, 118 S. Ct. 554 (1997).

Circuit and determined that the "decency and respect" clause serves as advisory language that does not restrict the NEA from subsidizing indecent art.[38] In reaching this decision, the Court concluded that the amendment is not viewpoint discriminatory because, instead of forcing the NEA to reject art that fails to comport with mainstream standards of decency, the provision directs the NEA merely to consider decency in addition to other criteria in the selection process.[39] The Court further declared that § 954(d)(1) is not void for vagueness because the decency criteria only adds further considerations to an inherently subjective process.[40]

Throughout the evolution of First Amendment jurisprudence, the Supreme Court has examined both the type of speech afforded protection and the method used to restrict or limit speech to determine whether a statute's language will have a "chilling effect" on expression.[41] Concerns over the possible deterrence of free speech arise when a statute is vague or overbroad.[42] The Supreme Court addressed vagueness problems by establishing the void-for-vagueness

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[38] *See Finley*, 118 S. Ct. at 2176, 2180. In essence, the Court held that § 954(d)(1) is not an absolute restriction on the funding of indecent art and has not affirmatively constrained the NEA's grant-making authority. *See id.* at 2175-76. The Court interpreted the amendment as adding considerations to the review process but not specifying that "decency" and "respect" are to be given any particular weight in the award decision. *See id.* at 2175.

[39] *See id.* at 2176. The Court referred to the legislative history of the amendment to stress that the "decency and respect" clause incorporates additional criteria into the award process and does not disfavor applicants because of their ideas or perspectives. *See id.* Moreover, the Court emphasized that the amendment's goal is to reform procedures and not to proscribe speech. *See id.* The Court did not perceive a threat of censorship due to the considerations of "decency" and "respect." *See id.* Multiple interpretations of these terms will prevent the preclusion of particular views, according to the Court. *See id.* at 2176-77; Respondents' Brief at 41, *Finley* (No. 97-371) (stating "[o]ne would be hard-pressed to find two people in the United States who could agree on what the 'diverse beliefs and values of the American public' are, much less on whether a particular work of art 'respects' them").

[40] *See Finley*, 118 S. Ct. at 2176. The Court admitted that both "decency" and "respect" are vague terms, but when the government is funding programs rather than regulating programs, clarity may not be feasible. *See id.* at 2179. The Court analogized the NEA's grant-making process to government scholarships and indicated that all such programs can be considered vague because of their inherently subjective criteria. *See id.* at 2179-80. Scholarship or grant programs expand the opportunity for individual expression and do not abridge the freedom of speech of those persons who do not receive funding. *See* Reply Brief for Petitioners at 16, *Finley*, (No. 97-371).

[41] *See supra* note 6 (discussing the chilling effect of overbroad and vague statutes).

[42] *See supra* note 8 (discussing the constitutional perils of the vagueness doctrine); *supra* note 7 (reviewing the overbreadth doctrine).

doctrine in *Connally v. General Construction Co.*[43] In *Connally*, the Court decided for the first time that a law that causes an average person to guess at its meaning and application is void on its face.[44] Further, the Court emphasized that when a law is open to varying interpretations, instead of precise statutory or judicial definition, the guarantee of due process is abandoned.[45]

The Court further articulated the vagueness doctrine in *Grayned v. City of Rockford*.[46] In holding that a law is void for vagueness if its restrictions are unclear, the Court first determined that a statute must give citizens fair warning of exactly what conduct is prohibited.[47] Second, the Court explained that the statute must delineate precise

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[43] 269 U.S. 385 (1926). At issue in *Connally* was an Oklahoma statute providing that state employees who work an eight-hour day be paid the current per diem rate of the locality where the work is performed. *See id.* at 388. A violation of this statute resulted in a fine or imprisonment. *See id.* The construction company in *Connally* wanted to enjoin enforcement of the statute because the Commissioner of Labor determined that the company should be paying its employees higher wages. *See id.* at 388-89. An interlocutory appeal was granted. *See id.* at 391. The Supreme Court held that the terms "locality" and "current rate of wages" were both vague and did not inform persons who would be liable under the statute of the conduct they had to obey. *See id.* at 393-95. The Court therefore found the statute invalid. *See id.* at 393.

[44] *See id.* at 394-95. The Court cited the reasoning of *United States v. Capital Traction Co.*, 34 App. D.C. 592, 597 (1910), in which the court held that the difference between conduct that is legal and conduct that is illegal cannot be left to speculation. *See Connally*, 269 U.S. at 392. The Court in *Connally* observed that because of the vague language, the rate of wages will vary among different employers. *See id.* at 395. The Court surmised that a criminal statute cannot rest upon such an uncertain calculation. *See id.*

[45] *See Connally*, 269 U.S. at 395. The Court further admitted that the enforcement of vague statutes is "as likely to defeat the purpose of the Legislature as to promote it." *Id.* at 394.

[46] 408 U.S. 104 (1972).

[47] *See id.* at 108. The statute at issue in *Grayned* was an anti-noise law that prohibited persons on grounds next to a school building from making any noise that disturbed the peace or disrupted the classes while school was in session. *See id.* at 107-08. Richard Grayned was convicted for taking part in a demonstration in front of an Illinois high school where African-American protesters carried signs urging equal treatment. *See id.* at 105. Grayned was convicted of violating the anti-noise statute, as well as an anti-picketing statute. *See id.* at 106. On appeal, Grayned challenged the statutes as overbroad and void for vagueness, but the Illinois Supreme Court affirmed the lower court's decision. *See* City of Rockford v. Grayned, 46 Ill. 2d 492, 493, 498 (1970). The Supreme Court found the anti-picketing statute unconstitutional on equal protection grounds, but held that the anti-noise statute was not unconstitutionally vague or overbroad. *See Grayned*, 408 U.S. at 107-08. The Supreme Court found that the anti-noise statute was clear as to what conduct was prohibited because it forbade noisy or diversionary actions that would disrupt school classes at specified times of the day. *See id.* at 110-11. Moreover, the Court determined that the statute plainly defined the prohibited disturbances as those that would disrupt classes; therefore, it gave citizens fair warning of the conduct being proscribed. *See id.* at 112.

standards to prevent arbitrary and discriminatory application.[48] Third, the Court stated that when a statute addresses an area traditionally protected by the First Amendment, the language must not cause citizens to "'steer far wider of the unlawful zone [than] if the boundaries of the forbidden areas were clearly marked.'"[49]

In addition to examining the method of regulation, the Court will also examine the speaker's mode of expression when evaluating the constitutionality of speech restrictions.[50] In *FCC v. Pacifica Foundation*,[51] the Supreme Court established that constitutionally protected indecent speech could be regulated to protect children from offensive material.[52] The Court distinguished this decency restriction

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[48] *See Grayned*, 408 U.S. at 108-09. The Court distinguished the anti-noise statute in this case from general breach of the peace ordinances. *See id.* at 113 (citing Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (holding that an ordinance prohibiting three or more people from assembling on the sidewalk, if they are annoying to passersby, is impermissibly vague because of the subjective meaning of "annoying"); Cox v. Louisiana, 379 U.S. 536, 578-79 (1965) (finding that a breach of the peace statute could be interpreted to punish persons who merely expressed an unpopular view)). The Court concluded that the anti-noise statute does not invite subjective interpretation or arbitrary enforcement because it clearly provides that the conduct will be punished only if it interferes with classes. *See id.* at 113-14.

[49] *Id.* at 109 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). The Court stated that precise language in a statute indicates that the legislature has thoroughly considered First Amendment interests that may be affected and has determined that regulation is still necessary based on additional public policy concerns. *See id.* at 109 n.5 (citing Edwards v. South Carolina, 372 U.S. 229, 236 (1963)); *see also* Amsterdam, *supra* note 8, at 81 (arguing that the void-for-vagueness doctrine determines how far a public order can deprive citizens' rights); TRIBE, *supra* note 3, § 12-31, at 1033 (discussing the acceptable level of vagueness and stating that "to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others").

[50] *See* FCC v. Pacifica Found., 438 U.S. 726, 744 (1978).

[51] 438 U.S. 726 (1978).

[52] *See id.* at 746. In *Pacifica*, a New York, listener-supported radio station aired a monologue about contemporary speech by comedian George Carlin. *See id.* at 729-30. In this 12-minute monologue, Carlin listed words, including "cocksucker," "shit," and "twat," and repeated them continuously. *See id.* at 729, 750-55. A listener filed a complaint with the FCC, and the FCC issued a declaratory order indicating that Pacifica could receive sanctions in the future if further complaints were received. *See id.* at 730. The order further stated that the broadcast was indecent and was prohibited by 18 U.S.C. § 1464, which provides that the broadcast of obscene, indecent or profane words will result in fines or imprisonment. *See id.* at 731. The FCC also relied on 47 U.S.C. § 303(g), which requires the FCC to use the radio in the public's interest. *See id.* The United States Court of Appeals for the District of Columbia Circuit reversed, finding the FCC's actions were a form of censorship and were overbroad. *See* Pacifica Found. v. FCC, 556 F.2d 9, 10-11 (D.C. Cir. 1977). The Supreme Court upheld the FCC's order, holding that the monologue was indecent. *See Pacifica*, 438 U.S. at 741, 751. The Court noted that an order "that indecent language be avoided will have its primary effect on the form, rather than the content, of

from an impermissible viewpoint restriction by reasoning that modes of expression, including decency, are not a central component of the speaker's message.[53] Therefore, the Court held that prohibiting the broadcast of a monologue that uses profane language is not an objection to the speaker's viewpoint, but rather a restriction on the mode of the expression.[54] Moreover, the Court indicated a willingness to restrict modes of expression when a strong countervailing interest is at stake.[55]

Another issue with which the Court has long struggled is the First Amendment protections afforded to government-subsidized speech.[56] In *Regan v. Taxation With Representation*,[57] the Court determined that funding restrictions that are both content-neutral and viewpoint-neutral pass constitutional muster.[58] The Court equated

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serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18.

[53] *See Pacifica*, 438 U.S. at 746 & n.22. The Court relied on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), to establish that indecent speech is low value speech that may be regulated to protect a countervailing interest. *See id.* at 746 (citing *Chaplinsky*, 315 U.S. at 572, wherein the Court stated that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[54] *See Pacifica*, 438 U.S. at 746 n.22. The Court stressed that Carlin's monologue did not argue a point of view, but instead illustrated that contemporary attitudes towards profanity are ridiculous. *See id.* The Court found that the FCC "objects, not to this point of view, but to the way in which it is expressed." *Id.* This mode of expression, noted the Court, does not necessarily carry First Amendment protection. *See id.*

[55] *See id.* at 749-50. The Court determined that the context of the monologue was important in deciding whether the FCC's actions were constitutional. *See id.* at 747-48. Because the monologue was broadcast in the early afternoon, the Court found that the FCC could prohibit the broadcast in order to protect children from offensive material. *See id.* at 749-50.

[56] *See* Leff, *supra* note 3, at 392-412 (discussing the tension between government action and support for the arts).

[57] 461 U.S. 540 (1983).

[58] *See id.* at 548. The Internal Revenue Code, 26 U.S.C. § 501(c)(3), states that exemptions are granted to organizations that do not participate substantially in lobbying efforts except for veterans organizations. *See id.* at 542. Taxation With Representation of Washington (TWR), a non-profit corporation, was denied tax-exempt status because of its lobbying activities. *See id.* at 541-42. TWR filed suit in federal district court for First and Fifth Amendment violations, arguing that Congress had decided to fund lobbying by veterans organizations, but refused to fund lobbying of other qualifying organizations. *See id.* at 542, 547. After an award of summary judgment for the defendants, the Court of Appeals for the District of Columbia Circuit reversed. *See id.* at 542. The Supreme Court found that the IRS's conditions for exemption did not violate the First or Fifth Amendments because Congress has wide discretion to fund selectively organizations in the public's interest. *See id.* at 550. Further, the Court noted that "[the] Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR

tax exemptions with government subsidies and held that a statute that grants tax exemptions to nonprofit organizations that do not substantially participate in lobbying activities does not violate the First Amendment.[59] This discretionary allocation of tax exemptions, the Court concluded, is a proper exercise of congressional authority and is not an attempt to suppress speech.[60]

The Court in *Rust v. Sullivan*[61] tried to define Congress's discretionary powers in a funding context by holding that the government can selectively subsidize a program that promotes certain goals without also subsidizing an alternate program that addresses these goals in a different way.[62] Building on the rationale used in *Taxation With*

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any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies." *Id.* at 545

[59] *See id.* at 548. The Court relied on *Cammarano v. United States*, in which the Court held that the First Amendment does not require Congress to subsidize lobbying. *See id.* at 513 (citation omitted). The Court noted that Congress is not acting in its regulatory capacity when it denies tax-exempt status to organizations that lobby, nor has it infringed on any existing First Amendment rights; rather, it has merely chosen not to finance TWR's lobbying. *See id.* at 546. The Court reiterated that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe [upon] the right . . . ." *Id.* at 549; *see also* Maher v. Roe, 432 U.S. 464, 466, 474 (1977) (holding that a Connecticut statute that does not fund nontherapeutic abortions but provides funds for childbirth does not violate the Constitution); Buckley v. Valeo, 424 U.S. 1, 105-06 (1976) (holding that a statute providing federal subsidies to candidates who enter primary campaigns, but not to candidates who do not participate in primaries, does not infringe upon First Amendment rights).

[60] *See Taxation With Representation*, 461 U.S. at 550. The Court opined that Congress has broad powers to make funding decisions to support or encourage activities that will benefit the public interest. *See id.* (*citing Maher*, 432 U.S. at 476) ("[Congress's] power to encourage actions deemed to be in the public interest is necessarily far broader.").

[61] 500 U.S. 173 (1991).

[62] *See id.* at 193. The statute at issue in *Rust* was Title X of the Public Health Service Act, which provides government funds to family planning services. *See id.* at 178. None of the funds received through Title X grants could be used for programs that included abortion as a type of family planning. *See id.* Congress intended this restriction to limit funds solely for preventive family planning services, infertility services, population research, and "other related medical, informational, and educational activities." *Id.* at 178-79. Furthermore, regulations under the Public Health Service Act specifically excluded services for pregnancy or prenatal care from qualifying for Title X funds. *See id.* at 179. The regulations were challenged as an impermissible construction of the Public Health Service Act and also as viewpoint-discriminatory conditions on federal subsidies. *See id.* at 181, 192. The United States District Court for the Southern District of New York upheld the regulations and the Court of Appeals for the Second Circuit affirmed. *See id.* at 181. The Supreme Court also upheld the regulations and specifically found that the conditions for funding were not viewpoint-based. *See id.* at 192. The Court relied on *Maher* to reiterate that the government is free to favor childbirth over abortion. *See id.* at 192-93. Moreover, the government may endorse this value judgment by allocating federal funds to support childbirth services. *See id.* In doing so, the government is not required also to offer funds to organizations that advocate abortion. *See id.* at 193.

Representation, the Supreme Court stressed that the government does not discriminate based on viewpoint when it funds one activity instead of another.[63] Rather, the Court articulated, the government is merely enforcing limitations that prevent a grantee from using funds for activities that fall outside the scope of the subsidy program.[64] The Court emphasized that Congress is free to fix the limits of a publicly funded program, and in doing so, may refuse to fund speech that is specifically excluded from the project's scope.[65]

The result is different, however, when the government allocates funds to third parties to encourage private speech.[66] In *Rosenberger v. Rector and Visitors of the University of Virginia,*[67] a state university refused to support a student newspaper that advocated a Christian viewpoint.[68] The Court held that when the government creates a limited public forum,[69] it may not choose to fund some speakers instead of

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[63] *See id.* The Court distinguished viewpoint-discrimination from selective subsidies by indicating that the government is not suppressing speech by funding one program to the exclusion of another, but rather that the government's selection advances goals that Congress finds to be important to the public interest. *See id.* Furthermore, Title X grantees are not prevented from engaging in abortion-related services; they are merely restricted from using Title X funds to finance these activities. *See id.* at 198. *But see* Leff, *supra* note 3, at 384 (stating that the conditions upheld in *Rust* were, in fact, viewpoint-based and censor other viewpoints because only one favored perspective was funded); Post, *supra* note 5, at 170 (arguing that the Court's decision in *Rust* is only defensible if the restricted speech is considered as part of a managerial regime committed to achieving a legitimate goal).

[64] *See Rust,* 500 U.S. at 194. The Public Service Health Act is designed to promote preventive family planning and does not recognize abortion as a means of family planning. *See id.* at 193. The limits placed on Title X fund recipients ensure that the goals of the act are achieved. *See id.* Abortion counseling or referral services are outside the scope of the federal program and are not eligible for funds under Title X. *See id.* at 193-94.

[65] *See id.* at 194.

[66] *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995).

[67] 515 U.S. 819 (1995).

[68] *See id.* at 822-23, 825.

[69] *See id.* at 829-30. Justice Kennedy stated that the student activities fund at issue in *Rosenberger* "[was] a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at 830. A limited pubic forum includes public facilities that are used for activities not specifically related to expression. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993) (finding that access to a school auditorium after school hours created a limited public forum); International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (defining a limited public forum as "property that the State has opened for expressive activity by part or all of the public"); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 790, 801-02 (1985) (holding that a charitable campaign program at federal workplaces was a limited public forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) (holding that a school's internal mail system was a limited public forum).

others based on the viewpoints expressed.[70] The Court, relying on *Rust*, acknowledged that when the government funds private speakers to disseminate its *own* message, the government is not required to subsidize opposing viewpoints.[71] The Court concluded, however, that

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[70] *See Rosenberger*, 515 U.S. at 834. The University of Virginia, a state organization, uses a student activity fund (SAF) to support extracurricular activities that are related to the school's educational purposes. *See id.* at 824. Student groups, known as Contracted Independent Organizations (CIOs), apply for disbursements from the SAF to support their expenses. *See id.* The guidelines that govern disbursements exclude financial support to religious activities, among others. *See id.* at 825. The university refused to disburse funds to a third-party contractor on behalf of a CIO, Wide Awake Productions, because it published a student newspaper that supported a Christian viewpoint. *See id.* at 822-23, 825. After appealing within the university, Wide Awake Productions filed suit, alleging that the SAF's denial of payment constituted impermissible viewpoint discrimination. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 795 F. Supp. 175, 177 (W.D. Va. 1992); Rosenberger v. Rector and Visitors of the Univ. of Va., 18 F.3d 269, 274 (4th Cir. 1994). The United States District Court for the Western District of Virginia granted summary judgment in favor of the university and the United States Court of Appeals for the Fourth Circuit affirmed, holding that the SAF guidelines were content-discriminatory; however, the university had a compelling interest in maintaining the separation between church and state. *See Rosenberger*, 795 F. Supp. at 184; *Rosenberger*, 18 F.3d at 288.

The Supreme Court reversed and Justice Kennedy, writing for the majority, recognized that the distinction between content and viewpoint discrimination may be imprecise. *See Rosenberger*, 515 U.S. at 831. The Court found that the university's policy does not prohibit the subject of religion, but disfavors student publications with religious viewpoints. *See id.* Justice Kennedy further stated that "[r]eligion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* Therefore, the university's denial of funding to Wide Awake Productions constituted viewpoint-discrimination and not subject-matter discrimination. *See id.* The Court observed that this conclusion is important because subject-matter discrimination may be permissible if it serves the purpose of the forum. *See id.* at 829-30. To the contrary, the Court stated that viewpoint-discrimination is not permissible if the speech would otherwise conform to the forum's purpose. *See id.* Having concluded that the SAF was a forum, the Court determined that the subjects discussed in the newspaper published by Wide Awake Productions were within the limits of the SAF guidelines. *See id.* at 831. Hence, the university's viewpoint discrimination was impermissible. *See id.* at 832.

[71] *See Rosenberger*, 515 U.S. at 833. This conclusion rests on the Court's decision in *Rust*, in which the Court held that when government is speaking or when it funds private speakers to convey its message, it may regulate the content of the expression. *See id.* Justice Kennedy further recognized that

> the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes . . . [and] it may take steps to ensure that its message is neither garbled nor distorted by the grantee.

Id. (citations omitted).

a policy that funds a wide array of speakers conveying varied messages may not selectively fund only favored viewpoints.[72]

The *Rosenberger* Court also rejected the argument that scarcity of government funds justifies viewpoint discrimination.[73] Particularly in the university context, the suppression of ideas and thoughts, the Court opined, strikes at the heart of First Amendment principles.[74] The Court, therefore, determined that any restrictions on the funding of private speech must be viewpoint-neutral.[75]

In a recent clash between government subsidies and private speech, the United States Supreme Court, in *NEA v. Finley*,[76] upheld the "decency and respect" clause of § 954(d)(1) under the First

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[72] *See id.* at 834-35. The situation in *Rosenberger* is therefore different in that the university, a state organization, is not conveying its own message. *See id.* at 834. Rather, the student groups are separate entities from the university and are offered funds to advance their own messages, not the messages of the university. *See id.* at 835. The Court stated that

> [i]t does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. . . . Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

Id. at 834-35.

[73] *See id.* at 835. Here, the Court stated that "[the] government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.* Justice Kennedy referred to the decision of *Lamb's Chapel*, 508 U.S. 384, 393-94, in which the Court invalidated a school district's rule prohibiting organizations from using school property after hours for "religious purposes." *See Rosenberger*, 515 U.S. at 835; *see also Lamb's Chapel*, 508 U.S. at 393-94 (holding that the district discriminated on the basis of viewpoint because it did not allow the presentation of religious perspectives on family values on school property). The provision of funds, according to the Court, is not different from access to school facilities because "the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong . . . ." *Rosenberger*, 515 U.S. at 835.

[74] *See Rosenberger*, 515 U.S. at 835. The Court emphasized that the university's funding restriction, which prohibits publications whose main purpose is to promote a specific belief in or with regard to a deity, would have a "chilling effect" on student speech and creativity. *See id.* at 836. Justice Kennedy specified that

> the prohibition . . . would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes . . . . Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications . . . . Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies provided he did not point out their (necessary) imperfections.

Id. at 836-37.

[75] *See id.* at 835.

[76] 118 S. Ct. 2168 (1998).

Amendment.[77] Rather than restrict the NEA from subsidizing indecent or disfavored viewpoints, the Court determined that § 954(d)(1) proffers additional criteria for the NEA to consider during its selection process.[78] Although the Court recognized that decency and respect standards might be imprecise, the majority held that § 954(d)(1) should survive a vagueness challenge because all of the factors considered during the NEA's evaluation of artistic merit are inherently subjective.[79]

Writing for the majority, Justice O'Connor began the opinion by reviewing the history of the NEA.[80] The Justice emphasized the NEA's discretionary role in arts funding and identified criteria by which the organization distributes awards.[81] Justice O'Connor further explained the application and awards process,[82] noting that only a small percentage of NEA grants have led to public controversy.[83] Nonetheless, the Justice discussed Congress's attempts to reform the agency's grant-making process in 1990, which resulted in the adoption of § 954(d)(1).[84]

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[77] *See id.* at 2172 (citing 20 U.S.C. § 954(d)(1) (1994)).

[78] *See id.* at 2176.

[79] *See id.* at 2177.

[80] *See id.* at 2172.

[81] *See id.* The NEA's enabling statute lists broad funding priorities. *See id.* For example, the NEA seeks to support projects that achieve "'artistic and cultural significance, giving emphasis to American creativity and cultural diversity,' 'professional excellence,' and the encouragement of 'public knowledge, education, understanding, and appreciation of the arts.'" *Id.* (quoting 20 U.S.C. § 954(c)(1)-(10)).

[82] *See Finley*, 118 S. Ct. at 2172. Applications are first reviewed by an advisory panel comprised of experts in the particular field. *See id.* These panels are required to reflect "'diverse artistic and cultural points of view'" because they are composed of people of "'wide geographic, ethnic, and minority representation,'" plus laypersons "'who are knowledgeable about the arts.'" *Id.* (quoting 20 U.S.C. § 959(c)(1)-(2)). The panel reports its opinion to the Council, which in turn makes recommendations to the Chairperson on funding decisions. *See id.* Wielding the ultimate authority on grant decisions, the Chairperson is nonetheless prohibited from approving an applicant who was given a negative recommendation by the Council. *See id.* (citing 20 U.S.C. § 955(f)).

[83] *See id.* Justice O'Connor noted that the NEA has awarded more than three billion dollars to arts organizations and individuals while prompting increased support for the arts on state, corporate, and foundation levels. *See id.* Despite this success, the Justice discussed the controversy surrounding the NEA funding of two artists, Andres Serrano and Robert Mapplethorpe. *See id.*; *see also supra* note 14 (discussing congressional reaction to Serrano's and Mapplethorpe's works).

[84] *See Finley*, 118 S. Ct. at 2173. The Court explained that congressional reaction to these two grants included a reduction in the NEA's budget (by the exact amount previously given to Serrano and Mapplethorpe) and an amendment that prohibited NEA funds to "'be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene . . . .'" *Id.* at 2172 (alteration in

Justice O'Connor prefaced the Court's substantive analysis by stressing that Finley, in order to advance a facial constitutional challenge, had to demonstrate that the application of § 954(d)(1) would inevitably suppress speech.[85] The Court then segued into a discussion of viewpoint discrimination, finding error in the Ninth Circuit's interpretation of § 954(d)(1).[86] The Court declined to read the provision as an ultimate restriction on awards to artists deemed "indecent" or "disrespectful."[87] Rather, the Court determined that the text of § 954(d)(1) is merely advisory language to be considered in the overall evaluation of a grant application.[88] This language, noted Justice O'Connor, stands in stark contrast to the unambiguous language of other funding restrictions, such as § 954(d)(2), which clearly states that obscene art will not be funded.[89]

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original) (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. 101-121, 103 Stat. 738, 738-742 (1990)). The Court continued by noting that the NEA complied with this amendment by requiring all grant recipients to certify that they would not use NEA funds for projects that were inconsistent with this amendment. *See id.* at 2173. This certification requirement was later found unconstitutionally vague. *See* Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 782 (C.D. Cal. 1991).

The Court discussed the Independent Commission (Commission) appointed by Congress to review the NEA's grant-making process and emphasized the Commission's recommendations for procedural changes that would enhance the advisory panels' role. *See Finley*, 118 S. Ct. at 2173. Based on this suggestion and pending challenges to the funding restrictions of the 1990 appropriations bill, the Court stated that Congress eventually came to a bipartisan compromise by enacting the Williams-Coleman Amendment to the NEA's reauthorization. *See id.*; *see also supra* note 15 (discussing congressional ratification of the Williams-Coleman amendment). This amendment became 20 U.S.C. § 954(d)(1). *See Finley*, 118 S. Ct. at 2176.

[85] *See Finley*, 118 S. Ct. at 2175; *see also* Rust v. Sullivan, 500 U.S. 173, 183 (1991) ("'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully . . . .'") (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (finding that facial invalidation "is, manifestly, strong medicine" and "has been employed by the Court sparingly and only as a last resort"); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (stating that "facial challenges to legislation are generally disfavored . . . .").

[86] *See Finley*, 118 S. Ct. at 2175; *see also supra* notes 34-36 and accompanying text (discussing the Ninth Circuit's holding).

[87] *See Finley*, 118 S. Ct. at 2175.

[88] *See id.* Justice O'Connor stated that the NEA views § 954(d)(1) as hortatory; therefore, "decency" and "respect" are merely additional considerations to be appraised during the grant-making process. *See id.* The Justice explained that the NEA has implemented this provision by securing representatives from diverse cultural, ethnic, religious, and professional backgrounds to serve on the advisory panels. *See id.* These panels will provide a wide array of views on decency and respect when considering a grant application, the Justice reasoned. *See id.* at 2173-74. Despite the NEA's reliance on these advisory panels, Justice O'Connor refused to decide whether this method sufficiently complied with the demands of § 954(d)(1). *See id.* at 2175.

[89] *See id.* at 2176. Justice O'Connor buttressed her conclusion that this provision

Next, the Court contended that Congress adopted the "decency and respect" clause as a bipartisan compromise designed to save the NEA from elimination by steering clear of viewpoint-based criteria for funding.[90] Justice O'Connor stressed that Congress specifically chose not to prohibit particular viewpoints in funding decisions, but rather to incorporate additional criteria in the selection process further to define artistic excellence.[91] The Justice noted that these additional criteria, found in § 954(d)(1), do not force the NEA categorically to deny funding based on viewpoint-discriminatory standards.[92]

Having determined that Congress adopted § 954(d)(1) as a means of reforming funding procedures instead of restricting speech, Justice O'Connor reiterated that the provision would not ultimately encourage invidious viewpoint discrimination.[93] The Justice explained that in order to consider § 954(d)(1) facially unconstitutional, there must be substantial danger of First Amendment violations.[94] Unlike other statutes invalidated by the Supreme Court on

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is only hortatory by contrasting it with § 954(d)(2), which is a clear and concise restriction against the funding of obscene speech. *See id.* Referring to § 954(d)(2), which provides that obscenity will not be funded because it is not protected speech and because it lacks artistic merit, the Justice reasoned that "[w]hen Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms." *Id.*

[90] *See id.* Justice O'Connor discredited the artists' assertion that § 954(d)(1) discriminates on the basis of viewpoint, because the amendment was adopted *specifically* to avoid enacting other proposed amendments that would have restricted the funding of certain categories of speech. *See id.* For instance, the Crane Amendment, which would have essentially eliminated the NEA, was rejected by the House. *See id.* at 2173. The Court observed that the Rohrabacher Amendment mandated a restriction on grants to art that intends to denigrate the beliefs, objects, or tenets of a specific religion, or intends to denigrate an individual or group of people based on race, gender, national origin, or handicap. *See id.* at 2173. The Court noted that the Rohrabacher Amendment was also rejected. *See id.* Justice O'Connor indicated that the sponsors of § 954(d)(1) intended to avoid viewpoint-discrimination altogether. *See id.* at 2176.

[91] *See id.* Justice O'Connor discussed the Independent Commission Report, which cautioned Congress not to adopt viewpoint-based criteria for funding. *See id.* Further, the Justice noted that this report suggested that the additional criteria for selection should be included as a part of the selection process, rather than treated as an isolated consideration. *See id.*

[92] *See id.* Based on the Independent Commission Report's recommendation, Congress reformed the NEA's award process to include the criteria in § 954(d)(1) to "inform the assessment of artistic merit . . . ." *Id.*

[93] *See Finley*, 118 S. Ct. at 1276. In fact, the Justice noted later in the opinion that the artists were not alleging discrimination in any one particular funding decision. *See id.* at 2178. Further, two of the artists received NEA grants after filing this action against § 954(d)(1). *See id.* The Justice cautioned, however, that if the NEA used subjective criteria to manipulate awards into a penalty upon disfavored ideas, then § 954(d)(1) would be constitutionally suspect. *See id.*

[94] *See id.* at 2176. Justice O'Connor contrasted the present case with the Su-

facial challenges, here, the Court perceived no danger that the "decency and respect" clause would suppress speech because it does not threaten censorship or punish the expression of particular ideas.[95] In fact, Justice O'Connor noted that considerations of "decency" and "respect" are open to many interpretations that will inevitably encompass a wide array of thoughts and ideas.[96] The Justice further rejected Finley's argument that the NEA could exploit this subjectivity to employ viewpoint discrimination, noting that the "decency and respect" criteria are no more subjective than is the agency's decision on artistic merit.[97]

The Court next discussed several constitutional applications for the "decency and respect" clause, including educational programs and projects that promote cultural diversity.[98] The Court opined that

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preme Court's decision in *R.A.V. v. St. Paul*, 505 U.S. 377, 380 (1992). *See Finley*, 118 S. Ct. at 2176. In *R.A.V.*, the Court struck down on its face a municipal ordinance that threatened criminal liability for placing a symbol "'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'" on public or private property. *R.A.V.*, 505 U.S. at 391, 380 (quoting MINN. STAT. § 609.713(1) (Supp. 1987)). The Justice recounted that the Court found that the provision set forth a penalty for the expression of particular views, prohibited expression of "disfavored subjects," and suppressed "distinctive idea[s] conveyed by a distinctive message." *Id.* at 391, 393.

[95] *See Finley*, 118 S. Ct. at 2176. The Justice stated that the Court does not perceive a realistic danger that § 954(d)(1) will silence speakers or compromise First Amendment liberties, as was the case with the ordinance in *R.A.V.* *See id.* Justice O'Connor stressed that the "decency and respect" criteria, unlike the criminal penalty in *R.A.V.*, "do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." *Id.*

[96] *See id.* at 2176-77. Justice O'Connor noted the Respondent's argument that it would be difficult to find two people who would agree on what type of art is decent or whether a particular piece of art respects them. *See id.* at 2176.

[97] *See id.* at 2177. Justice O'Connor, indicating that § 954(d)(1) is unlikely to cause the NEA's grant-selection process to become any more selective, refused to strike down legislation based on "'its hypothetical application to situations not before the Court.'" *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 743 (1978)).

[98] *See id.* Justice O'Connor referenced the NEA's enabling statute to conclude that educational programs are a main focus of the NEA. *See id.* (citing 20 U.S.C. § 951(9) (1994) ("'Americans should receive in school, background and preparation in the arts and humanities . . . .'"); § 954(c)(5) (stating that NEA's funding goals include "'projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts'")); *see also supra* note 12 (discussing § 951, the NEA's enabling statute, which lists commitment to education as a primary goal of the NEA). Therefore, the Justice reasoned, "'decency' is a permissible factor where 'educational suitability' motivates its consideration." *Finley*, 118 S. Ct. at 2177 (citing Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982)).

The Justice found permissible applications of the "respect" prong of § 954(d)(1) as well. *See Finley*, 118 S. Ct. at 2177 (quoting 20 U.S.C. § 951(10) ("'[I]t is vital to democracy to honor and preserve its multicultural artistic heritage.'") (alteration in original); § 954(c)(4) (the NEA explicitly considers diversity by giving

applications of § 954(d)(1) in contexts not specifically contemplated by the NEA's enabling statute would not necessarily suppress protected speech.[99] Moreover, the Court noted that content-based considerations are inherent to arts funding when only a small majority of deserving artists will receive grants.[100]

Following this line of reasoning, the Court discredited Finley's reliance on *Rosenberger*.[101] Justice O'Connor declared that the competitive nature of the NEA's funding procedures requires the agency to make content-based conclusions to determine artistic excellence.[102] The Court concluded that *Rosenberger* was unpersuasive because the funding criteria in *Rosenberger* did not require a similar threshold.[103]

Justice O'Connor further justified § 954(d)(1) by stressing that Congress has wide discretion in setting funding priorities.[104] The Court explained that Congress may selectively subsidize a program that serves a public purpose as long as other constitutionally pro-

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special consideration to "'projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community'"); § 954(c)(1) (the NEA also gives special consideration to projects that emphasize cultural diversity)).

[99] *See Finley*, 118 S. Ct. at 2177.

[100] *See id.* Justice O'Connor recognized that the NEA denies a majority of the applications it receives, *even those that are both artistically meritorious and constitutionally protected*, for a variety of reasons, including: technical proficiency, creativity, public interest, educational value, suitability for target audiences, etc. *See id.* at 2177-78 (citing Brief for Petitioners at 32, *Finley* (No. 97-371); *see also* Finley v. NEA, 100 F.3d 671, 685 (9th Cir. 1996) (Kleinfeld, J., dissenting) (observing that competitive grant programs will invariably deny funds to some constitutionally protected individuals). The Justice also noted that the NEA's competitive award process, which bases funding decisions on artistic worth, cannot be neutral. *See Finley*, 118 S. Ct. at 2178.

[101] *See Finley*, 118 S. Ct. at 2178 (citing Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995)).

[102] *See id.* The Justice indicated that the NEA's award process, unlike the subsidy program at issue in *Rosenberger*, relies on aesthetic judgments and funds only those artists who achieve "the inherently content-based 'excellence' threshold . . . ." *Id.*

[103] *See id.* The allocation of student activities funds in *Rosenberger*, Justice O'Connor noted, was made available to all student groups that were related to the university's educational purpose. *See id.* This standard, continued the Justice, is objective, unlike the NEA's subjective process. *See id.* at 2178; *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (holding that a school district's ban on the use of the school auditorium for religious purposes was not viewpoint-neutral); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 552 (1975) (holding that a municipal theater that allows any group to perform may not ban a production of "Hair," even if another theater is available).

[104] *See Finley*, 118 S. Ct. at 2179. Justice Ginsburg did not join in this part of the opinion. *See id.* at 2171. Justice O'Connor maintained that Congress has wide discretion in determining spending priorities and "that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 2179; *see also supra* notes 57-60 and accompanying text (discussing Regan v. Taxation with Representation, 461 U.S. 540 (1983)).

tected rights are not compromised.[105] Accordingly, the Court held that the NEA did not engage in viewpoint discrimination when it denied Finley's grant, but rather that the NEA chose to fund one artist over another.[106]

Finally, the Court concluded that § 954(d)(1) is not unconstitutionally vague.[107] Recognizing that although the provision is imprecise, the Court opined that individuals will not be deterred from creating art that might infringe upon the "forbidden area" with regard to these federal grants.[108] Furthermore, the Court determined that the provision only contributes inexact considerations to an inherently subjective selection process.[109] Accordingly, the Court reversed the Ninth Circuit decision and remanded the case for further proceedings.[110]

In a concurring opinion, Justice Scalia, joined by Justice Thomas, agreed that § 954(d)(1) is constitutional; however, the Justice stated that the provision establishes both content-based and viewpoint-based criteria for application evaluations.[111] Justice Scalia explained that Congress intended the decency criteria to be considered in evaluating *each* grant application, therefore, the language of

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[105] *See Finley*, 118 S. Ct. at 2179. *Rust* teaches, according to Justice O'Connor, that Congress may choose to fund one program over another in order to encourage activities that are in the public interest. *See id.* In the present case, the Justice explained that Congress revamped the NEA's enabling act in 1990 to mandate that "arts funding 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.'" *Id.* (quoting 20 U.S.C. § 951(5) (1994)) (alteration in original). Therefore, the selective funding of artists who further Congressional goals is not viewpoint-discrimination. *See id.*

[106] *See id.*

[107] *See id.*

[108] *See id.* Despite the imprecision of § 954(d)(1), Justice O'Connor stressed that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id.*

Justice O'Connor also surmised that other government grant and scholarship programs award funds based on subjective considerations, such as "excellence." *See id.* at 2179-80; *see also* 2 U.S.C. § 802(a) (1994) (Congressional Award program "designed 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) (1994) (providing funds based on "progress and scholarship in the humanities"). To invalidate § 954(d)(1) on vagueness grounds, the Justice contended, would challenge the constitutionality of other valuable government scholarship programs. *See Finley*, 118 S. Ct. at 2180.

[109] *See Finley*, 118 S. Ct. at 2180; *see also supra* note 89 and accompanying text (noting that the "decency and respect" clause is merely hortatory).

[110] *See Finley*, 118 S. Ct. at 2180.

[111] *See id.* (Scalia, J., concurring).

§ 954(d)(1) is not merely advisory.[112] To conclude that the "decency" clause is only hortatory, the Justice continued, renders § 954(d)(1) wholly unnecessary because § 959(c) already requires the chairperson to compose advisory panels of persons with diverse artistic and cultural viewpoints.[113] Therefore, Justice Scalia concluded that the NEA's implementation of § 954(d)(1), by securing diverse panels to provide a wide array of views on decency and respect, is duplicative.[114]

Agreeing with the majority that § 954(d)(1) does not require *denial* of applications that violate standards of decency and respect, Justice Scalia explained that the NEA decision-makers will favor applicants that comport with this criteria over those that do not.[115] Therefore, the Justice determined that the "decency and respect" clause constitutes viewpoint discrimination.[116] Such a conclusion is not affected, Justice Scalia surmised, by the subjectivity of the terms "decency" and "respect."[117] Justice Scalia also disagreed with the majority's analysis of the legislative history of § 954(d)(1), finding that

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[112] *See id.* Justice Scalia observed that decency may be an element of artistic excellence and merit *or* a factor to be considered in addition to artistic excellence and merit. *See id.* The Justice concluded that "either way, it is entirely, 100% clear that decency and respect are to be taken into account in evaluating applications." *Id.* Although Justice Scalia did not suggest that the decency criteria are dispositive in every case, the Justice stated that they must be considered in every case. *See id.* at 2181 (Scalia, J., concurring).

Justice Scalia read § 954(d)(1) to mean that the evaluators *must* take into consideration the "decency" and "respect" criteria. *See id.* at 2180 (Scalia, J., concurring). The Justice found this conclusion so clear that it was inexplicable "what the Court ha[d] in mind (other than the gutting of the statute) when it speculate[d] that the statute is merely 'advisory.'" *Id.*

[113] *See id.* at 2181 (Scalia, J., concurring) (citing 20 U.S.C. § 959(c), which requires the Chairperson to promulgate rules to ensure that the panels are comprised of individuals who represent diversity and multiculturalism).

Justice Scalia opined that the Chairperson has no way of ensuring that these panels take decency factors into account when reviewing applications, although if the panel does consider this criteria, it is likely to assess a candidate in a manner consistent with American values. *See id.*

[114] *See id.*

[115] *See id.* The Justice opined that, if all other factors are equal, an applicant who displays disrespect for American beliefs and values is less likely to receive a grant than is an applicant who displays respect. *See id.*

[116] *See Finley*, 118 S. Ct. at 2181 (Scalia, J., concurring). The Justice stated that although the statute does not require the denial of funding to applicants who exhibit disrespect for American values, it is just as discriminatory as "a provision imposing a five-point handicap on all black applicants for civil service jobs [but which does not] compel the rejection of black applicants." *Id.*

[117] *See id.* at 2181-82 (Scalia, J., concurring). The Justice analogized the subjectivity of § 954(d)(1) to a provision favoring "'Republican-party values' [which] would be rendered nondiscriminatory by the fact that there is plenty of room for argument as to what Republican-party values might be." *Id.* at 2182 (Scalia, J., concurring).

instead of a mere procedural alteration, this clause was meant to discriminate against the public funding of projects such as Serrano's "Piss Christ" and Mapplethorpe's homoerotic photographs.[118] The Justice further discredited the fact that § 954(d)(1) was a bipartisan proposal,[119] noting that the motives of Congress are of little importance compared with the plain text of the statute.[120]

Having concluded that § 954(d)(1) is viewpoint discriminatory, Justice Scalia turned to the issue of whether such discrimination violates the First Amendment.[121] Justice Scalia opined that Congress did not abridge indecent speech because artists are still free to create works that are disrespectful of the public's beliefs and values; however, this same scorned public is not forced to finance these projects.[122] Justice Scalia also argued that the NEA is not the only source of funding for artists and, like every other federal subsidy program, the government can choose to fund programs that encourage activities for the public good without abridging an applicant's freedom of speech.[123]

Although Justice Scalia agreed that Finley's reliance on *Rosenberger* was misplaced, the Justice's opinion departed from the majority's application of the First Amendment to federal funding.[124] The Justice asserted that the First Amendment does not constrain the

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[118] *See id.* at 2182 (Scalia, J., concurring).

[119] *See id.* Justice Scalia proclaimed that "[i]t matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, 'The more we get together, the happier we'll be.'" *Id.*

[120] *See id.* Despite the fact that § 954(d)(1) was enacted as an alternative to a proposal that would have mandated clear viewpoint discrimination, Justice Scalia commented that "[w]e do not judge statutes as if we are surveying the scene of an accident; each one is reviewed, not on the basis of how much worse it could have been, but on the basis of what it says." *Id.*

[121] *See id.*

[122] *See Finley*, 118 S. Ct. at 2182-83 (Scalia, J., concurring). Justice Scalia underscored this analysis with legal precedent establishing that a denial of a taxpayer subsidy is not the same as suppression of dangerous ideas. *See id.* at 2183 (Scalia, J., concurring) (citing Regan v. Taxation With Representation, 461 U.S. 540, 550 (1983)); *see also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (noting that a denial of a taxpayer subsidy "does not necessarily 'infringe' [upon] a fundamental right . . . [because] unlike direct restriction or prohibition — such a denial does not, as a general rule, have any significant coercive effect").

[123] *See Finley*, 118 S. Ct. at 2182-83 (Scalia, J., concurring). Justice Scalia, relying on *Rust*, emphasized that the government can, without violating the First Amendment, assign funds to projects deemed important for the public without an obligation to fund alternative programs. *See id.* at 2183 (Scalia, J., concurring).

[124] *See id.* at 2184 (Scalia, J., concurring) (citing Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

government's ability to allocate both competitive and noncompetitive funds.[125] Just as the First Amendment has no application to funding, the Justice contended that neither does the vagueness doctrine.[126] The Justice explained that the rule against vague legislation applies to the government's regulation of expressive conduct, *not* to government grant programs.[127] As such, the Justice clearly found viewpoint-based, and content-based, restrictions appropriate in government funding because they do not abridge the freedom of speech.[128] Justice Scalia observed that Congress could ban the funding of indecent art altogether, but instead Congress took the lesser step of disfavoring indecent speech through "decency and respect" considerations.[129] Justice Scalia concluded that "[t]he Court' s opinion today renders even that lesser step a nullity."[130]

In a dissenting opinion, Justice Souter also found that § 954(d)(1) constituted viewpoint discrimination but stressed that in the context of federal patronage of the arts, such discrimination violates the First Amendment.[131] Justice Souter chided the Court for creating an exception to First Amendment restrictions when the gov-

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[125] *See id.* Referring to the majority's statement that the government is permitted to allocate funding based on criteria that would be impermissible if criminal liability or direct regulation of speech were at issue, Justice Scalia opined that the Court believes that the First Amendment requires some constraints on funding, but that the Court failed to elaborate on this assertion. *See id.*

[126] *See id.*

[127] *See id.* The Justice indicated that if the vagueness doctrine did apply in the funding context, then the phrase "artistic excellence" could be considered even more vague than "decency" and "respect":

> [T]he agency charged with making grants under a statutory standard of "artistic excellence" — and which has itself thought that standard met by everything from the playing of Beethoven to a depiction of a crucifix immersed in urine — would be of more dubious constitutional validity than the "decency" and "respect" limitations that respondents (who demand to be judged on the same strict standard of "artistic excellence") have the humorlessness to call too vague.

Id. at 2184-85 (Scalia, J., concurring).

[128] *See id.* at 2184 (Scalia, J., concurring).

[129] *See Finley*, 118 S. Ct. at 2185 (Scalia, J., concurring).

[130] *Id.* Justice Scalia argued that the NEA implemented § 954(d)(1) by charging the Chairman with the duty to ensure diverse advisory panels that would encompass a wide array of views on "decency and respect." *See id.* at 2181 (Scalia, J., concurring). However, Justice Scalia observed that § 959(c) already requires the Chairperson to create such diverse panels and, therefore, § 954(d)(1) is redundant. *See id.* Justice Scalia declared that "'[t]he operation was a success, but the patient died.' What such a procedure is to medicine, the Court's opinion in this case is to law." *Id.*

[131] *See id.* at 2185 (Souter, J., dissenting). Justice Souter stated that by subsidizing a variety of artists, the government is neither acting in its government-as-speaker role, nor in its government-as-buyer role, whereby viewpoint discrimination is constitutional. *See id.* at 2190 (Souter, J., dissenting).

ernment acts as a patron.[132] Justice Souter concluded that the NEA is much like the *Rosenberger* student activities fund in that money is allocated to encourage a variety of private speakers and, therefore, the government may not discriminate based on viewpoint.[133]

The Supreme Court's decision in *Finley* offers a splintered and fairly weak ruling in the increasingly confusing area of federal subsidies and the role of the First Amendment. Although § 954(d)(1) survived both viewpoint-discriminatory and vagueness challenges, the most startling aspect of this legal battle is that there was no clear winner.[134] Proponents of § 954(d)(1) may discover federal funds used to support indecent, albeit meritorious, art in the future because the Court deemed the "decency and respect" clause to be merely advisory, thus imposing no additional constraints on NEA grants.[135] Opponents of this legislation may fear the suppression of ideas and the abridgment of speech, yet the Supreme Court has virtually neutralized such a threat by converting the "decency and respect" criteria

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[132] *See id.*

[133] *See id.* at 2191 (Souter, J., dissenting) (citing Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)). Justice Souter indicated that the NEA's purpose was to "'support new ideas' and 'to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry.'" *Id.* (quoting 20 U.S.C. § 951(10)(3) (1994)). The Justice stated that "[s]o long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their 'freedom of thought, imagination, and inquiry' to defying our tastes, our beliefs, or our values." *Id.* Justice Souter also equated the scarcity of funds in *Rosenberger* with the competition for NEA grants. *See id.* at 2192 (Souter, J., dissenting). Therefore, the Justice disagreed with the Court that the competitive nature of NEA funds distinguished the *Finley* case from *Rosenberger*. *See id.*

[134] Despite the eight to one vote, both Justice Scalia and Justice Thomas concurred in the judgment only and agreed with Justice Souter that § 954(d)(1) was viewpoint discriminatory. *See Finley*, 118 S. Ct. at 2180 (Scalia, J., concurring). Further, Justice Ginsburg did not join in the majority's conclusion that the government may utilize greater discretion in competitive-funding decisions than in direct regulations of speech. *See id.* at 2171.

In upholding § 954(d)(1), Justice O'Connor read the provision as merely advisory, perhaps reducing it to optional criteria for advisory panels to consider. *See supra* notes 88-89 and accompanying text (discussing the hortatory nature of § 954(d)(1)); *see also supra* notes 112-14 and accompanying text (discussing the duplicative effect of implementing § 954(d)(1) when § 954(c) already calls for the formation of diverse advisory panels). On the other hand, by allowing the subjective criteria of "decency and respect" to remain in the statute, the potential for viewpoint-based discrimination is present if a panel disfavors indecent art.

[135] *See Finley*, 118 S. Ct. at 2175. Justice O'Connor stated that § 954(d)(1) "does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Id.*

into imprecise considerations that can be ignored.[136] It is clear, however, that future "as-applied" challenges to § 954(d)(1) are possible if NEA funds are manipulated or used to suppress certain ideas in the marketplace.[137]

The *Finley* decision does nothing to clarify the longstanding debate over government support for the arts. As both the concurring and dissenting opinions point out, the text of § 954(d)(1) appears to have successfully cloaked viewpoint-based criteria as a procedural guideline; therefore, a better debate is whether the government can discriminate on the basis of viewpoint when acting as a patron of the arts.[138] The Court failed to discuss this issue directly, indicating only that competitive funding may be allocated based on criteria that would not be constitutional in a regulatory context.[139]

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[136] *See On Speech Issues, Court Speaks in Many Tongues*, N.J. L.J., Aug. 24, 1998, at S12 ("[R]educing Section 954(d)(1) to 'considerations' that can be ignored — as Justice O'Connor argued — seems to undermine what Congress sought to do and is almost as disingenuous as the government's position that the provision is simply a mandate for diversity in the composition of panels.").

[137] *See Finley*, 118 S. Ct. at 2178-79. Justice O'Connor emphasized 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." *Id.* at 2178.

[138] Justice O'Connor accepted the government's argument that the provision was incorporated to reform procedures. *See supra* notes 89-90 and accompanying text (observing that § 954(d)(1) was adopted as an alternative to other proposals that would have restricted the funding of certain categories of speech). Justice Souter acknowledged that if the Chairperson does consider decency and respect through regulations that ensure diversity of panels, the statute would be satisfied. *See Finley*, 118 S. Ct. at 2188 (Souter, J., dissenting). However, Justice Souter disputed the application of this provision to reforming procedures because "[t]he reference to considering decency and respect occurs in the subparagraph speaking to the 'criteria by which applications are judged,' not in the preamble directing the Chairperson to adopt regulations; it is in judging applications that decency and respect are most obviously to be considered." *Id.*; *see also Finley*, 118 S. Ct. at 2182 (Scalia, J., concurring) (arguing that the legislative history of § 954(d)(1) "in no way propels the Court's leap to the countertextual conclusion that the provision was merely 'aimed at reforming procedures . . . .'").

[139] *See Finley*, 118 S. Ct. at 2179. Justice Souter argued that this language creates an exception to the traditional government-as-speaker and government-as-buyer roles, in which the government is constitutionally able to engage in viewpoint discrimination. *See id.* at 2190 (Souter, J., dissenting). When the government itself is speaking, or funds private speakers to disseminate its message, the government is allowed to discriminate on the basis of viewpoint. *See id.* at 2179. Justice Souter noted that the NEA does not fit into the government-as-speaker category, because the message is not the NEA's, nor does it fit into the government-as-buyer role, because the NEA is not purchasing anything with NEA grants. *See id.* at 2190 (Souter, J., dissenting). Yet, as Justice Souter pointed out, the majority allowed the NEA to act as a patron of the arts with less stringent First Amendment guidelines. *See id.* The Court did not explicitly address this issue because the majority held that the "decency and respect" clause was not viewpoint discriminatory. *See id.* at 2179.

The Court failed to find that § 954(d)(1) discriminates on the basis of viewpoint by relying on the plain language of the statute and its legislative history, but the Court's discussion of legal precedent is troubling. Relying on *Rust*, the Court asserts that the government can choose selectively to fund programs for the public good, yet *Rust* only controls when the government is promoting *its own* message or policy.[140] In this case, as the dissent suggests, the underlying goal of the NEA is to act as a patron, endorsing new ideas and encouraging freedom of thought from *individuals or groups*.[141] Therefore, the messages disseminated by subsidized artists are not the NEA's messages and do not fall squarely under the ruling in *Rust*, which would allow viewpoint discrimination in these funding decisions.[142] Additionally, *Rosenberger* teaches that the government may not favor one viewpoint over another when it allocates funds to encourage a diversity of views, yet the Court narrowed *Rosenberger* to apply to noncompetitive funding scenarios unlike the NEA's grant-making process.[143]

The *Finley* decision explored the difficulties of applying objective standards — the constitutional right to be free from vague laws and viewpoint discrimination — to the inherently subjective topic of art. Although the NEA's "decency and respect" criteria has been validated by the Supreme Court, this victory may be short-lived. The true winner in this battle is yet to be determined because the Court has left the door wide open for "as-applied" challenges to § 954(d)(1) should its implementation lead to the suppression of our country's artistic voices.

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[140] *See Finley*, 118 S. Ct. at 2179; *see also supra* notes 61-65 (discussing Rust v. Sullivan, 500 U.S. 173 (1991)).

[141] *See Finley*, 118 S. Ct. at 2191 (Souter, J., dissenting). *But see* 20 U.S.C. § 951(5) (1994) (providing that funding of artists should contribute to public confidence regarding the utilization of taxpayer funds). Perhaps the Court evaluated the NEA grants as promoting the government's message on the arts because the NEA's purpose was also modified in 1990 to read: "Public funds . . . must ultimately serve public purposes the Congress defines." 20 U.S.C. § 951(5).

[142] *See Finley*, 118 S. Ct. at 2191 (Souter, J., dissenting).

[143] *See id.* at 2179; *see also supra* notes 66-75 and accompanying text (discussing *Rosenberger*). *But see Finley*, 118 S. Ct. at 2192 (Souter, J., dissenting) (equating scarcity of funds with competitive funds, and finding no difference between the student activities fund and the NEA funds).