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Law and the Ideal Citizen

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The theme identified for this lecture series is the subject of responsibility. I assume Washington and Lee has selected that topic out of a sense that it has not received sufficient attention, as compared, for example, to the subject of "rights." I select "rights" as the counter-example because we often hear of the two in tandem – "rights and responsibilities." As such, the concept of responsibility connotes a sense of obligation as to what is due from us to others and to the community. It is, in that sense, easier to be in favor of rights than it is of responsibility. Rights give us freedom to do as we wish, while responsibilities impose limits or affirmative burdens on us that accompany privileges or benefits we have at our disposal.

I wish to discuss the responsibility side of the ledger, though I think it is described more accurately as the formation of character, of our public intellectual character, to be more precise. Although public life, just like private life, certainly is not made up solely of liberty, or freedom, or rights, public life poses a dilemma of the first order to describe of what that life consists. Many have stumbled when they moved from an analysis of negative liberty into the realm of public duties, and many have stumbled even more in analyzing the intellectual and emotional capacities needed by the democratic citizenry. It is commonplace to say that one may far more easily define the limits of power than to prescribe the nature of its exercise.

Yet, sometimes we find that things are different from what they seem, and what may appear to be the protection of "rights" in fact may be part of a process of defining a social character. This is what I have found after studying the First Amendment over many years. Nearly everyone believes, and they are largely correct in doing so, that the First Amendment is concerned with protecting "rights," or establishing the limits of official censorship with respect to the human behavior known as "speech." In this century, which has been the period in which the modern jurisprudence of freedom of speech and

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press has been formed (the very first Supreme Court cases interpreting the First Amendment not having arisen until 1919[1]), the vast majority of the cases have involved debates over the extent to which the government may prohibit speech because it is dangerously persuasive or offensive. We know, more or less, that the sum of these cases now establishes that speech is protected – even speech advocating illegality or speech that is deeply offensive to our core values (e.g., so-called hate speech) – unless it is just about to cause serious criminal activity or unless it falls within one of the established exceptions to the First Amendment (obscenity, fighting words, libel, etc.). The traditional rationale for this constitutional state of affairs is that such an open, "uninhibited," system is more likely to yield "truth" and good democratic decision-making than a more censored expressive environment.

On a few occasions, both state and federal legislatures and the courts have toyed with the idea of using the First Amendment as a "sword." By saying "sword," these groups mean to use the First Amendment to restrict some speech so that speech opportunities are distributed more "fairly" or evenly. The belief is that the purpose of freedom of speech and press is to preserve an "uninhibited" and "wide-open" "marketplace of ideas," and if prohibiting censorship will not achieve that level of openness because, for example, the economic system distributes wealth in such disparate ways that some citizens as a result will have greater access to the marketplace of ideas than others, then the state (including the courts) should be able to restrict some speech in the effort at creating fair opportunities. At this point, the case law is all over the lot on this perspective of the First Amendment. It is not helpful on this occasion to explore the intricacies and contradictions of this jurisprudence, but the point is worth making that, on a number of occasions, there have been significant efforts to take the rationale for the "right" of freedom of speech and turn it into an instrument for societal reform. "Rights," in that way, can become methods of achieving what have been referred to as "positive liberties."

Now I want to suggest that the First Amendment in particular has been employed not only to preserve, and sometimes to enhance, speech opportunities of citizens but also, in a more complex way, to share or to affect the intellectual character of the society. This additional purpose or function arises from the fact that there are two sides of free speech – the "right" of free speech, which is what we have been talking about, and the "tolerance" of free speech. Although the traditional angle of vision on free speech assumes the goal to be one of protecting the activity of speech against the evils of censorship, it is also possible, and I suggest that it has happened, to envision the goal as one

1. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 618-19 (1919) (addressing First Amendment issues); Frohwerk v. United States, 249 U.S. 204, 206 (1919) (same); Schenk v. United States, 249 U.S. 47, 49 (1919) (same).

of dealing with the problematic nature of mind underlying the act of censorship. It even might be true that the "protected" speech is not worthy of protection in itself but is only a means to another end of promoting a certain capacity through the act of tolerance.

Promoting a certain capacity through the act of tolerance, in my view, has occurred with the principle of freedom of speech when it has involved extremist speech. Another view posits that the protection afforded speech advocating violence, or what now is referred to as hate speech, is a necessary evil required to secure the outer boundaries of free speech against state incursion – a kind of extended fortress that will better guarantee the worthy expression within. Another theme arises in the free speech cases and literature. This theme speaks about the need for a democratic society to develop certain capacities of self-restraint towards undesirable and even bad behavior, which is nicely singled out and tested in this isolated area of speech behavior and achieved through extraordinary toleration. At least three important shifts occur in this perceived meaning of free speech: first, the object of what we are doing changes from preservation of an activity to that of realizing benefits from the reaction to that activity; second, those benefits derive from the fact that at least the reaction, but probably also the speech activity itself, is not unique or distinctive in human affairs but rather illustrative or representative (the lessons learned are therefore transferable to life generally); and third, social life is appropriately organized by designating certain areas, such as speech, in which particular facets of our character are marked for extraordinary testing.

The more closely you look at the free speech jurisprudence, I believe, the more this focus on the development of an underlying intellectual character through the act of extreme tolerance comes to the fore. From the very start, Holmes set the framework for the ensuing discussion by focusing his attention, and thus our attention, on an analysis of the nature of our impulses to censor speech, which involved understanding the roles of belief and doubt in the context of social conflict. He said, in now famous words:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the

> competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[2]

Holmes's approach addressed the "logic" of intolerance; the roots of intolerance in our impulse to believe and to appear to be certain about our beliefs; our efforts at forestalling internal and external doubts about our commitment to our beliefs; the necessity of embracing a posture of self-doubt; and the pragmatic resolution of majority rule. Holmes's lessons have substantive resonance going back to Mill and beyond and going into the future with countless writings about social theory and the origins of totalitarianism. Holmes's lessons are the common ground for the argument for an acceptance of pluralism.

A recent example, outside of the First Amendment context, involves the modern debates over what we call multiculturalism. The essay is by Clifford Geertz and is entitled, "The Uses of Diversity."[3] Geertz's antagonist is Claude Levi-Strauss's lecture given in celebration, as it were, of the inevitability of the benefits of ethnocentrism. According to Geertz, Levi-Strauss had argued that ethnocentrism was "not only not a bad thing, but at least so long as it does not get out of hand, rather a good one."[4] Geertz describes Levi-Strauss's argument as follows: "[L]oyalty to a certain set of values, inevitably makes people 'partially or totally insensitive to other values' to which other people, equally parochial, are equally loyal."[5] Thus, to Levi-Strauss "[i]t is not at all invidious to place one way of life or thought above all others . . . ."[6] For cultures to survive they must "resist the cultures surrounding it," and they must "remain somewhat impermeable toward one another."[7] Therefore, according to Geertz, Levi-Strauss believes that "distance lends, if not enchantment, anyway indifference, and thus integrity."[8]

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2. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

3. Clifford Geertz, *The Uses of Diversity*, *in* SEASONAL PERFORMANCES 36-53 (L. Goldstein ed., 1991).

4. *Id.* at 38.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Geertz says that Levi-Strauss recognizes that this positive ethnocentrism has limits, that "such relative incommunicability" does not authorize anyone to oppress or destroy the values rejected or those who carry them."[9] However, Geertz sees in the Levi-Strauss perspective a disturbing slippage into a state of mind fundamentally at odds with a disposition very much needed in contemporary, and increasingly multicultural, American society.[10] Geertz is all the more troubled by the fact that Levi-Strauss's perspective is seemingly embraced by many others: "[O]ur philosophers, historians, and social scientists [have turned] toward the sort of we-are-we and they-are-they imperméabilité Levi-Strauss recommends."[11] Therefore, what Geertz sees as so problematic is Levi-Strauss's celebration of ethnocentrism going well beyond the issues of multiculturalism; however, Geertz's proposed remedy also goes beyond the issues of multicuturalism.

Just as Holmes pursued a remedy of self-doubt for certitude, along with trust in the marketplace of ideas, so Geertz recommends that we make ourselves more open than our natures might prefer and more open than Levi-Strauss would allow us to indulge. Geertz believes that, in the modern world, the different cultures are blending at such a pace that we need to realize that our own culture gives us only partial insight into what it means to be human. Developing an openness and a receptivity to other ways of life therefore will help us better understand ourselves and the world. Not making this effort, on the other hand, will yield only perpetual hostility and deepening – even "fatal" – conflict. Geertz sees some merit in Levi-Strauss's warning that a love-it-to-death attitude will destroy a beneficial world of difference, contrast, and variety. Yet Geertz warns us to be alert to the opposing, far more serious, risk of the excesses of ethnocentrism and a world full of people happily "apotheosizing their heroes and diabolizing their enemies."[12]

Geertz says an approach of closing off from other beliefs and ways of life will not do. We live now more in a "collage" than ever before and that collage requires a determination to resist the siren song of ethnocentrism.[13] According to Geertz, we have

> come to such a point in the moral history of the world . . . that we are obliged to think about such diversity rather differently than we have been used to thinking about it. If it is in fact getting to be the case that rather than being sorted into framed units, social spaces with definite edges to them, seriously disparate approaches to life are becoming scrambled

9. *Id.*
10. *Id.* at 39.
11. *Id.*
12. *Id.* at 50.
13. *Id.*

> together in ill-defined expanses, social spaces whose edges are unfixed, irregular, and difficult to locate, the question of how to deal with the puzzles of judgment to which such disparities give rise takes on a rather different aspect. Confronting landscapes and still lifes is one thing; panoramas and collages quite another.[14]

For Geertz, the promise of openness and receptivity is advancement of our knowledge and self-understanding. We must not expect complete agreement: "Everyone – Sikhs, Socialists, Positivists, Irishmen – is not going to come around to a common opinion concerning what is decent and what is not, what is just and what is not, what is beautiful and what is not, what is reasonable and what is not; not soon, perhaps not ever."[15] However, "the right posture is not to settle in to your own niche but to be open to the others." We must expand our capacity to relate to the other, to experience the "power of such diversity, when personally addressed, to transform our sense of what it is for a human being, Bororo, Hattite, Structuralist, or Postmodern Bourgeois Liberal, to believe, to value, or to go on . . . ."[16] So Geertz arrives at this conclusion: "The trouble with ethnocentrism is that it impedes us from discovering at which sort of angle, like Forster's Cavafy, we stand to the world; what sort of bat we really are."[17] We therefore need to "feel our way into alien sensibilities, modes of thought . . . we do not possess, and are not likely to" in order to learn more about "what sort of bat we really are."[18]

Geertz's mind follows a close parallel to Holmes's. If you overcome the temptation to sink comfortably into the false certitude of your own beliefs and perspectives, and recognize that you may not know all there is to know and that you still have much to learn, then by adopting a stance of openness and tolerance with respect to those who believe differently from you (either by allowing them to speak or to manifest their cultural values) you will in the end more likely be favored with the truth. If you do not, on the other hand, you risk conflict, violence, and perhaps fatality.[19] This attitude shows how the intellectual character underlying censorship is the same as that behind intolerance generally. As I mentioned earlier, understanding the intellectual character underlying intolerance is relevant to understanding the function of free

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14. *Id.* at 51.
15. *Id.* at 42.
16. *Id.*
17. *Id.* at 43.
18. *Id.*
19. Holmes once wrote, "Pleasures are ultimates, and in cases of difference between ourselves and another there is nothing to do except in unimportant matters to think ill of him and in important ones to kill him." EDMUND WILSON, *Justice Oliver Wendell Holmes, in* PATRIOTIC GORE 762 (1962).

speech as constituting a zone or sphere or human activity in which tolerance is taken to extraordinary lengths. Understanding the character is one means of instructing ourselves about the importance of restraining a pervasive, problematic tendency in social conflict.

It is also worth noting at this point that the problems of belief and certitude transcend not only censorship but also resistance to diversity and multiculturalism. Indeed, this resistance is one of the most commonly cited flaws in the human personality, and its bad consequences range from totalitarianism to unwillingness to compromise in the political process. The breadth of the relationship is a lecture in itself, and I must leave it at that for now.

Now, I would like to focus our attention on a more fundamental problem with the Holmes-Geertz recommendation; namely, we need something far more comprehensive than what they have given us. There is, of course, an inherent appeal to any argument for tolerance. However, a moment's reflection teaches us to be wary of the easy rhetorical advantage to an argument for tolerance. The simple point is that pluralism must have limits. Obviously, we have basic values and moral principles about which we cannot compromise or accept a stance of "pluralism," but the problem of the limits of pluralism is much greater than this. It is not such a bad thing for people to want to pursue their vision of things, even though it conflicts with the visions of others. In a speech to the Federal Bar Association, Learned Hand once warned how tiresome political and social conflict and the allure of trying to escape that conflict by turning over the decisions to a dictator can be. To the person who seeks such an escape Hand says, "look where he will, there are no immutable laws to which he can turn; no not even that in selfless abnegation he must give up what he craves, for life is self-assertion. Conflict is normal; we reach accommodations as wisdom may teach us that it does not pay to fight."[20]

In real life, where the case for pluralism is a good but not exclusive argument, we always are looking for ways and means of resolving our conflicts over how to live. A posture of skepticism or self-doubt will only take you so far. If I acknowledge my own fallibility, I then have to decide what to do with that fact. In its strong form, fallibility is ubiquitous, and I might just as well do as I wish, because no one has more access to the truth than I do. Why should I trust openness or the "marketplace" to yield the truth? Where does the "truth" in that trust come from? Sometimes we seem to think that people who strongly believe in and are committed to their positions best produce truth. How does this fact fit into the notion of self-doubt and spirit of openness? An even deeper objection to the self-doubt plus interest in truth perspective on the world of social conflict is that truth is hardly the only thing

20. Learned Hand, *Democracy: Its Presuppositions and Realities*, 1 Fed. Bar Ass'n J., Mar. 1932, at 40-45.

we seek in life. Even when advancement of knowledge is possible, we do not pay any price to acquire it. Just as important, much of what we search for in life cannot be described as "true" or "false"; rather it is a choice among many choices about how to live, in a world in which only a tiny fraction of available choices about how to live is realistically possible.

We identify all sorts of methods of trying to resolve the dilemma of political conflict. One method that is the simple method of majority rule or some variation on voting majorities. Another method is the famous "harm principle" of John Stuart Mill. Still another is utilitarianism. And so on. None of these rules of resolution answers all the questions we are asking, or should be asking, about what kind of character is required to negotiate our way through political differences. No relationship, political or otherwise, could long survive a simple system of voting without more. The "harm principle" really only speaks to the limits on the power of the majority to restrict the liberty of the minority. The "harm principle" does not say much at all about the myriad choices we make about how to live or, more accurately, about how to live together. The same is true of systems such as utilitarianism, which tend to take our "preferences" as givens and hence say little or nothing about the complex process of mutual engagement that is the stuff of any relationship, personal or political. The character of the relationship matters as well; the character matters enormously.

This is a point where Geertz's essay offers a significant additional dimension to the discussion. To learn just "what sort of bat we really are" Geertz recognizes that more is needed than simply taking a pluralistic, live-and-let-live approach to the new reality of multiculturalism. "To live in a collage," he says, "one must in the first place render oneself capable of sorting out its elements, determining what they are . . . how, practically, they relate to one another, without at the same time blurring one's own sense of one's own location and one's own identity within it."[21] He readily acknowledges that the "difficulty in this is enormous": "Comprehending that which is, in some manner or form, alien to us and likely to remain so, without either smoothing it over with vacant murmurs of common humanity, disarming . . . or dismissing it as charming, lovely even, but inconsequent, is a skill we have arduously to learn, and having learnt it, always very imperfectly, work continuously to keep alive; it is not a connatural capacity, like depth perception or the sense of balance, upon which we can complacently rely."[22]

Risking embarrassment of professional self-glorification, Geertz suggests that ethnography can be our guide in attaining this capacity. Ethnography "remains a science of which we all have need," because "the strangenesses it

21. Geertz, *supra* note 3, at 52-53.

22. *Id.* at 53.

has to deal with are growing more oblique and more shaded, less easily set off as wild anomalies – men who think themselves descended from wallabies or who are convinced they can be murdered with a sidelong glance – its task locating those strangenesses and describing their shapes, may be in some ways more difficult, but it is hardly less necessary."[23] In other words,

> [t]he job of ethnography . . . is indeed to provide, like the arts and history, narratives and scenarios to refocus our attention; not, however, ones that render us acceptable to ourselves by representing others as gathered into worlds we don't want and can't arrive at, but ones which make us visible to ourselves by representing us and everyone else as cast into the midst of a world full of irremovable strangenesses we can't keep clear of.[24]

At its best, it enables us to have "a working contact with a variant subjectivity."[25]

It strikes me that what Geertz is describing is profoundly important about at least one of the principal qualities needed in a democracy. However, what he says must be amended in three ways. The first amendment is to recognize that the capacity he is talking about – openness, receptivity to the other, suspension of one's own beliefs, and an identity with and a merging into, even if only temporary, another mind – is critically important not only for multiculturalism but also for all human interaction, especially that of difference and conflict. What Geertz is talking about is perhaps a difference of degree but certainly not of kind. Crossing the boundaries of different sensibilities is an everyday issue, not one limited to cultural diversity.

The second amendment is an amplification of Geertz's observation that this capacity is extraordinarily difficult to acquire. As he says, it does not come naturally. The reasons for the difficulty are many and are beyond the scope of this lecture, but we can say that some arise from Holmes's observation about the "logic" of censorship. Censorship flows from the sense that we are at risk of losing our own internal sense of identity and commitment to our values and beliefs. Censorship also flows from our fear that we are in danger of encouraging our opponents and enemies to interpret our tolerance as lack of resolve or belief.

The third amendment is simply to note that, as important as developing this capacity is, this capacity of openness is one of many capacities we might identify as crucial to the personality or character that a healthy democratic society requires. Among those essential characteristics we might add would be the ability to do what Geertz suggests, while still retaining the will to commit ourselves and to act. A long and distinguished literature explores the

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23. *Id.* at 50-51.
24. *Id.* at 50.
25. *Id.*

conflict between a posture of skepticism and a capacity for action. As we have seen, a well-functioning democratic community calls for more than skepticism, and the supposed inconsistency between skepticism and the will to take necessary action may be – and I think is – overdone. Nevertheless, the tension is quite real, and, at the very least, it highlights the fact that suspension of belief or openness is not the only capacity we must work on; in fact, it may be in some conflict with other qualities that we also need.

I realize that I am covering complicated psychological ground rather quickly. My main goal is to provide at least a framework for thinking about the intellectual character beyond the goal of preservation of rights that a democratic system of government requires. There are plenty of discussions to draw upon, such as those of Holmes and Geertz. In the end, however, it always will be necessary to recognize the complexity of the subject. It is precisely that complexity that allows us to make sense out of the world as it has been constructed. Various spheres, such as the First Amendment, offer us opportunities to stretch and to refine certain strands of that intellectual complexity. It is with this intellectual complexity in mind that we might conclude by looking at another area of the First Amendment represented by the Supreme Court decision last term in *National Endowment for the Arts v. Finley*.[26]

In *Finley*, the Court faced a challenge to a 1990 amendment of the NEA's reauthorization bill,[27] which directed the NEA Chairperson 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."[28] Congress enacted the amendment in the wake of two controversial NEA grants. The first grant gave $30,000 to the Institute for Contemporary Art at the University of Pennsylvania for a Robert Mapplethorpe photography exhibit, which included several pictures with homoerotic content and two pictures of children with their genitals exposed.[29] The second grant gave $15,000 to the Southeastern Center of Contemporary Art in Winston-Salem, North Carolina, for an art exhibit, which included a Andres Serrano photograph of a plastic crucifix submerged in a beaker of the artist's urine entitled "Piss Christ."[30]

The plaintiffs in *Finley* were four performance artists who applied for NEA grants before Congress enacted the 1990 amendment.[31] In each case, an

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26. 118 S. Ct. 2168 (1998).

27. 20 U.S.C.A. § 954(d)(1) (1990).

28. National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2180 (1998).

29. *See id.* at 2172 (describing controversial grant providing funds for Mapplethorpe exhibit).

30. *See id.* (describing controversial grant providing funds for Serrano photograph).

31. *See id.* at 2174.

advisory panel had recommended approval, but the NEA denied each application.[32] Initially, the performance artists asserted First Amendment and statutory claims, but after Congress enacted the 1990 amendment, the artists amended their complaints to challenge the new provision as void for vagueness and impermissibly viewpoint-based.[33] The district court granted the plaintiffs' motion for summary judgment, and a divided court of appeals affirmed.[34]

In an opinion written by Justice O'Connor, the Supreme Court reversed.[35] Interpreting the statute as merely hortatory, the Court flatly rejected the artists' contention that the amendment was an example of viewpoint discrimination. Rather than precluding speech on the basis of its viewpoint, the amendment aimed only at reforming procedures by admonishing the NEA to take "decency and respect" into consideration.[36] Indeed, the NEA's position was that the amendment imposed no overriding criteria by which to judge applications and that the provision was satisfied by "ensuring that the peer review panels represent[ed] a variety of geographical areas, aesthetic views, professions, areas of expertise, races and ethnic groups, and gender."[37] Although the Court did not address whether this was in fact sufficient under the statute, it agreed that the 1990 amendment imposed no categorical requirement controlling grant awards. Given the advisory nature of the amendment and the myriad interpretations of "decency and respect," the Court found the criteria in the 1990 amendment unlikely to serve as a veil for viewpoint discrimination.

Justice O'Connor observed that content-based considerations are an inherent part of arts funding: Given the NEA's limited resources, it must deny the majority of grant applications and absolute neutrality is simply not possible.[38] The funding mechanism established by the NEA is a competitive process based on artistic merit, and, the Court noted, the "excellence" threshold is inherently content-based. The Court emphasized 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."[39]

Additionally, the Court did not find the new provisions unconstitutionally vague. Although "undeniably opaque,"[40] the Court found the amendment no

32. *See id.* (describing factual predicate of case).

33. *See id.* (explaining procedural history of case).

34. *See id.* (discussing procedural history of case).

35. *See id.* at 2180 (reversing Ninth Circuit decision that application denials violated constitutional rights).

36. *See id.* at 2175-76.

37. *Id.* at 2175.

38. *See id.* at 2177-78 (stating that content based considerations must play role in NEA funding decisions).

39. *Id.* at 2179.

40. *Id.*

more vague than the terms employed in any number of government programs awarding grants on the basis of subjective criteria. The amendment does no more than to add "some imprecise consideration to an already subjective selection process," and thus, on its face, does not impermissibly infringe First or Fifth Amendment rights.[41]

In a pointed concurrence, Justice Scalia, joined by Justice Thomas, concurred in the judgment, but he criticized the Court for "gutting" the amendment by accepting the NEA's interpretation of it, rather than evaluating the statute as written. Under the plain meaning of the statute's terms, according to Justice Scalia, decency and respect are to be taken into account in evaluating grant applications. He could find nothing in the statute that suggested that the new amendment was advisory. Moreover, Justice Scalia read the statute as an explicit attempt at viewpoint discrimination, which he found constitutional in the arts funding context. Justice Scalia argued that ". . . Congress did not abridge the speech of those who disdain the beliefs and values of the American public, nor did it abridge indecent speech."[42] Furthermore, "those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. Avant-garde artistes . . . remain entirely free to epater les bourgeois; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it."[43] Because the NEA is not the sole source of funding for art, the government is free to reserve NEA funds for art it deems to be in the public interest. Citing *Rust v. Sullivan*,[44] Justice Scalia reiterated that the government can selectively fund a program to encourage certain activities without having to fund an alternative program. Indeed, the government takes positions on various points of view all the time, and it makes no constitutional difference whether elected officials further their favored point of view by achieving it directly, by advocating it officially, or by giving money to others who achieve or advocate it – none of this infringes the speech of anyone. In conclusion, Justice Scalia asserted that Congress could have banned NEA funding of indecent or offensive art outright without violating the Constitution, but instead, Congress chose a lesser step of merely disfavoring the funding of such art.[45]

In the sole dissent, Justice Souter began from the position that "viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional,"[46] and he argued that this fundamental principle underlying

41. *Id.* at 2180.
42. *Id.* at 2182.
43. *Id.* at 2182-83.
44. Rust v. Sullivan, 500 U.S. 173 (1991).
45. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2185 (1998).
46. *Id.*

the First Amendment is no less applicable in the context of disqualification for government favors than in affirmative suppression of speech. Both the statute's language and the legislative history, Justice Souter argued, lead to the inevitable conclusion that the 1990 amendment had the clear purpose of viewpoint discrimination: "[T]he limitation obviously means that art that disrespects the ideology, opinions, or convictions of a significant part of the American public is to be disfavored, whereas art that reinforces those values is not."[47] In Justice Souter's view, the case should be controlled by *Rosenberger v. Rector & Visitors of University of Virginia*,[48] which held that the government may not discriminate on the basis of viewpoint when it neither speaks directly nor subsidizes a message it favors, but rather disburses funds to encourage the expressions of private speakers.[49] Justice Souter pointed out that the government neither buys any of the art produced by NEA grant recipients, nor directs the content of art produced with NEA funds; the NEA provides money to independent artists and organizations for consumption by the public. When subsidizing the expression of others, government cannot favor one lawfully stated view over another – and this is precisely what the "decency and respect" amendment attempts to do.

Now, what can we make of the *Finley* issue in light of the earlier discussion regarding public intellectual character? It seems to me we ought to be asking whether certain institutions – such as universities, museums, and national endowments for the arts and humanities – serve a major public, First Amendment purpose, by nurturing and emphasizing a particular facet of that character. The Court has, in fact, long indicated that these institutions are special under the Constitution. In *Rust v. Sullivan*, the case Justice Scalia referenced as precedent for the government to control the speech of willing recipients of state funding, the Court seemingly went out of its way to exclude universities from that holding, saying

> the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.[50]

What actually characterizes these institutions is more their special ethos of openness of engagement and receptivity, very much along the lines that Geertz said was true of his own discipline, anthropology. Concerned as the Constitu-

47. *Id.* at 2188.

48. 513 U.S. 959 (1994).

49. *See* Rosenberger v. Rector & Visitors of Univ. of Virginia, 513 U.S. 959 (1994).

50. Rust v. Sullivan, 500 U.S. 173, 200 (1991) (citing Keyishian v. Board of Regents, State Univ. of N.Y., 385 U.S. 589, 603, 605-06 (1967)).

tion is with the fulfillment of the democratic promise, having such protected spheres is important, just as important as preserving the open marketplace of ideas. Government efforts to control the content of the decisions in these spheres threaten not only their independence but their temperament. The principle is one of preserving the autonomy of these institutions to be free of partisan interventions for the reason that the special intellectual character sustained within them serves the underlying purposes of the First Amendment. Political interventions transgress that special culture of openness and suspension of belief. Thus, Justice Souter's opinion in *Finley* points us in the right direction, as do implicit assumptions in the majority opinion.

We have taken a long route to this conclusion. I would like to emphasize two major points. The first point is that sometimes what seem like "rights" can, in fact, be methods of developing deeper public character. That is, I believe, one of the important facets of the First Amendment as it has evolved in this century. The second point is that we all would benefit, as I assume the creators of the theme of "responsibility" for this year's celebration believed, from paying greater attention to the qualities of mind needed in a democracy, to the tensions between those qualities and other desirable qualities, and to the institutions in the society that work to nurture those qualities.