Maryland Law Review

Volume 59 | Issue 1 Article 7

National Endowment for the Arts v. Finley: Sinking Deeper into the Abyss of the Supreme Court's Unintelligible Modern Unconstitutional Conditions Doctrine

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Note

NATIONAL ENDOWMENT FOR THE ARTS v. FINLEY: SINKING DEEPER INTO THE ABYSS OF THE SUPREME COURT'S UNINTELLIGIBLE MODERN UNCONSTITUTIONAL CONDITIONS DOCTRINE

In *National Endowment for the Arts v. Finley*,[1] the United States Supreme Court considered whether a statute instructing the Commissioner of the National Endowment for the Arts (NEA) to consider "decency and respect" in granting funds to artists[2] amounted to viewpoint discrimination and whether this provision violated the First Amendment[3] rights of NEA grant applicants.[4] The Court held that because the "decency and respect" provision does not *expressly* threaten the censorship of ideas, there was no realistic danger that the provision would compromise any First Amendment values.[5] The majority justified this determination by declaring that to be facially invalid, the statute must "set forth a clear penalty, proscribe views on particular disfavored subjects, and [suppress] distinctive idea[s] conveyed by a distinctive message."[6] By misapplying precedent and by advocating an implausible construction of the statute in question, the Court has descended further into the abyss of its inconsistent and unintelligible modern unconstitutional conditions doctrine, and in so doing, has provided Congress with a backdoor method of using selective grants as a means of limiting speech and of suppressing First Amendment rights.

I. THE CASE

The NEA was established by Congress in 1965 to support the arts by "pledging federal funds to 'help create and sustain . . . *a climate*

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1. 118 S. Ct. 2168 (1998).

2. National Endowment for the Arts Act, 20 U.S.C. § 954(d)(1) (1994). The Act states, in relevant part, that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.*

3. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

4. *See Finley*, 118 S. Ct. at 2171-72.

5. *See id.* at 2176.

6. *Id.*

encouraging freedom of thought, imagination, and inquiry.'"[7] But in 1990, responding to public outrage resulting from the award of two particular NEA grants,[8] Congress amended the National Foundation on the Arts and Humanities Act by directing "the Chairperson of the NEA to ensure that 'artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.'"[9] While the NEA had not adopted an official interpretation of this provision, referred to as § 954(d)(1), the NEA's National Council unanimously approved a resolution to implement § 954(d)(1) "by ensuring that members of the advisory panels that conduct the initial review of grant applications represent 'geographic, ethnic, and aesthetic diversity.'"[10]

Four artists, who applied for NEA grants before § 954(d)(1) was enacted, filed suit against the NEA in federal district court after their grant applications were rejected. The complaint alleged that the NEA had violated their First Amendment rights by basing the rejection of their applications on criteria "other than those set forth in the NEA's enabling statute."[11] The artists amended their complaint after Con-

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7. *Id.* at 2172 (emphasis added) (quoting 20 U.S.C. § 951(7) (1965)). Congress gave the NEA "substantial discretion" to award these funds and "identifi[ed] only the broadest funding priorities, including 'artistic and cultural significance, giving emphasis to American creativity and cultural diversity,' 'professional excellence,' and the encouragement of 'public knowledge, education, understanding, and appreciation of the arts.'" *Id.* (quoting 20 U.S.C. § 954(c)(1)-(10) (1965)).

8. Public outrage, in 1989, was directed at the NEA funding of Robert Mapplethorpe's *The Perfect Moment*, which included "homoerotic photographs that several Members of Congress condemned as pornographic," and Jose Serrano's *Piss Christ*, "a photograph of a crucifix immersed in urine." *Id.* (citing 135 Cong. Rec. 9789, 22,372 (1989)).

9. *Id.* at 2171 (alteration in original) (quoting 20 U.S.C. § 954(d)(1) (1990) (amending 20 U.S.C. § 954 (1965))); *see supra* note 2 (providing the relevant text). Congress initially reacted to the works of Mapplethorpe and Serrano "by eliminating $45,000 from the agency's budget, the precise amount contributed to the two exhibits by NEA grant recipients" and by passing an amendment providing that the NEA may not use funds to support works "considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 2172-73 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, 103 Stat. 738, 738-742 (1990)). After a federal district court invalidated this amendment as unconstitutionally vague and the NEA declined to appeal, Congress adopted the "decency and respect" requirement of § 954(d)(1). *See id.* at 2173 (citing Bella Lewitsky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991)).

10. *Finley*, 118 S. Ct. at 2173 (citations omitted).

11. *Id.* at 2174. The four applicants, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, also alleged that the NEA "had breached the confidentiality of their grant applications through the release of quotations to the press, in violation of the Privacy Act of 1974." *Id.* (citing 5 U.S.C. § 552(a) (1974)).

gress enacted § 954(d)(1) to challenge the provision "as void for vagueness and impermissibly viewpoint based."[12]

The district court denied the NEA's motion for judgment on the pleadings.[13] The court, however, granted summary judgment in favor of the artists on their claim that the "decency clause" in § 954(d)(1) "is impermissibly vague under the Fifth Amendment Due Process Clause and violates the First Amendment on its face."[14] The court rejected the NEA's argument that they could comply with § 954(d)(1) by simply having diverse advisory panels in the selection process.[15] According to the court, "a construction of the decency provision as requiring only the diversification of panel membership would render the 'decency' clause of § 954(d) without legal content."[16] As for the Fifth Amendment vagueness issue, the court concluded that the decency clause did not adequately "notify applicants of what is required of them or . . . circumscribe NEA discretion" and that the clause was therefore inconsistent with the Fifth Amendment's Due Process Clause.[17] The court also found that "the decency clause clearly

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12. *Id.* (citing First Amended Complaint, 1 Record, Doc. No. 16, p.1 (Mar. 27, 1991)). The four artists were also joined by the National Association of Artists' Organizations (NAAO). *See id.*

According to the district court, the amended complaint alleged that the NEA "injured plaintiffs' First Amendment interests by denying their applications because of the content of their past artistic expression and by failing to provide a written statement of reasons for the denial." Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1463 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998).

13. *See Finley*, 795 F. Supp. at 1463-68, 1476. The only claim excepted from the denial of judgment on the pleadings was the "plaintiffs' claim that defendants failed to provide them with a written statement of reasons for the denial . . . ." *Id.* at 1464, 1476. According to the court, the plaintiffs did not provide any authority to support this claim. *See id.* at 1464.

14. *Id.* at 1468, 1476; *see supra* note 3 (providing the relevant text of the First Amendment). The Fifth Amendment Due Process Clause states that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The court stated that the Fifth Amendment Due Process Clause "requires that a statute be sufficiently clearly defined so as not to cause persons 'of common intelligence—necessarily [to] guess at its meaning and [to] differ as to its application.'" *Finley*, 795 F. Supp. at 1471 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

15. *See Finley*, 795 F. Supp. at 1471.

16. *Id.* The court also rejected the NEA's alternative construction, "that 'decency' and 'respect' are factors only to the extent that they are implicit in the assessment of artistic merit," as being contrary to congressional intent. *Id.*

17. *Id.* at 1472; *see supra* note 14 (describing the Fifth Amendment's due process requirements). In reaching this conclusion, the district court adopted the artists' reasoning "that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency.'" *Finley*, 795 F. Supp. at 1471 (quoting Bullfrog Films v. Wick, 646 F. Supp. 492, 505 (C.D. Cal. 1986)).

reaches a substantial amount of protected speech" and therefore violated the First Amendment.[18]

The Ninth Circuit Court of Appeals affirmed the district court's ruling.[19] The court of appeals found that § 954(d)(1) forced the NEA to ensure that grant applications were evaluated according to the "decency and respect" provision which "was enacted to prevent the funding of particular types of art" and that the NEA Chairperson had "no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction."[20] The court concluded that § 954(d)(1) could not be defined objectively, and therefore, the decency and respect clause "gives rise to the danger of arbitrary and discriminatory application."[21] Accordingly, the court held that § 954(d)(1) was void for vagueness under the Fifth Amendment and impermissibly restricted the plaintiffs' First Amendment rights as well.[22] In the alternative, the court held that § 954(d)(1) violated the First Amendment's prohibition against placing content- and viewpoint-based restrictions on protected speech.[23] The court found that the provision "authoriz[ed] viewpoint discrimination, as [an] 'egregious

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18. *Finley*, 795 F. Supp. at 1475-76; *see also supra* note 3 and accompanying text (discussing the First Amendment). After this case, the NEA settled the individual respondents' "statutory and as-applied constitutional claims by paying the amount of the vetoed grants, damages, and attorney's fees." National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2174 (1998) (citing Stipulation and Settlement Agreement, 6 Record, Doc. No. 128, pp.3-5 (June 11, 1993)).

19. *See* Finley v. National Endowment for the Arts, 100 F.3d 671, 683-84 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998).

20. *Id.* at 680.

21. *Id.* at 680-81. The court of appeals reasoned that the clause was "inherently ambiguous" and could vary in meaning among individuals. *Id.* at 680 (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Therefore, the court felt that the provision gave government officials too much power to deny an application simply because it offended that official's subjective beliefs and values. *See id.* at 680-81.

22. *See id.* at 681, 683-84.

23. *See id.* at 681-83. The court felt it was necessary to address this issue because of the dissent's "argument that the government may restrict the content of speech it funds." *Id.* at 681. In his dissent, Judge Kleinfeld acknowledged that "anyone in America . . . has a constitutional right to express himself indecently and offensively" and that indecency is often an effective method for proving a point. *Id.* at 684 (Kleinfeld, J., dissenting). To support this point, the dissent provided a list of supposed indecent works of art ranging from Allen Ginsberg's poetry to Edouard Manet's painting, *The Luncheon on the Grass*. *See id.* He further argued that indecency is often an effective method for proving a point and lauded the First Amendment's protection of such works of art. *See id.* Judge Kleinfeld concluded, however, that just because "offensive or indecent expression cannot be censored does not mean that the government has to pay for it." *Id.* According to the dissent, the NEA provision under consideration does not prohibit "artists from expressing themselves indecently or disrespectfully," which would be unconstitutional; instead, the provision restricts the NEA's actions, which is not unconstitutional. *Id.* at 685.

form of content discrimination'"[24] and that "[b]ecause the government has made no attempt to articulate a compelling interest served by the provision, § 954(d)(1) cannot survive strict scrutiny."[25]

The Supreme Court granted certiorari to consider whether § 954(d)(1) amounted to facially unconstitutional viewpoint discrimination and whether the provision was void for vagueness under the First and Fifth Amendments.[26]

II. LEGAL BACKGROUND

The unconstitutional conditions doctrine was developed by the Supreme Court to "mediate the boundary between constitutional rights and government prerogatives in the areas of spending, licensing, and employment."[27] This doctrine governs the extent to which the government may limit the constitutional rights of individuals who are engaged in governmental programs or who receive governmental benefits.[28] The Supreme Court has gone through two separate stages in their development of an unconstitutional conditions doctrine which can be grouped into "traditional" and "modern" categories. From 1958, when the Supreme Court decided *Speiser v. Randall*,[29] until its 1987 decision in *Regan v. Taxation with Representation of Washington*,[30] the Court articulated a logical and generally consistent unconstitutional conditions doctrine. This doctrine prevented the government from denying benefits to an individual based on their viewpoint,[31] while also affording the government the right to allocate

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24. *Finley*, 100 F.3d at 683 (quoting Rosenberger v. University of Va., 515 U.S. 819 (1995)).

25. *Id.* (footnotes omitted). The court noted that a content-based restriction on speech is presumed unconstitutional and subject to strict scrutiny and that "[to] survive this scrutiny, the government must advance a compelling interest." *Id.* at 681 (citations omitted).

26. *See Finley*, 118 S. Ct. at 2171-72. Although the Court in *Finley* also decided the vagueness issue, it is not particularly relevant to our consideration of the unconstitutional conditions doctrine and it will not be discussed further in this Note. *See id.* at 2179-80.

27. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U. L. REV. 593, 593 (1990).

28. *See id.* at 593 n.2 ("In brief, the doctrine holds that although government may choose not to provide certain benefits altogether, it may not condition the conferral of a benefit, once provided on a beneficiary's waiver of a constitutional right." (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 681 & n.9 (2d ed. 1988))).

29. 357 U.S. 513 (1958).

30. 461 U.S. 540 (1983).

31. *See Speiser*, 357 U.S. at 526; Perry v. Sindermann, 408 U.S. 593, 597 (1972); *Regan*, 461 U.S. at 548. The only exception to this doctrine was that the government could discriminate based on viewpoint if they demonstrated a clear interest in suppressing constitutionally protected speech. *See Speiser*, 357 U.S. at 529.

selectively benefits to organizations when the granting of such benefits was not "aimed at the suppression of dangerous ideas."[32] Since *Arkansas Writers' Project, Inc. v. Ragland*,[33] however, the Court has been far less consistent in its treatment of the unconstitutional conditions doctrine.

A. *Traditional Unconstitutional Conditions Cases: The Development of a Clear Doctrine*

In its first unconstitutional conditions case, *Speiser v. Randall*, the Supreme Court held that a California law requiring veterans to sign a loyalty oath as a prerequisite to receiving tax exemptions amounted to an unconstitutional violation of due process.[34] Articulating a clear unconstitutional conditions doctrine, the Court found that a state could not limit speech *indirectly*, through the denial of benefits, when it did not have the right to regulate such speech *directly*.[35] The indirect regulation of speech, in this case the selective denial of tax exemptions, was held to be unconstitutional because it coerced individuals to refrain from engaging in constitutionally protected speech and was "frankly aimed at the suppression of dangerous ideas."[36] The Court concluded that when a state seeks to deter an individual's right to free speech, "due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition."[37]

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32. *See Regan*, 461 U.S. at 548-50 (noting that "[w]here governmental provision of subsides is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader'" than when "the State attempts to impose its will by force of law" (internal citations omitted) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959); Maher v. Roe, 432 U.S. 464, 476 (1977))).

33. 481 U.S. 221 (1987).

34. *Speiser*, 357 U.S. at 515, 529.

35. *See id.* at 526 (stating that "[i]t is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment" (quoting Bailey v. Alabama, 219 U.S. 219, 239 (1911))). In a concurring opinion, Justice Douglas stated that, "[i]f the Government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second-class citizenship by withholding tax benefits granted others." *Id.* at 536 (Douglas, J., concurring).

36. *Speiser*, 357 U.S. at 519 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)). The Court noted that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the state were to fine them for the speech." *Id.* at 518.

37. *Id.* at 528-29. While the Court did not discuss the circumstances under which a state may inhibit speech, the Court alluded that a state would need a compelling interest. *See id.* at 529 ("The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.").

Less than one year after deciding *Speiser*, in *Cammarano v. United States*,[38] the Court considered whether two Department of Treasury regulations, forbidding businesses from claiming tax exemptions for sums expended for the purpose of lobbying, violated the First Amendment.[39] The Court held that the regulations did not violate the First Amendment, and in reaching this conclusion, the Court clarified *Speiser* by stating that while a governmental entity could not indirectly limit speech through the denial of tax exemptions, individuals had no right to tax exemptions or to any other governmental benefits simply because they were engaging in constitutionally protected activities.[40] The Court reasoned that this case differed from *Speiser* because, in *Cammarano*, the federal government was not penalizing anyone for engaging in a constitutionally protected activity.[41] Instead, because *everyone* engaged in efforts to promote or to defeat legislation was required to pay taxes relating to these activities, the nondiscriminatory denial of a tax deduction for lobbying did not directly or indirectly limit any constitutional rights.[42]

The Court continued to develop their clear unconstitutional conditions doctrine in *Perry v. Sindermann*.[43] In *Perry*, the Court held that the lack of a contractual or of a tenure right to reemployment did not defeat the claim of a college professor that the nonrenewal of his employment contract violated his free speech rights under the First and Fourteenth Amendments.[44] The Court followed their decisions in *Speiser* and in *Cammarano*, reasoning that even though an inherent right to receive a governmental benefit did not exist, a governmental entity could not deny a benefit to an individual simply because he engaged in a constitutionally protected activity.[45] Therefore, if the

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38. 358 U.S. 498 (1959).

39. *See id.* at 512-13.

40. *See id.* at 513 ("Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities out of their own pocket . . . .").

41. *See id.*

42. *See id.* In his concurring opinion, Justice Douglas explained that were the Court to hold these regulations unconstitutional, they would be lending support to the discredited notion that "First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Id.* (citing Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); Follett v. McCormick, 321 U.S. 573, 578 (1944)).

43. 408 U.S. 593 (1972).

44. *See id.* at 599, 602-03.

45. *See id.* at 597 ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person because of his constitutionally protected interests—especially, his interest in freedom of speech.").

professor had been denied further employment for engaging in constitutionally protected speech, the college would be, in effect, "produc[ing] a result which [it] could not command directly," in violation of the First Amendment.[46]

In *Regan v. Taxation With Representation of Washington*,[47] the Court was once again called upon to determine the constitutionality of a federal tax exemption scheme. Furthering its consistent unconstitutional conditions doctrine, the Court ruled that Congress's decision to allow a selective tax subsidy for veterans groups who were engaged in lobbying did not violate the First and Fifth Amendment rights of nonsubsidized entities, even though the subsidy was not extended to other nonprofit organizations engaged in lobbying.[48] The Court first rejected the petitioner's argument that this denial of a tax exemption for other groups engaged in lobbying activities constituted an "unconstitutional condition" as articulated in *Speiser* and in *Perry*.[49] Instead, the majority likened the situation here to the one present in *Cammarano*, reasoning that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity," but has instead simply chosen not to pay for the lobbying efforts of other organizations out of public moneys.[50]

The Court reasoned that this was not a case in which Congress was allocating subsidies in such a way as to "aim[ ] at the suppression of dangerous ideas" because qualified veterans' organizations were entitled to receive an exemption regardless of the "content" of the speech that they might engage in, including lobbying.[51] The Court also indicated that Congress must be given wide discretion in their decisions to grant selective tax benefits, provided that the granting of such benefits is not aimed at the suppression of dangerous ideas.[52] In reaching this conclusion, the Court preserved the distinction between

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46. *Id.* (alteration in original) (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

47. 461 U.S. 540 (1983).

48. *See id.* at 545-48.

49. *See id.* at 545-46.

50. *Id.* at 546.

51. *Id.* at 548-50 (internal quotation marks omitted) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)). Justice Blackmun, in a concurring opinion, agreed with the majority that this tax scheme's discrimination between veterans' organizations and other nonprofit organizations was not based on "the content of their speech." *Id.* at 551 (Blackmun, J., concurring). He also noted, as did the majority, that "a statute designed to discourage the expression of particular views would present a very different question." *Id.* (citing *Regan*, 461 U.S. at 548, 550)

52. *Id.* at 548-49 ("Congressional selection of particular entities or persons for entitlement to this sort of largesse 'is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.'" (quoting United States v. Realty Co., 163 U.S. 427, 444 (1896))).

constitutionally permissible regulations that selectively grant tax benefits to organizations that engage in constitutionally protected speech and those regulations that impermissibly deny tax benefits to an organization *because* they engage in such activities.[53]

B. *Modern Unconstitutional Conditions Cases: An Era of Inconsistencies*

Four years after deciding *Regan*, the Court revisited the unconstitutional conditions doctrine in *Arkansas Writers' Project, Inc. v. Ragland*,[54] where it held that an Arkansas law, which selectively exempted certain types of publications from a generally applicable personal property tax, violated the First Amendment.[55] The Court ruled that because, under the Arkansas law, a magazine's tax status depended entirely on its content and because each magazine was subject to official scrutiny to determine its content, the law in question amounted to an unconstitutional content-based regulation.[56] In so holding, the Court altered its unconstitutional conditions doctrine by extending its analysis of the selective allocation of benefits from simply considering whether a tax exemption discriminates against a particular viewpoint, to whether a tax exemption amounts to discrimination against an entire subject area.[57]

Justice Scalia dissented, arguing that this case was analogous to *Regan* and *Cammarano*, in that the Arkansas legislature had simply decided not to subsidize the exercise of a fundamental right, which did not in itself infringe upon that right.[58] Justice Scalia also reasoned that this tax exemption scheme did not infringe upon any constitu-

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53. *See Regan*, 461 U.S. at 548-49.

54. 481 U.S. 221 (1987).

55. The Arkansas law at issue exempted from the general state sales tax "[g]ross receipts or gross proceeds derived from the sale of newspapers . . . and religious, professional, trade, and sports journals and/or publications printed and published within [the state of Arkansas]." *Id.* at 224 (first alteration in original) (internal quotation marks and citations omitted) (citing ARK. CODE ANN. §§ 84-1904(f), (j) (1980)).

56. *See id.* at 230.

57. *See id.* The Court stated:

> Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular views by specific [publications] . . . . The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

Id. (internal citations omitted) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980)) (citing FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984); Metromedia, Inc. v. San Diego, 453 U.S. 400, 518-19 (1981) (plurality opinion); Cavey v. Brown, 447 U.S. 455, 462 n.6 (1980)).

58. *See id.* at 236 (Scalia, J., dissenting) (citing Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983)).

tional rights because it did not have "significant coercive effect."[59] Justice Scalia did concede, however, that a different result might be reached where "the subsidy pertains to *the expression of a particular viewpoint* on a matter of political concern."[60]

In its next unconstitutional conditions case, *Rust v. Sullivan*,[61] the Court considered a First Amendment challenge to several Department of Health and Human Services (HHS) regulations that prohibited Title X family planning funds[62] from being used for counseling that advocated abortion as a method of family planning.[63] The Court rejected this challenge, holding that the HHS regulations did not violate the First Amendment by impermissibly discriminating on the basis of viewpoint because they only prohibited family planning projects that received federal funds from discussing abortion as a viable family planning option.[64] Determining that "there is a basic difference between direct state interference with a protected activity and encouragement of an alternative activity,"[65] the Court stated that the government "may 'make a value judgment favoring childbirth over abortion, . . . and [may] implement this judgment through the allocation of public funds.'"[66] The Court explained that forbidding doctors

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59. *Id.* at 237. Justice Scalia argued that it was "implausible" that a generally applicable sales tax, "with a few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting," the publications at issue in this case. *Id.*

60. *Id.* (emphasis added).

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

62. According to the Court, Title X of the Public Health Service Act granted authority to the Secretary of HHS to "make grants to and to enter into contracts with . . . entities to assist in the establishment and operation of voluntary family planning projects" but required that no Title X funds be provided for use "in programs where abortion is a method of family planning." *Id.* at 178 (quoting 42 U.S.C. §§ 300a-4a-6 (1970)).

63. *See id.* at 179, 181. The regulations at issue here attached three conditions to the receipt of Title X funds by a family planning project. First, the project could not provide counseling concerning the use of abortion as a method of family planning or provide referrals for abortions as a method of family planning. *See id.* at 179 (citing 42 C.F.R § 59.8(a)(1) (1989)). Second, the regulations prohibited a project receiving Title X funds from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning.'" *Id.* at 180 (quoting 42 C.F.R. § 59.10(a)). Finally, a Title X project would have to be organized in such a manner as to be "'physically and financially separate' from prohibited abortion activities." *Id.* (quoting 42 C.F.R. § 59.9).

64. *See id.* at 192, 203.

65. *Id.* at 193.

66. *Id.* at 192-93 (first alteration in original) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). Justice Rehnquist, writing for the majority, concluded that because due process grants no affirmative right to governmental aid, even if necessary to secure life, liberty, or property, the government has no constitutional duty to subsidize activities related to abortion simply because the act is a constitutionally permissible one. *See id.* at 201 (citation omitted). The dissent argued that this conclusion was flawed and, citing *Regan* and *Cammarano*, determined that the Title X regulations were not constitutional because they "discriminate[d] invidiously . . . in such a way as to aim[ ] at the suppression of dangerous

who receive Title X funds from discussing abortion as a family planning option did not constitute viewpoint discrimination, but was merely the government's choice to "fund one activity to the exclusion of the other."[67] The Court rejected analogies to its *Arkansas Writers' Project* decision, stating that the present case did not involve the "singling out [of] a disfavored group on the basis of speech content, but [was] a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."[68]

In a strongly worded dissent, Justice Blackmun, joined by two other justices,[69] criticized the majority's position, asserting that "[u]ntil today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds."[70] Blackmun, citing the "explicitly viewpoint based" language of the regulations, concluded that "[w]hatever may be the Government's power to condition the receipt

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ideas." *Id.* at 208 (Blackmun, J., dissenting) (alteration in original) (quoting Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959))). Justice Blackmun stated that "[b]y refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion, the Government plainly has targeted a particular viewpoint." *Id.* at 210.

67. *Rust*, 500 U.S. at 193. The majority further explained that if it was to hold that the Government has unconstitutionally discriminated on the basis of viewpoint when it "chooses to fund a program dedicated to advance certain goals, because the program in advancing those goals necessarily discourages alternative goals, numerous Government programs would be rendered constitutionally suspect." *Id.* at 194. Furthermore, according to the majority, such a holding would essentially require the Government to "subsidize analogous counterpart rights" whenever it wished to subsidize any one protected right, a proposition that the Court "has soundly rejected." *Id.* (citing Regan v. Taxation with Representation, 461 U.S. 540 (1983); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977)).

68. *Id.* at 194-95; *see also supra* notes 43-50 (discussing the *Arkansas Writers' Project* decision). The Court also justified its holding by stating that "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in . . . *Regan*, not denied it the right to engage in abortion-related activities." *Id.* at 198. But in determining that Congress is not forbidding a doctor from discussing abortion when consulting clients outside of the scope of Title X funding, the Court never mentioned their consideration of a similar issue discussed in *Arkansas Writers' Project*, where the majority stated that, "[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987). In reaching this conclusion, the Court also cited its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, where it stated that "[w]e are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means." 425 U.S. 748, 757 n.15 (1976).

69. Justice Blackmun's *Rust* dissent was joined by Justices Marshall and Stevens. Justice O'Connor joined part of Blackmun's dissent, but did not join in his assessment of the unconstitutional conditions doctrine. *See Rust*, 500 U.S. at 203-04.

70. *Id.* at 207 (Blackmun, J., dissenting).

of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech."[71] The dissent also criticized the majority's conclusion that the regulations were constitutional because they merely represented Congress's choice to "fund one activity to the exclusion of the other," arguing that "there are some bases upon which the government may not rest its decision to fund or not to fund."[72]

In its most recent unconstitutional conditions decision, *Rosenberger v. Rector and Visitors of University of Virginia*,[73] the Supreme Court, by a bare majority, held that a state university's funding guidelines that denied generally available student activity funds to organizations engaged in "religious activities" violated the First Amendment.[74] The Court rejected the state's argument that the university guidelines discriminated on the basis of content, rather than on the basis of viewpoint. The Court relied on the fact that the University permitted funding when religion was discussed as "subject matter," but denied funding for "those student journalistic efforts with religious editorial viewpoints."[75] Rather than attempting to follow the unconstitutional

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71. *Id.* (citing Speiser v. Randall, 357 U.S. 513, 518-19 (1958)). Justice Blackmun went on to state that "[a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a law . . . abridging the freedom of speech." *Id.* at 208 (quoting FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 546 (1980) (Stevens, J., concurring))). In a separate dissent, Justice Stevens discussed the language of the controlling statute for Title X funding, the Family Planning Services and Population Research Act of 1970, and determined that the statute was "directed at conduct, rather than the dissemination of information or advice." *Id.* at 220-23 (Stevens, J., dissenting).

72. *Id.* at 210 (Blackmun, J., dissenting). Justice Blackmun noted that just as the Court would not allow funding decisions to be based upon the race of an applicant, "our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions." *Id.* at 210-11.

73. 515 U.S. 819 (1995).

74. *Id.* at 824-25, 837. The University defined "religious activity" as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825 (alteration in original) (citation omitted).

75. *Id.* at 831. The majority explained:

> Religion 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. The prohibited perspective, not the general subject matter, resulted in the refusal to make . . . payments, for the subjects discussed were otherwise within the approved category of publications.

Id.

Although the Court found that *viewpoint* discrimination had occurred in this particular case, it never defined exactly what constituted content, versus viewpoint, discrimination. The closest the majority came to defining this distinction was when they stated that "discrimination against one set of views or ideas is but a subset or particular instance of the

conditions principles enunciated in *Arkansas Writers' Project* and in *Rust*, the Court created a new standard, holding that when the government is acting as speaker or is subsidizing the transmittal of a governmental message, it may make content and viewpoint-based choices, but when the government expends funds to "encourage a diversity of views from private speakers," it may not discriminate based on viewpoint.[76] In adopting this new test, the Court further explained that when allocating funds to "encourage a diversity of views," the limited availability of those funds would not justify discrimination based on viewpoint.[77] Applying this test to the University's funding program, the Court determined that the University was not attempting to transmit its own message through the program, but was instead "encourag[ing] a diversity of views from private speakers."[78] Therefore, the University, "having offered to . . . [subsidize student organizations] on behalf of private speakers who convey their own message," could not "silence the expression of selected viewpoints."[79]

In a lengthy dissent, Justice Souter, joined by three other justices,[80] disagreed with the majority's conclusion that the University's funding guidelines constituted viewpoint discrimination.[81] Souter argued that the issue of whether a governmental regulation creates a distinction based on viewpoint "turns on whether the burden on speech is explained by reference to the viewpoint" and not "whether the . . . regulation happens to be applied to a speaker who seeks to advance a particular viewpoint."[82] Accordingly, Souter reasoned, "the

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more general phenomenon of content discrimination." *Id.* at 830-31 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)). The Court admitted, however, that "the distinction is not a precise one." *Id.* at 831.

76. *Id.* at 833-34 (stating that "when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes," but that "viewpoint-based restrictions are [not] proper when the [government] 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" (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

77. *Id.* at 835 ("The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.").

78. *Id.* at 834-35. In arriving at this conclusion, the Court considered as important the fact that the University required each student group to sign an agreement that declares that the group is not an agent of the University and is not subject to its control. *See id.* at 835.

79. *Id.* at 835.

80. Souter's dissent was joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 863 (Souter, J., dissenting).

81. *See id.* at 895 ("There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to [petitioner's organization].").

82. *Id.* at 893 (citing Cornelius v. NAACP, 473 U.S. 788, 806 (1985)). To explain this concept, Souter provided the example of a city enforcing its excessive noise ordinance by "pulling the plug on a rock band using a forbidden amplification system." *Id.* at 894. Such

prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate" by "allow[ing] one message while prohibiting the messages of those who can be reasonably expected to respond."[83] Souter found that because the University's guidelines denied funds to all groups that expressed views on the merits of religion, the guidelines did not amount to viewpoint discrimination.[84] The dissent concluded by stating that if these funding guidelines constituted viewpoint discrimination, then "the Court has all but eviscerated the line between viewpoint and content."[85]

III. THE COURT'S REASONING

In *National Endowment for the Arts v. Finley*,[86] the Court held that the "decency and respect" criteria of § 954(d)(1) was facially valid because the provision did not sufficiently compromise First Amendment rights and that the government may allocate competitive funding according to criteria that would be impermissible if "direct regulation of speech or a criminal penalty [was] at stake."[87] Writing for the majority, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Breyer, and Ginsburg,[88] initially noted that because the respondents had raised a facial constitutional challenge to § 954(d)(1), they confronted a "'heavy burden' in advancing their claim"[89] and that to prevail, the respondents would be required to "demonstrate a substantial risk that application of the provision will lead to the suppression of speech."[90] Examining § 954(d)(1), the Court agreed with the NEA that the provision was "merely hortatory" and simply added "considerations" to the grant-making process and that the provision did not "preclude awards to projects that might be

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an action would not constitute viewpoint discrimination simply because the rock band was using its equipment to "espouse antiracist views." *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

83. *Id.* (citing United States v. KoKinda, 497 U.S. 720, 736 (1990) (plurality opinion); First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978); Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976)).

84. *See id.* at 895-86.

85. *Id.* at 898.

86. 118 S. Ct. 2168 (1998).

87. *Id.* at 2179-80.

88. *Id.* at 2171. Justice Ginsburg joined the majority's opinion except for Part II.B, in which the Court suggested that the constitutionality of 954(d)(1) could also be explained as a legitimate choice by Congress to fund selectively a program to encourage certain activities without funding alternative programs. *See id.* at 2179-80 (citing Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

89. *Id.* at 2175 (quoting *Rust*, 500 U.S. at 183).

90. *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

deemed 'indecent' or 'disrespectful,' or even specify that those factors must be given any particular weight in reviewing an application."[91] The Court also considered the "political context surrounding the adoption of the 'decency' and 'respect' clause," and determined that it was inconsistent with the respondents' argument that § 954(d)(1) compelled the denial of grants based on viewpoint.[92] Based on this determination, the Court concluded that there was no realistic danger that the "decency" and "respect" criteria of § 954(d)(1) would "compromise First Amendment values" because the criteria "do[es] not silence speakers by *expressly* 'threaten[ing] censorship of ideas.'"[93] The Court then proceeded to further justify their finding that a clear penalty did not exist in § 954(d)(1) by stating that because people would generally not agree as to what constitutes "decency" and "respect," "the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views."[94]

The majority also rejected the respondents' reliance on *Rosenberger*, asserting that the NEA grant-making process was distinguishable from the facts of *Rosenberger* on account of the "competitive process according to which [NEA] grants are allocated."[95] The majority explained that unlike the situation in *Rosenberger*, in the context of arts funding, the "Government does not indiscriminately 'encourage a diversity of views from private speakers.'"[96] Therefore, the majority reasoned that the NEA's mandate to make content-based judgments concerning the "artistic excellence" of applications set it apart from the subsidy considered in *Rosenberger*, which was made generally available to all student organizations.[97]

Finally, the majority noted that although the "First Amendment certainly has application in the subsidy context," the government may

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91. *Id.* The Court justified this interpretation by stating that "when Congress . . . has intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms." *Id.* at 2176 (citing 20 U.S.C. § 954(d)(2) (1990)). The Court did not pass judgment on the NEA's determination that § 954(d)(1) could be "adequately implemented . . . merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications." *Id.* at 2175 (citations omitted).

92. *Id.* at 2176.

93. *Id.* (alteration in original) (emphasis added) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 393 (1992)).

94. *Id.* at 2177.

95. *Id.* at 2178; *see also supra* notes 73-84 and accompanying text (examining the facts and issues in *Rosenberger*).

96. *Finley*, 118 S. Ct. at 2178 (quoting Rosenberger v. University of Va., 515 U.S. 819, 834 (1995)).

97. *See id.* (citing *Rosenberger*, 515 U.S. at 824).

"distribute competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[98] Quoting *Rust v. Sullivan*, the Court stated that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[99] In so deciding, the majority noted that "the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[100]

In a concurring opinion, Justice Scalia, joined by Justice Thomas, attacked the majority for essentially "sustain[ing] the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it."[101] Justice Scalia argued that § 954(d)(1) constituted viewpoint discrimination because the "decency and respect" provision, if it meant anything, would require at least that NEA grant applications displaying decency and respect would be favored over those that did not.[102] Holding true to his *Arkansas Writers' Project* dissent, however, Justice Scalia argued that because the First Amendment has no application to government funding decisions, Congress has every right to fund selectively speech that it deems to be in the public interest, regardless of whether such funding involves viewpoint discrimination.[103]

Filing the lone dissent, Justice Souter took issue with the majority's conclusion, finding that "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas."[104] Responding to the Court's finding that the "decency and respect" provision is so illusive that it could not have the practical effect of "preclud[ing] or punish[ing] the expression of

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98. *Id.* at 2179.

99. *Id.* (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)); *see also supra* notes 61-72 (discussing the facts and issues in the *Rust* decision).

100. *Finley*, 118 S. Ct. at 2179 (quoting *Rust*, 500 U.S. at 193) (citing Maher v. Roe, 432 U.S. 464 (1977)).

101. *Id.* at 2180 (Scalia, J., concurring). Justice Scalia began his opinion by remarking of the Court's decision: "[t]he operation was a success, but the patient died." *Id.*

102. *See id.* at 2181. Justice Scalia noted, in a footnote, that he believed that the statute should be upheld regardless of whether it constituted content or viewpoint discrimination, and therefore he "pass[ed] over this conundrum and assum[ed] the worst." *Id.* at 2181 n.1.

103. *See id.* at 2182-84. Justice Scalia argued that because the First Amendment only prohibits those government actions that abridge freedom of speech, it does not apply to those instances where Congress merely *refuses to fund* constitutionally protected speech. *See id.*

104. *Id.* at 2185 (Souter, J., dissenting) (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

particular views,"[105] Souter stated that regardless of whether the standards are imprecise, "the First Amendment has never been read to allow the government to rove around imposing general standards of decency."[106] Souter justified this statement by asserting that "'general standards of decency' are quintessentially viewpoint based: they require discrimination on the basis of conformity with mainstream mores."[107] Souter also disagreed with the Court's reading of the legislative history of § 954(d)(1), citing the statements of several members of Congress who suggested that the provision would prevent public funds from being spent on art deemed "indecent" or "disrespectful."[108] Souter then attacked the majority's conclusion that regardless of the presence of viewpoint discrimination, "there is no constitutional issue here because government arts subsidies fall within a zone of activity free from First Amendment restraints."[109] He argued that *Rosenberger* was clearly controlling and that under *Rosenberger*, § 954(d)(1) constituted unconstitutional viewpoint discrimination because the funding of the arts, through the NEA, is more appropriately characterized as "encourag[ing] a diversity of views from private speakers," rather than the state "disburs[ing] public funds to private entities to convey a governmental message."[110]

IV. ANALYSIS

In *Finley*, the Supreme Court has extended its modern unconstitutional conditions doctrine. In the process, the Court has provided Congress with a method of employing selective grants as a means of limiting speech and of suppressing First Amendment rights. These results were a direct outcome of the Court's implausible construction of § 954(d)(1), abandonment of precedent with regard to viewpoint discrimination, and misapplication of the standards articulated in *Rust* and *Rosenberger*.

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105. *Id.* at 2177.

106. *Id.* at 2187.

107. *Id.*

108. *Id.* at 2186.

109. *Id.* at 2190.

110. *Id.* at 2191 (quoting Rosenberger v. University of Va., 515 U.S. 819, 833-34 (1995)). *But see Finley*, 118 S. Ct. at 2178 (distinguishing *Rosenberger* from the case at hand); *supra* notes 95-97 and accompanying text (noting the *Finley* majority's rejection of the Respondents' reliance on *Rosenberger*). *See also supra* notes 73-84 and accompanying text (explaining the facts and issues in the *Rosenberger* decision).

A. *Implausible Construction of § 954(d)(1)*

Even before analyzing the impact of the "decency and respect" provision in the context of the unconstitutional conditions doctrine, the Supreme Court advocated an implausible construction of § 954(d)(1) by determining that this provision is only a "consideration" and "does not preclude awards to projects that might be deemed indecent or disrespectful . . . or even specify that those factors must be given any particular weight in reviewing an application."[111] The Court's conclusion ignores the fact that the language of § 954(d)(1), to have any meaning at all, will require that those evaluating NEA grant applications, in every instance, give preference to applicants whose work promotes "general standards of decency and respect for the diverse beliefs and values of Americans" over those that do not.[112] If no preference need be shown for "decent and respectful" art, then the language of § 954(d)(1) has no legal effect whatsoever because it does not actually require anything.[113] To conclude that this result is what Congress intended is not only illogical, but contrary to a variety of statements made in the course of the legislative effort to pass § 954(d)(1).[114] Although the majority avoided deciding the issue, it is

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111. *Finley*, 118 S. Ct. at 2175; *see* text accompanying *supra* note 87.

112. *See Finley*, 118 S. Ct. at 2181 (Scalia, J., concurring) (agreeing with the majority that § 954(d)(1) "'imposes no categorical requirement' . . . in the sense that it does not require the denial of all applications that violate general standards of decency or exhibit disrespect for the diverse beliefs and values of Americans" but pointing out that "[t]o the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes" (internal citations omitted)); *id.* at 2189 (Souter, J., dissenting) (arguing that the Court's interpretation of § 954(d)(1) did not amount to a "fair reading" because "it cannot be read as tolerating awards to spread indecency or disrespect, so long as the review panel, the National Counsel on the Arts, and the Chairperson [of the NEA] have given some thought to the offending qualities and decided to underwrite them anyway").

113. *See id.* at 2180 (Scalia, J., concurring) (arguing that the Court's interpretation of § 954(d)(1) effectively guts the provision of its meaning and that "[t]he most avid congressional opponents of the provision could not have asked for more"); *see also* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998) (stating that "it is clear from the language of the statute that 'decency' and 'respect' for diverse beliefs *are* factors to be considered in determining artistic merit," and therefore eligibility for funding).

114. *See* 136 CONG. REC. 28,631 (1990) ("We add to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account on behalf o[f] the American public which sponsors and upholds this agency."); *id.* at 28,624 ("[W]e have added language . . . which underscores that the decisions of artistic excellence *must* take into consideration general standards of decency and respect for the diverse beliefs and values of the American public. Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds" (emphasis added)); *id.* at 28,672 ("I want to reiterate this lest there be any public misunderstanding—

also clear that the mandate of § 954(d)(1) cannot be fulfilled by simply having the NEA staff its review panels with persons representing "various backgrounds and points of view."[115] As Justice Scalia correctly pointed out:

> A diverse panel membership increases the odds that, *if and when* the panel takes the factors into account, it will reach an accurate assessment of what they demand. But it in no way increases the odds that the panel *will* take the factors into consideration—much less *ensures* that the panel will do so, which is the Chairperson [of the NEA's] duty under the statute.[116]

B. *The Abandonment of "Viewpoint Discrimination" Precedent*

The majority erred in its conclusion that the "decency and respect" clause of § 954(d)(1) does not constitute unconstitutional viewpoint-based discrimination. One of the few clear messages that had consistently been conveyed throughout the Court's unconstitutional conditions decisions, including *Speiser*, *Cammarano*, and *Regan*, was that Congress could never discriminate in allocating subsidies in such a way as to aim at the "suppression of dangerous ideas."[117] The Court

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there is new language now in the grant procedure itself which mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded."); *see also Finley*, 118 S. Ct. at 2182 (Scalia, J., concurring) ("It is evident in the legislative history that § 954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as [Serrano and Mapplethorpe's work] . . . [I]t is perfectly clear that the statute was meant to disfavor—that is to discriminate against—such productions."); *id.* at 2189 (Souter, J., dissenting) (noting that according to the author of § 954(d)(1), the decency and respect provision mandates that general standards of decency be accorded). *But see Finley*, 118 S. Ct. at 2176 (asserting that the "political context surrounding the adoption of the 'decency and respect' clause is inconsistent with respondents' assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria").

115. *See id.* at 2181 (Scalia, J., concurring) (suggesting that this method of compliance "is so obviously inadequate that it insults the intelligence"); *id.* at 2189 (Souter, J., dissenting) (asserting that "it defies the . . . plain language [of § 954(d)(1)] to suggest that the NEA complies with the law merely by allowing decency and respect to have their way through the subconscious inclinations of panel members" because "taking into consideration is a conscious activity" and even if this method of compliance was sufficient, it "would merely mean that the selection for decency and respect would occur derivatively through the inclinations of the panel members, instead of directly through the intentional application of the criteria" and would still constitute impermissible viewpoint discrimination).

116. *Id.* at 2181 (Scalia, J., dissenting).

117. *See* Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (suggesting that the case would be decided differently if Congress were to allocate subsidies "in such a way as to 'aim at the suppression of dangerous ideas'" (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959))); *Cammarano*, 358 U.S. at 513 (stating that "nondiscriminatory denial of deduction from gross income [is valid because it is] . . . plainly 'not aimed

even stated, just three years before deciding *Finley*, that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[118]

Comparing the statute in question with others that have been invalidated by the Court, the majority distinguished § 954(d)(1) by stating that the provision does not reach the threshold required to constitute viewpoint discrimination because § 954(d)(1) merely adds "considerations" to the grant-making process,[119] and because "one 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."[120] Even assuming that these determinations are correct, they do not support the Court's conclusion that § 954(d)(1) does not constitute viewpoint discrimination.[121] Although § 954(d)(1) may not absolutely compel the denial of NEA funding for artworks considered "indecent" or "disrespectful" by the NEA reviewing authorities, the fact that art deemed to be "indecent" or to be "disrespectful" must be disfavored to some extent is enough,[122] under the Court's various unconstitutional conditions pronouncements, to brand the provision as viewpoint discrimination.[123] In his dissent, Justice Souter aptly

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at the suppression of dangerous ideas'" (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958))); *Speiser*, 357 U.S. at 519 (stating that in *Speiser* the denial of a tax exemption is invalid because it "is frankly aimed at the suppression of dangerous ideas" (quoting American Communication Ass'n v. Douds, 339 U.S. 382, 402 (1950))).

118. Rosenberger v. University of Va., 515 U.S. 819, 829 (1995) (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).

119. *See Finley*, 118 S. Ct. at 2175.

120. *Id.* at 2176.

121. *See id.* at 2189 (Souter, J., dissenting) ("[E]ven if I found the Court's view of 'consideration' plausible, that would make no difference at all on the question of constitutionality.").

122. *See supra* notes 111-114 and accompanying text (discussing why the majority's conclusion that § 954(d)(1) did not compel the NEA to give any particular weight to considerations of "decency and respect" was erroneous).

123. *See, e.g.*, *Rosenberger*, 515 U.S. at 828-30 (stating that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant" and that the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983))); *see also id.* at 894 (Souter, J., dissenting) ("Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can be reasonably expected to respond" (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978); Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976); United States v. KoKinda, 497 U.S. 720, 736 (1990))).

pointed out the inherent flaw in the majority's reasoning by posing a compelling question:

> What if the statute required a panel to apply criteria "taking into consideration the centrality of Christianity to the American cultural experience," or "taking into consideration whether the artist is a communist," or "taking into consideration the political message conveyed by the art," or even "taking into consideration the superiority of the white race"? Would the Court hold these considerations facially constitutional merely because the statute had no requirement to give them any particular, much less controlling, weight? I assume not.[124]

For similar reasons, the Court's conclusion that § 954(d)(1) will not result in viewpoint discrimination because "the considerations enumerated in § 954(d)(1) [are] susceptible to multiple interpretations"[125] is unconvincing.[126] The fact that "decency and respect" are interpreted differently by a variety of people only means that a wider range of viewpoints is subject to suppression, not that viewpoint discrimination will be lacking.[127] As *Rosenberger* explicitly stated, the "exclusion of several views on [any particular] problem is just as offensive to the First Amendment as exclusion of only one."[128]

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124. *Finley*, 118 S. Ct. at 2189-90 (Souter, J., dissenting). Justice Scalia also provided a hypothetical that effectively questions the merit of the majority's reasoning on this issue. Scalia stated that the conclusion that § 954(d)(1) constitutes viewpoint discrimination

> is not altered by the fact that the statute does not 'compel' the denial of funding any more than a provision imposing a five-point handicap on all black applicants for civil service jobs is saved from being race discrimination by the fact that it does not compel the rejection of all black applicants.

Id. at 2181 (Scalia, J., concurring) (internal citations omitted) (quoting *Finley*, 118 S. Ct. at 2176).

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

126. *See id.* at 2181-82 (Scalia, J., concurring) (asserting that "the conclusion of viewpoint discrimination is not affected by the fact that what constitutes 'decency' or 'the diverse beliefs and values of the American people' is difficult to pin down" (quoting *Finley*, 118 S. Ct. at 2176)).

127. *See id.* at 2188 (Souter, J., dissenting) ("The fact that [§ 954(d)(1)] . . . disfavors art insufficiently respectful of America's 'diverse' beliefs and values [does not alter the conclusion that it constitutes viewpoint discrimination] . . . the First Amendment does not validate the ambition to disqualify many disrespectful viewpoints instead of merely one." (citing *Rosenberger*, 515 U.S. at 831-32)). In advancing its argument, the Court appeared to suggest that § 954(d)(1) cannot be labeled as viewpoint discrimination because it is impossible to determine *exactly* what viewpoint is being disfavored. The Court, however, has never insisted upon such a rigorous determination in assessing viewpoint discrimination in the context of government subsidies. *See Rosenberger*, 515 U.S. at 831 (expressing some difficulty in labeling "religious thought" as a particular viewpoint or broad subject matter, but making no effort to define exactly what constitutes a religious viewpoint).

128. *Rosenberger*, 515 U.S. at 831.

These distinctions lead the Court to conclude that regardless of what limitations are placed on artists seeking NEA funding, the fact that § 954(d)(1) does not "expressly threaten [the] censorship of ideas," is sufficient proof that the provision will not compromise any First Amendment values.[129] In adopting the "express" censorship threshold for determining whether a statute is unconstitutionally viewpoint-based,[130] the majority created a backdoor method for the government to tread on the First Amendment rights of the recipients of governmental benefits. This new standard implicitly gives the Congress carte blanche to discriminate against individual viewpoints, provided that they do so in such broad terms that the specific speech they are trying to suppress is not absolutely clear on its face or provided they do so in a way that may be "susceptible to multiple interpretations."[131] Although the majority in *Finley* might respond that an *as applied* challenge would be viable if a governmental entity uses the challenged law or regulation to actually engage in viewpoint discrimination,[132] it may be difficult, if not impossible, to prove successfully such discrimination when the entity is making funding determinations based on subjective criteria.[133] To avoid judicial scrutiny, a governmental entity could simply explain that their decision not to fund a particular project or activity was the result of a permissible subjective content-based decision, rather than an impermissible viewpoint-based decision.

C. *Misapplication of the* Rust *and* Rosenberger *Standards*

In addition to misconstruing the language of § 954(d)(1), the *Finley* Court also misapplied the Court's unconstitutional conditions

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129. *See Finley*, 118 S. Ct. at 2176.

130. *See supra* notes 90-94 and accompanying text (discussing the Court's "express" censorship determination).

131. *See Finley*, 118 S. Ct. at 2177.

132. *See id.* at 2178. The Court explained:

> If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas."

Id. (alteration in original) (quoting Regan v. Taxation with Representation, 461 U.S. 540, 550 (1982)).

133. Such is the case with the NEA, where, under § 954(d)(1), "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1) (1994). Because this provision allows the NEA to base funding decisions on subjective criteria, any "as applied" challenge to § 954(d)(1) could be quashed by the NEA, should they justify their funding decision based on general standards of "excellence" rather than on a failure to meet the "decency and respect" requirement.

doctrine by failing to apply the proper *Rosenberger* standards and by misapplying the doctrine enunciated in *Rust*. Attempting to justify upholding § 954(d)(1) by distinguishing *Finley* from *Rosenberger*, the Court stated that in arts funding, "in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers.'"[134] The Court's cramped application of *Rosenberger*, however, is unconvincing. Although the Court recognized that "the scarcity of NEA funding does not distinguish this case from *Rosenberger*," it incorrectly concluded that the "competitive process according to which the grants are allocated does."[135] The NEA's competitive process is simply the manner in which it disperses scarce funds. The definitive constitutional question is not whether the process is "competitive," but whether the process employs "some acceptable neutral principle" in allocating funds.[136]

The *Finley* majority seemed to suggest, through its *Rosenberger* analysis, that the type of subsidization present here falls under the "government as speaker" category set forth in *Rosenberger*.[137] Under the actual *Rosenberger* test, however, the NEA funding process is more appropriately placed in the category of "expend[ing] funds to encourage a diversity of views from private speakers" rather than that of government speaking on its own behalf.[138] A brief glance at the NEA enabling statute demonstrates that the National Endowment for the Arts was never intended to be a tool of Congress for the expression of

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134. *Finley*, 118 S. Ct. at 2178 (quoting *Rosenberger*, 515 U.S. at 834); *see supra* notes 76-77 and accompanying text (discussing the test formulated in *Rosenberger* that distinguishes between instances where the government is speaking on its own behalf and those where it is "expending funds to encourage a diversity of views from private speakers").

135. *See Finley*, 118 S. Ct. at 2178; *id.* at 2192 (Souter, J., dissenting) (arguing that *Rosenberger* "anticipated and specifically rejected this distinction when it held in no uncertain terms that '[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity'" (alteration in original) (quoting *Rosenberger*, 515 U.S. at 835)).

136. *See id.* at 2192 (Souter, J., dissenting) ("Scarce money demands choices, of course, but choices 'on some acceptable [viewpoint] neutral principle,' like artistic excellence and artistic merit . . . ." (alteration in original) (quoting *Rosenberger*, 515 U.S. at 835)); *Rosenberger*, 515 U.S. at 835 (recognizing that when allocating scarce resources, it is "incumbent on the State . . . to ration or allocate the scarce resources on some acceptable neutral principle").

137. *See Finley*, 118 S. Ct. at 2190 (Souter, J., dissenting) ("A second basic strand in the Court's treatment of today's question . . . in effect assumes that whether or not the statute mandates viewpoint discrimination, there is no constitutional issue here because government art subsidization falls within a zone of activity free from First Amendment restraints." (internal citations omitted)).

138. *See Finley*, 118 S. Ct. at 2191 (Souter, J., dissenting) ("The NEA, like the student activities fund in *Rosenberger*, is a subsidy scheme created to encourage expression of a diversity of views from private speakers.").

government ideals, nor was it enlisted to convey a government message; rather, the NEA was created to "help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry."[139] Because the NEA's purpose is to encourage a diversity of ideas and views, when considering whether the government is acting as speaker, it matters not that the funds are derived from the coffers of Congress; and as Justice Souter wrote, "[t]he Government freely admits . . . that it neither speaks through the expression subsidized by the NEA, nor buys anything for itself with NEA grants."[140]

While failing to apply the proper *Rosenberger* standards in *Finley*, the Court also misapplied its unconstitutional conditions standards enunciated in *Rust*. Writing for the majority in *Finley*, Justice O'Connor cited *Rust v. Sullivan* in determining that Congress may selectively fund a program to encourage certain activities without funding any alternative programs.[141] But, as pointed out by the majority in *Rosenberger*, in *Rust*, 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."[142] Even in *Rust* itself, the Court stated that "[we do not] suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."[143] Because the language of the NEA enabling statute makes it clear that the purpose of the grant program is to encourage a diversity of ideas,[144] *Rust* adds nothing to the Court's analysis, as its reasoning was limited by *Rosenberger* to situations where the state speaks on its own behalf or "when it enlists private entities to convey its own message."[145]

Rosenberger should have been the controlling case in *Finley*.[146] In *Rosenberger*, the Court found that

> [t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not

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139. 20 U.S.C. § 951(7) (1994); *see also* H.R. REP. No. 99-274, at 13 (1985) ("[NEA] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free"); H.R. REP. No. 300, at 4 (1965) (maintaining "that the intent of this act should be the encouragement of free inquiry and expression").

140. *Finley*, 118 S. Ct. at 2190 (Souter, J., dissenting) (internal footnotes omitted).

141. *See Finley*, 118 S. Ct. at 2179.

142. *Rosenberger*, 515 U.S. at 833.

143. Rust v. Sullivan, 500 U.S. 173, 199 (1991).

144. *See supra* note 139 and accompanying text.

145. *Rosenberger*, 515 U.S. at 833; *see supra* note 142 and accompanying text.

146. *See Finley*, 118 S. Ct. at 2191 (Souter, J., dissenting) ("*Rosenberger* controls here.").

> they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.[147]

This analysis can easily be extended to *Finley* because "the NEA, like the student activities fund in *Rosenberger*, is a subsidy scheme created to encourage expression of a diversity of views from private speakers."[148] Because the NEA, under § 954(d)(1), was given the power to examine art to determine whether it met the threshold of "decency and respect," and because in NEA funding, the government is not acting as speaker or subsidizing the transmittal of a governmental message,[149] the *Finley* Court was incorrect in failing to apply their *Rosenberger* viewpoint discrimination test to strike down the NEA grant program as unconstitutional.[150]

The outcome of *Finley* is problematic and raises great concern regarding the preservation of a cognizable unconstitutional conditions doctrine. First, while claiming to follow precedent, the Court continued to garble an already inconsistent unconstitutional conditions doctrine. Second, the Court demonstrated its willingness to give great deference to congressional acts that are clearly intended to discriminate based on viewpoint. If what the Court stated in *Finley* is true, then *Rosenberger* only applies to situations where funds are distributed without any sort of competitive process,[151] and the government must "indiscriminately encourage a diversity of views" to remove a funding decision from the "government as speaker" category, where viewpoint discrimination is permissible.[152] This analysis limits the ap-

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147. *Rosenberger*, 515 U.S. at 835.

148. *Finley*, 118 S. Ct. at 2191 (Souter, J., dissenting).

149. *See supra* note 134 and accompanying text.

150. *See Finley*, 118 S. Ct. at 2191-92. Justice Souter stated:

> Given this congressional choice to sustain freedom of expression, *Rosenberger* teaches that the First Amendment forbids decisions based on viewpoint popularity. So 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. It may not use the NEA's purse to "suppres[s] . . . dangerous ideas."

Id. (alteration in original) (quoting Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983)).

151. *See id.* at 2178 (asserting that the competitive process through which the NEA awards its grants distinguishes it from *Rosenberger* because the funds distributed in *Rosenberger* were "available to all student organizations that were 'related to the educational purpose of the University'" (quoting *Rosenberger*, 515 U.S. at 824)).

152. *See id.* (rejecting the respondents' reliance on *Rosenberger* in this case because "in the context of arts funding . . . the Government does not indiscriminately 'encourage a diversity of views from private speakers'" (quoting *Rosenberger*, 515 U.S. at 835)).

plicability of *Rosenberger* to little more than its precise factual situation. This effect alone makes the unconstitutional conditions doctrine more difficult to assess because it severely limits the situations in which the fairly consistent *Rosenberger* reasoning will apply. The Court is now left in the unsavory position of trying to piece together its inconsistent pre-*Rosenberger* decisions along with *Finley* in deciding future unconstitutional conditions cases.[153] While the Court may have achieved their policy goal of allowing § 954(d)(1) to stand, this analysis destroyed any semblance of a cognizable unconstitutional conditions doctrine which may have existed after *Rosenberger*.

The outcome of *Finley* is also problematic because by holding that only those acts of Congress that *expressly* threaten the censorship of ideas will be deemed unconstitutional, the Court implicitly afforded Congress the power to discriminate against an individual group or an individual viewpoint. Certainly, the lack of "directed viewpoint discrimination" should not be conclusive evidence that the allocation of an otherwise viewpoint-based benefit is consistent with the First Amendment. This determination amounts to the Court granting Congress a "violate the First Amendment free" card, provided that Congress is inventive enough to reach their desired ends implicitly, rather than expressly.

The Court could remedy their *Finley* errors by beginning to apply the various unconstitutional conditions tests with consistency and by defining with clarity how they have reached their results. Drawing a clear distinction between content and viewpoint discrimination may be a logical first step in analyzing the propriety of selective governmental funding determinations. Should the Court continue to use this test, it must articulate a clear doctrine governing what constitutes content and viewpoint discrimination, rather than molding individual cases to fit into desired categories.[154] The Court encounters the same problems when attempting to determine when Congress is funding private speech versus when Congress grants funds acting as speaker. Both of these distinctions may be logical, but because the Court has never defined what these terms mean, its unconstitutional conditions decisions now amount to judicial policymaking, with the Court seemingly reaching decisions through a results oriented approach rather

153. *See* discussion *supra* Part II.B (surveying recent cases where the Court has not been entirely consistent in its treatment of the unconstitutional conditions doctrine).

154. *Cf. Rosenberger*, 515 U.S. at 898 (Souter, J., dissenting) (arguing that the Court's conclusion that the regulations at issue amounted to viewpoint discrimination "all but eviscerated the line between viewpoint and content").

than through the application of a cognizable unconstitutional conditions doctrine.

V. CONCLUSION

The Court has demonstrated great difficulty in extending the well articulated traditional unconstitutional conditions doctrine to the modern era of government where legislative bodies use subsidies as informal regulatory tools, as can be seen in the Court's rulings from *Arkansas Writers' Project* to *Finley*. Most difficult for the Court to determine in this modern era are those cases where a determination seems to involve judgments about subject matter or aesthetics, but where the regulation is in fact an effort to control a particular point of view.[155] Unfortunately, the Court has not developed a clear policy for unconstitutional conditions, and the Court's recent cases have highlighted the inevitable problems that arise from a doctrine which allows governmental discretion in creating and in dispersing subsidies,[156] while also attempting to ensure that the government does not use subsidies to engage in viewpoint discrimination through "the suppression of dangerous ideas."[157] The Court's ruling in *National Endowment for the Arts v. Finley* demonstrates that as government continues to allocate funding as an indirect means of regulating individual activities, these two interests will continually conflict with one another, leading to an even greater difficulty in articulating an already garbled unconstitutional conditions doctrine.

HAROLD B. WALTHER

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155. *See* Sunstein, *supra* note 27, at 593. According to Sunstein:

> Many of the most vexing questions in constitutional law result from the rise of the modern regulatory state, which has allowed government to affect constitutional rights, not through criminal sanctions, but instead through spending, licensing, and employment . . . . It is here that constitutional law promises to receive its most serious tests in the next generation.

Id.

156. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program."); Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983) ("Congressional selection of particular entities or persons for entitlement . . . 'is obviously a matter of policy and discretion'" (citations omitted)).

157. Speiser v. Randall, 357 U.S. 513, 519 (1958). *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (alteration in original) (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972))).