Washington University
Law Quarterly

VOLUME 77 NUMBER 1 1999

ARTICLES

# *NEA V. FINLEY*: A DECISION IN SEARCH OF A RATIONALE

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## I. INTRODUCTION

For the better part of a decade, debate has raged over whether Congress can constitutionally restrict, or at least influence, the ability of the National Endowment for the Arts ("NEA") to award grants to artists and institutions for the creation or display of art work that a significant segment of the public would consider highly offensive.[1] In the October 1997 Term, the Supreme Court, by an 8-1 margin in *NEA v. Finley*,[2] upheld section 954(d), a 1991 congressional amendment to the NEA Act that requires the Chairperson of the NEA to ensure that, in establishing regulations and procedures for assessing artistic excellence and artistic merit, "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into consideration.[3]

Perhaps *Finley* is best understood as a prudential decision validating a political compromise that sought to, and has largely succeeded in, ending the

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1. The NEA controversy has been described in great detail elsewhere. *See, e.g*, John H. Garvey, *Black and White Images*, 56 LAW & CONTEMP. PROBS. 189 (1993); Craig Alford Masback, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 YALE L. & POL'Y REV. 177 (1992).

2. 118 S. Ct. 2168 (1998).

3. 20 U.S.C. § 954(d)(1) (1994).

arts funding controversy, as well as insulating the NEA from further and possibly fatal attack. If these were the goals of Congress and the Court, only time will tell whether their efforts resulted in complete success. As a matter of constitutional law, however, the Court confronted a very messy area of First Amendment jurisprudence and left it even messier.

From a doctrinal and theoretical standpoint, *Finley* is extraordinarily unsatisfying. Justice O'Connor's opinion for the majority makes many salient points, but it fails to pull them together into a coherent rationale. Glaring contradictions in the majority opinion suggest that it was the product of a Court in agreement as to the result but not as to a rationale. Much of the confusion in the opinion seems quite deliberate, as if to suggest that the Court decided to reach a result it found difficult to justify under existing precedent, thus producing an opinion that through obscurity might cause as little damage as possible to the existing doctrinal framework. Justice Scalia, in concurrence, and Justice Souter, in dissent, demonstrated that a clearer and more principled opinion than the majority's could be written either to uphold or invalidate the legislation. Thus, although the issue was difficult, it was hardly intractable.

This Article analyzes the opinions in *Finley*, speculates on the significance of the case, and suggests an alternative rationale for the decision that has both advantages and disadvantages over the Court's opinion. Part II provides a brief history of the arts funding controversy and the *Finley* litigation. Part III examines the three opinions in *Finley*, relying heavily on the incisive critiques of the majority opinion developed by Justices Scalia and Souter. Part IV discusses the dynamics of the *Finley* opinion as an exercise in Supreme Court decision making. Part V considers the doctrinal impact of *Finley* on viewpoint discrimination and the unconstitutional conditions doctrine. Finally, Part VI offers a doctrinal rationalization of *Finley* that I believe better captures the essence of the controversy in *Finley* and considers whether that rationalization would have been a preferable approach.

## II. PRELUDE TO THE SUPREME COURT'S DECISION

### *A. The Arts Funding Controversy and Congressional Response*

The incidents giving rise to the arts funding controversy of the 1990s have been described in detail elsewhere, necessitating only a brief summary here.[4]

4. *See supra* note 1.

Congress created the NEA in 1965 as a vehicle to assist in funding the arts.[5] Grant applications are reviewed by advisory panels, which in turn make recommendations to the NEA Chairperson.[6] The program was not particularly controversial until the NEA awarded two specific grants: the first to the Institute of Contemporary Art at the University of Pennsylvania to present a retrospective of the photographs of the late Robert Mapplethorpe; and the second to the Southwest Center for Contemporary Art, which in turn awarded a grant to an artist named Andres Serrano.[7] Most of the Mapplethorpe photographs were uncontroversial. A segment titled the *X Portfolio*, however, featured a number of sexually explicit images, including a young girl with her vagina exposed and a man with a bullwhip protruding from his rectum.[8] Serrano used his grant money to produce a photograph of a crucifix immersed in urine entitled *Piss Christ*.[9] The political fallout that occurred once these grants attracted public attention enveloped the NEA in controversy for the better part of a decade.

Congress responded by deleting forty-five thousand dollars, the amount of the grants for the Mapplethorpe and Serrano exhibits, from the NEA appropriation bill the following year.[10] Moreover, it added a clause prohibiting the use of NEA funds

> to promote, disseminate, or produce materials which in the judgment of the [NEA] . . . may be 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.[11]

The NEA implemented this provision by requiring grantees to certify that they would not expend any of the funds received in violation of these limitations.[12] A federal district court invalidated this certification requirement after finding the requirement both unconstitutionally vague under the Fifth Amendment and an unconstitutional condition on freedom of speech under the

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5. *See* National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 5(a), 79 Stat. 845, 846 (codified as amended at 20 U.S.C. § 954(a) (1994)).

6. *See* 20 U.S.C. § 959(c).

7. *See Finley*, 118 S. Ct. at 2172.

8. *See* Garvey, *supra* note 1, at 190.

9. *See Finley*, 118 S. Ct. at 2172.

10. *See* Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 701, 738-42 (making appropriations for Department of Interior and related agencies for fiscal year ending Sept. 30, 1990).

11. *Id.* § 304(a), 103 Stat. at 741.

12. *See* Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 776 (C.D. Cal. 1991).

First Amendment.[13] In addition, Congress established a temporary Independent Commission to study the art funding issue and to report on the need for further changes to the statute or procedures.[14]

In September of 1990 the Independent Commission, which had taken testimony from art and constitutional law experts, reported back to Congress and recommended several procedural changes to the grant-making process.[15] After lengthy debate, Congress adopted several of the procedural changes recommended by the Commission.[16] In addition, it amended the NEA Act's Statement of Findings and Purposes to provide that "[t]he arts and the humanities belong to all the people of the United States"[17] and public funding of the arts "should contribute to public support and confidence in the use of taxpayer funds."[18] Finally, Congress enacted section 954(d), the provision at issue in *Finley*, which provides:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that–
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> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purpose of this section. Such regulations shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.[19]

John Frohnmayer, the Chairperson of the NEA, maintained that the agency could comply with these requirements simply by ensuring that the membership on the review panels reflected the diversity of the Nation.[20]

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13. *See id*.
14. *See* Act of Oct. 23, 1989 § 304(c), 103 Stat. at 742.
15. *See Finley*, 118 S. Ct. at 2173.
16. *See* Act of Nov. 5, 1990, Pub. L. No. 101-512, sec. 318, § 103(e)-(i), 104 Stat. 1915, 1964-66 (codified at 20 U.S.C. § 954(i)-(l) (1994)).
17. *Id.* § 101, 104 Stat. at 1961.
18. *Id.*
19. *Id.* § 103(b), 104 Stat. at 1963.
20. *See Finley*, 118 S. Ct. at 2173-74.

### *B. The* Finley *Case*

Four performance artists—Karen Finley, John Fleck, Holly Hughes, and Tim Miller—applied for NEA grants before the 1989 amendments.[21] An advisory panel initially recommended approving the grants. The Chairperson, however, sent three applications back to the panel for reconsideration, and although the advisory panel again recommended approving all four applications, the National Council on the Arts recommended denying them all and the NEA followed the Council's recommendation.[22] The four artists filed suit alleging violation of their First Amendment rights. After Congress passed section 954(d) in 1990, the artists amended their complaint to challenge that section as well.[23] Early in the litigation, the NEA settled the individual "as applied" claims of the four artists by paying them the amounts of the contested grants plus costs and attorneys' fees.[24] In 1992 the federal district court granted the plaintiffs' motion for summary judgment invalidating section 954(d) as unconstitutional on its face on the grounds that it was overbroad under the First Amendment and vague under the Fifth Amendment.[25] In the process, the district court rejected the NEA's position that it could comply with the statute simply by ensuring that the membership on the review panels reflected the diversity of the Nation.[26] Instead, the district court concluded that Congress had instructed the NEA explicitly to consider "decency and respect for diverse beliefs and values" in the process of reviewing each grant application.[27] The court enjoined the enforcement of the provision, and that injunction continued in force until the Supreme Court's decision six years later.[28]

In 1996 a divided Ninth Circuit affirmed.[29] It agreed that the statute mandated substantive consideration of decency and respect in the grants process rather than procedural implementation through the membership of the review panels.[30] The court held that the criteria of decency and respect for diverse

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21. *See id*. at 2174.
22. *See id*.
23. *See id*.
24. *See id*.
25. *See* Finley v. NEA, 795 F. Supp. 1457, 1476 (C.D. Calif. 1992).
26. *See id*. at 1470-71.
27. *Id*. at 1470.
28. *See* United States Supreme Court Official Transcript at *15, NEA v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371), *available in* 1998 WL 156955 (Mar. 31, 1998) (Oral Argument of Seth P. Waxman on behalf of Petitioners).
29. *See* Finley v. NEA, 100 F.3d 671 (9th Cir. 1996).
30. *See id*. at 676-77.

beliefs and values were unconstitutionally vague under the Fifth Amendment Due Process Clause.[31] In addition, it held that these criteria discriminated on the basis of viewpoint and that the Government failed to show that such discrimination was essential to the achievement of a compelling state interest.[32] The court rejected the contention that protecting the public from indecent speech or protecting the taxpayer from unwanted expenditures constituted compelling state interests.[33]

Judge Kleinfield dissented, arguing that the NEA could constitutionally consider viewpoint-based criteria such as decency and respect for diverse beliefs and values in a competitive grant program, even though it could not apply such criteria in a noncompetitive grant program or in a regulatory or criminal statute.[34] Three judges published a dissent from the denial of rehearing en banc.[35]

The United States Supreme Court granted certiorari and reversed the Ninth Circuit decision in an opinion by Justice O'Connor. Justice Scalia wrote a separate concurrence joined by Justice Thomas. Only Justice Souter dissented.

## III. THE SUPREME COURT OPINIONS

*NEA v. Finley* was one of the most closely watched cases of the 1997 Supreme Court Term. The issue of NEA funding had been a matter of public debate for almost a decade. Scholars had analyzed the constitutional issues in great detail.[36] Both art organizations and family values groups filed amicus briefs.[37] The Court resolved the issue, but without the clarity for which many

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31. *See id*. at 680.
32. *See id*. at 681-83.
33. *See id*. at 683 n.23.
34. *See id*. at 684-85.
35. *See* Finley v. NEA, 112 F.3d 1015, 1016 (9th Cir. 1997) (O'Scannlain, J., dissenting from denial of rehearing en banc).
36. *See, e.g*., OWEN FISS, LIBERALISM DIVIDED (1996); Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103 (1995); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996); Robert M. O'Neil, *Artist Grants and Rights: The NEA Controversy Revisited*, 9 J. HUM. RTS. 85 (1991); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209 (1993).
37. Amicus Briefs in support of respondents were filed on behalf of the New School for Social Research and the Brennan Center for Justice, Brief as Amicus Curiae in Support of the Respondents, NEA v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371), *available in* 1998 WL 3223 (Jan. 5, 1998); Volunteer Lawyers for the Arts, Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371),

had doubtlessly hoped. It is worth working through the opinion in some detail in order to understand the extent to which the Court's explanations are slippery, ambiguous, and incomplete.

## *A. The Majority Opinion*

### *1. The Meaning of the Statute*

Justice O'Connor wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Ginsburg, and Breyer. The meaning of the section 954(d) obligation to "take into consideration" decency and respect for diverse beliefs and values had been debated throughout the litigation. From the outset, the NEA had argued that it could discharge this obligation simply by ensuring that the membership on the review panels reflected national diversity. Both the district court and the court of appeals, however, decisively rejected this reading. Like the lower courts, Justice Souter's dissent readily disposed of this reading as inconsistent with the text and legislative history, as well as redundant because another statutory provision already required the Chairperson to consider diversity in selecting the panels.[38]

The majority dodged the issue by noting that it need not evaluate the NEA's interpretation because the statute was constitutional on its face even if construed more broadly.[39] The majority opinion is remarkably vague with regard to what exactly the statutory language entails. It seems to conclude, however, that when Congress directed the Chairperson to consider decency and respect, it was simply directing him to think about these factors in the course of making a

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*available in* 1998 WL 47261 (Feb. 6, 1998); Twenty-Six Arts, Broadcast, Library, Museum and Publishing Amici, Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371), *available in* 1998 WL 63172 (Feb. 6, 1998); Claes Oldenberg et al., Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371), *available in* 1998 WL 47599 (Feb. 6, 1998); Family Research Institute of Wisconsin, Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371), *available in* 1998 WL 47273 (Feb. 6, 1998); Rockefeller Foundation, Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371), *available in* 1998 WL 55169 (Feb. 6, 1998); Americans United for Separation of Church and State, Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371), *available in* 1998 WL 47259 (Feb. 6, 1998); and American Association of University Professors et al., Brief as Amicus Curiae in Support of the Respondents, *Finley* (No. 97-371), *available in* 1998 WL 47257 (Feb. 6, 1998). Amicus Briefs in Support of Petitioner NEA were filed on behalf of Morality in Media, Amicus Brief as Amicus Curiae in Support of the Petitioner, *Finley* (No. 97-371), *available in* 1998 WL 3223 (Jan. 5, 1998); and National Family Legal Foundation, Brief as Amicus Curiae in Support of the Petitioiner, *Finley* (No. 97-371), *available in* 1998 WL 6553 (Jan. 9, 1998).

38. *See* NEA v. Finley, 118 S. Ct. 2168, 2188-89 (Souter, J., dissenting).

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

decision and to weigh them in the balance,[40] but not treat them as preclusive in and of themselves.[41] In other words, a panel and the Chairperson could find a particular project indecent and void of respect for diverse beliefs and values and yet still award the grant on the basis of the project's artistic excellence. This construction would seem to be the most natural reading of the phrase "take into consideration." As Justice O'Connor noted, "[w]hen Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms"—for example, the prohibition against awarding grants for obscene works.[42] Neither Justice Scalia nor Justice Souter necessarily rejected the Court's interpretation of the statute.

Justice Scalia began his opinion with the comment that "'[t]he operation was a success, but the patient died.' What such a procedure is to medicine, the Court's opinion in this case is to the law. It sustains the constitutionality of 20 U.S.C. 954(d)(1) by gutting it."[43]

The problem with the Court's treatment of the statute is not that the Court read the decency and respect language as merely hortatory in nature, but rather that it simply avoided committing to any interpretation of the statute whatsoever. It seemed to assume that section 954(d) has some type of substantive impact, but it refused to say what. Contrary to Justice Scalia's remarks, the Court didn't gut the statute, it simply ignored it.

From the easily supportable conclusion that "consideration" is not equivalent to per se prohibition, the Court reasoned that the factors to be taken into consideration—decency and respect for diverse beliefs and values—are not intended to "disallow any particular viewpoints."[44] The Court noted that the legislation was bipartisan in nature, a compromise position designed to counter proposals to abolish the NEA and seemingly influenced by the Independent Commission's cautions regarding the use of independently preclusive criteria.[45] Perhaps the Court simply continued the argument that decency and respect are merely two factors in the mix that deserve some consideration. If so, the Court's opinion may suggest that these criteria are not viewpoint oriented simply because Congress indicated that it did not desire to preclude any artist solely on the basis of viewpoint. If this is the case, then Justice Scalia's[46] and Justice

40. *See id*. at 2176.
41. *See id*.
42. *Id*.
43. *Id*. at 2180 (Scalia, J., concurring).
44. *Id.* at 2176.
45. *See id*.
46. *See id*. at 2182 (Scalia, J., concurring).

Souter's[47] replies, that Congress could hardly neutralize viewpoint discriminatory criteria by declaring in the legislative history that it did not mean to authorize censorship, are unanswerable.

*2. The Impact of the Statute*

If there was any doubt where the Court was headed, however, it proceeded to assert that the mere consideration of decency and respect, as opposed to a flat-out prohibition, is unlikely to exert a chilling effect on the speech of artists, presumably because the threat is too indirect or diffuse.[48] Both Justice Scalia[49] and Justice Souter[50] took the Court to task for apparently assuming that consideration of a nonpreclusive factor will have no impact. As Justice Scalia put it, "[T]he presence of the 'tak[e] into consideration' clause 'cannot be regarded as mere surplusage; it means something,' . . . [a]nd the 'something' is that the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not."[51]

This seems obvious unless it is assumed first that the decision maker will ignore these criteria, and second that it is obvious to applicants that such will be the case. That may be the practice that the NEA would pursue, however, it is not an interpretation of the statute and its enforcement that the Court consciously adopted. Rather, the Court seemed to assert that the criteria simultaneously means "something" and "nothing."

*a. Decency and Respect Are Not Particularly Focused*

The primary point that the Court seemed to make in this section of its opinion is that the decency and respect criteria are neither intended to, nor will in practice, discriminate against specific viewpoints. It reasoned that because decency and respect are relatively vague terms that may mean different things to different people, they do not preclude any "particular" viewpoint.[52] From a standpoint of promoting free discussion, it seems perverse to prefer a statutory term that due to its vagueness discourages several points of view rather than just one. The notion of vagueness as an antidote to viewpoint discrimination would

47. *See id*. at 2187 n.3 (Souter, J., dissenting).
48. *See id*. at 2176-77.
49. *See id*. at 2181 (Scalia, J., concurring).
50. *See id*. at 2189-90 (Souter, J., dissenting).
51. *Id*. at 2181 (Scalia, J., concurring).
52. *Id*. at 2177.

seem to stand the concept of vagueness on its head.

Perhaps the best response to this argument is that the term decency does have a relatively clearly defined meaning. Justice Scalia, rarely far removed from a dictionary, pointed out that "decency" is defined as "'[c]onformity to prevailing standards of propriety or modesty.'"[53] Justice Souter turned instead to an even more authoritative source, prior Supreme Court precedent for the proposition that "'the normal definition of 'indecent' . . . refers to nonconformance with accepted standards of morality.'"[54] Vagueness arguments of the plaintiffs notwithstanding, Congress had a fairly good idea of what it meant by decency, as do the NEA and artists applying for grants.

The Court seemed to dismiss concerns about viewpoint discrimination on the ground that the criteria of decency and respect do not focus on "particular views"[55] nor do they result in "directed viewpoint discrimination."[56] The Court correctly suggested that indecent artwork could support either side of a particular debate. For instance, different artists might paint a picture of Jesse Helms or Karen Finley sexually abusing the Statue of Liberty to make contrasting points about the respective threats they pose to American values. The indecency and respect criteria could be considered content neutral with respect to this debate, even though it is more likely that opponents of the decency clause would use indecency to make their point than would its proponents. The criteria, however, are anything but neutral with respect to whether it is appropriate to use indecency as a means of artistic expression and whether it is appropriate for artists to be disrespectful of the beliefs and values of significant sectors of the public.

As both Justices Scalia[57] and Souter[58] recognized, the statute would clearly prefer decent and respectful art over that which is not. The sensibilities of a Norman Rockwell or an Ansel Adams would presumably be preferred over those of a Mapplethorpe, Serrano, or Finley. Most viewpoint-based criteria could be rendered even more discriminatory by focusing them more narrowly. For instance, a ban on indecency could be tightened into a ban on homoerotic indecency or a ban on indecency in support of abortion. The fact that these are even more egregious examples of viewpoint discrimination does not render the

53. *Id*. at 2181 (Scalia, J., concurring) (quoting AMERICAN HERITAGE DICTIONARY 483 (3d ed. 1992) (second definition)).

54. *Id*. at 2187 (Souter, J., dissenting) (quoting FCC v. Pacifica Found., 438 U.S. 726, 740 (1978)).

55. *Id*. at 2177.

56. *Id*. at 2176.

57. *See id*. at 2181 (Scalia, J., concurring).

58. *See id*. at 2188 (Souter, J., dissenting).

concept of indecency itself viewpoint neutral, however.

*b. A Facial Challenge*

The majority next emphasized that because the case presented only an on-the-face challenge to the legislation, "the vague exhortation to 'take them into consideration' . . . seems unlikely . . . [to] introduce any greater element of selectivity than the determination of 'artistic excellence' itself."[59] Nevertheless, as Justice Souter observed, the additional selectivity introduced by the concepts of decency and respect will inevitably be more viewpoint oriented than the concept of artistic excellence.[60] The majority seemed determined to ignore this point.

The Court then explained that the NEA was vested with responsibilities such as encouraging educational programs, to which the decency criterion would be germane,[61] and preserving our multicultural heritage, to which the respect criterion would be relevant.[62] No sooner did the majority make this point, however, than it conceded that "[w]e recognize, of course, that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents' First Amendment challenge."[63] The Court presumably made these points to bolster the argument that a facial challenge to the statute was inappropriate, given that there seemed to be constitutional applications. Nevertheless, the primary point that the Court seemed to draw from these potential constitutional applications was that if the NEA legitimately can take account of decency in some contexts without suppressing particular viewpoints, then there is no reason why it cannot do so in other contexts as well.[64] But if the decency and respect criteria are acceptable in the educational context, it isn't because they are viewpoint neutral but rather because they are pertinent and justifiable despite the fact that they are viewpoint discriminatory. As both Justices Scalia[65] and Souter[66] recognized, and as the majority refused to admit, the justification, if any, for admittedly viewpoint-discriminatory criteria should have been the central issue of the case.

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59. *Id*. at 2177.
60. *See id*. at 2192 n.9 (Souter, J., dissenting).
61. *See id*. at 2177.
62. *See id*.
63. *Id*.
64. *See id*. at 2177-78.
65. *See id*. at 2183 (Scalia, J., concurring).
66. *See id*. at 2193 (Souter, J., dissenting).

*3. Application of the* Rosenberger *Case*

The majority then turned its attention to *Rosenberger v. Rector and Visitors of University of Virginia*,[67] apparently the most pertinent precedent. The majority distinguished the *Rosenberger* facts from the facts in *Finley*. In *Rosenberger*, the Court found unconstitutional viewpoint discrimination when the University created a limited public forum by subsidizing the printing costs of student publications, except those presenting a religious perspective.[68] In *Finley*, however, according to the majority, the NEA art funding project was designed not to "'encourage a diversity of views from private speakers'" but rather to encourage excellence through a competitive process.[69] The Court reasoned that in a competitive process, unlike a public forum, judgments on whether to subsidize will inevitably be based on content, at least in the form of artistic excellence.[70]

Justice Scalia also distinguished *Rosenberger*, but solely on the basis that the University had established a limited public forum, arguing that whether the process was competitive or not was irrelevant.[71]

Justice Souter, on the other hand, maintained that *Rosenberger* controlled and that it prohibited the NEA's use of viewpoint-based criteria.[72] He argued that, like the student activity fund in *Rosenberger*, Congress had declared that the NEA grant program was designed "to 'support new ideas' and 'to help create and sustain . . . a climate of encouraging freedom of thought, imagination, and inquiry.'"[73] As such, the NEA may not deny applications due to the unpopularity of the viewpoint expressed.[74] Justice Souter argued that *Rosenberger* effectively rejected the *Finley* majority's attempt to distinguish NEA funding on account of its competitive nature when it declared that "'[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.'"[75] Rather, even where funds are scarce, the Government must base selection on viewpoint-neutral criteria.[76] Justice Souter

67. 515 U.S. 819 (1995).
68. *See id*. at 834-36.
69. *Finley*, 118 S. Ct. at 2178 (quoting *Rosenberger*, 515 U.S. at 835).
70. *See id*. at 2177-78.
71. *See id*. at 2184 (Scalia, J., concurring).
72. *See id*. at 2191 (Souter, J., dissenting).
73. *Id*. (Souter, J., dissenting) (quoting 20 U.S.C. § 951(10), (7) (1994)).
74. *See id*. (Souter, J., dissenting).
75. *Id*. at 2192 (Souter, J., dissenting) (quoting *Rosenberger*, 515 U.S. at 835).
76. *See id*. (Souter, J., dissenting).

also argued that, contrary to Justice Scalia's interpretation, *Rosenberger* did not turn on the conclusion that the student fund was a public forum, and in any event, the Court had established that viewpoint discrimination is impermissible even in nonpublic forums.[77]

*Rosenberger* would seem to be the most pertinent precedent to the NEA controversy. Nevertheless, it is hardly on all fours with *Finley* and thus requires thoughtful consideration. Justice O'Connor's reading of the case is defensible. The majority's primary distinction between the competitive grant process in *Finley* and the broadly available fund in *Rosenberger* is factually accurate. In contrast, Justice Souter's argument is misleading when he suggests that *Rosenberger* anticipated and disposed of the possibility of a competitive subsidization process issue with its notation that "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."[78] The *Finley* majority did not contend that scarcity leads to selectivity, but rather that a competitive process inevitably leads to selectivity. Aside from the fact that all resources—especially cash grants—are somewhat scarce, an institution could parcel out scarce resources in relatively small amounts to all applicants (as was presumably done in *Rosenberger*) or it could dispense them on a first-come-first-served basis. By definition, however, a competitive process will result in the denial of many, if not most, applications on the basis of some criteria. Likewise, in a given year, the NEA could deny many applications and decline to dispense all of the funds available simply because there were an insufficient number of "artistically excellent" proposals. Consequently, Justice Souter's conclusion that "the Court's 'competition' is merely a surrogate for 'scarcity'" is simply incorrect.

A competitive process requires the use of selection criteria that are unnecessary in a noncompetitive process. Thus, the majority explained that, unlike the student fund in *Rosenberger*, the NEA relies on an inherently content-based "excellence threshold" in evaluating applications.[79] Justice Souter recognized this but argued that *Rosenberger* requires the state to use only viewpoint-neutral criteria, even in a competitive process.[80] Artistic excellence, though content based, would satisfy Justice Souter while viewpoint-oriented criteria such as decency and respect would not. On its facts, however, *Rosenberger* doesn't go so far because, contrary to Justice Souter's

77. *See id*. at 2192 n.10 (Souter, J., dissenting).
78. *Rosenberger*, 515 U.S. at 835.
79. *Finley*, 118 S. Ct. at 2178.
80. *See id*. at 2192 n.9 (Souter, J., dissenting).

interpretation, it did not address the problem of viewpoint neutrality in a competitive selection process.

Explaining that the NEA funding process is competitive and that the *Rosenberger* program wasn't is a start, but to adequately distinguish *Rosenberger*, the Court needed to explain why using a competitive process is sufficient to legitimize viewpoint-based discrimination. The Court's terse explanation was that in the arts funding context "the Government does not indiscriminately 'encourage a diversity of views from private speakers.'"[81]

It certainly does not follow, however, that because the Government may utilize content-based but viewpoint-neutral selection criteria in a competitive process, it may in turn use viewpoint-based criteria as well. But the Court's holding does not appear to extend so far. Rather, the Court seemed to be taking issue with Justice Souter's conclusion that the primary point of the arts funding program is to support and encourage debate, discourse, or diversity of ideas. Instead, the Court seemed to suggest that the point of the program is to encourage good art regardless of whether it leads to a public forum-like environment. Thus, for the majority, diversity of viewpoint in NEA funded art would seem to be more of a happy by-product of the program than its intended goal.

Relying on the NEA Act itself, Justice Souter argued that encouraging diversity of viewpoint is far more central to the NEA's mission than the majority seemed willing to concede.[82] But assuming that the majority's conception of the NEA's mission is accurate, it still failed to explain why consideration of decency and respect for diverse beliefs and values is justifiable in such a context. Had the Court truly believed that the criteria of decency and respect were viewpoint neutral, it could have readily distinguished *Rosenberger* on that basis alone. The fact that the Court labored mightily to distinguish *Rosenberger* on other grounds suggests that it understood that section 954(d) presented a serious viewpoint-discrimination issue.

Having disposed of *Rosenberger*, however, at least to its own satisfaction, the Court did not suggest that in a competitive subsidy process the Government can freely discriminate on the basis of viewpoint without limitation. To the contrary, emphasizing that the challenge to section 954(d) was on its face rather than as applied and that there were no allegations before the Court that any particular grant had been denied on account of viewpoint discrimination, the

81. *Id*. at 2178 (quoting *Rosenberger*, 515 U.S. at 834).
82. *See id*. at 2191 (Souter, J., dissenting)

majority cited several precedents for the proposition that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'"[83] The majority also noted that "a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[84] As a result, the majority indicated that if, in a given case, the NEA applies the criteria in issue in a manner that appears intended to suppress a viewpoint or at least has that effect, a serious First Amendment question will exist. Therefore, the key to *Finley* may be that the case presented an on-the-face challenge, leaving the Court's standard viewpoint discrimination doctrine to be applied with customary rigor upon a showing that a particular application was denied because it was indecent or disrespectful.

### *4. Subsidization vs. Regulation and a Justification for Viewpoint Discrimination*

The majority ended section II-A of its opinion by upholding the constitutionality of the challenged provision on its face. At that point, one might assume that the opinion is about to end, given that the majority purported to have resolved the issue presented. The majority, however, added a short but significant paragraph headed II-B that seems to qualify, perhaps significantly, much of what was said in the preceding paragraph. After having just suggested that an actual viewpoint-based denial would raise serious First Amendment concerns, the majority observed that "although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake."[85] Citing *Regan v. Taxation with Representation of Washington*,[86] *Rust v. Sullivan*,[87] and *Maher v. Roe*,[88] the majority explained that the Government has wide discretion to choose spending priorities or to engage in selective funding without discriminating on the basis of viewpoint.[89] In the midst of this paragraph, the majority pointed out that

83. *Id.* at 2178 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983)).
84. *Id*. at 2178-79 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).
85. *Id.* at 2179.
86. 461 U.S. 540 (1983).
87. 500 U.S. 173 (1991).
88. 432 U.S. 464 (1977).
89. *See Finley*, 118 S. Ct. at 2179.

"Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should 'contribute to public support and confidence in the use of taxpayer funds.'"[90] Presumably, the majority was suggesting that contributing to public support and confidence through the consideration of decency and respect is a legitimate choice of priorities, analogous to the decision in *Regan* to subsidize lobbying only by veterans groups[91] through a tax exemption or the decision in *Rust* to subsidize preconceptional but not abortion counseling.[92] If so, then effectuating this congressional choice of priorities by denying an application on the grounds of indecency could hardly violate freedom of speech any more than denying a grant pursuant to the program in *Rust* because the grantee intended to engage in abortion counseling. Apparently, section II-B attempts at least to acknowledge the existence of relevant unconstitutional conditions doctrine precedent such as *Regan*, *Rust*, and *Maher* without actually engaging in detailed analysis of the issues from that perspective.

Arguably, this ambiguous paragraph represents the only point in the majority's opinion that even comes close to addressing the central issue raised by the case—that is, when Congress chooses to subsidize art, may it disfavor some proposals (the indecent and the disrespectful) either to protect the public from the indignity of having its tax dollars sponsor work that many consider deeply offensive or to at least prevent the ensuing controversy from undermining the program. Notably absent from the majority's opinion in *Finley* is any consideration of why Congress might have enacted section 954(d) and whether such reasons are capable of justifying viewpoint-discriminatory criteria.[93] In this paragraph, the majority briefly flirted with the question of justification but failed to confront it.

By way of contrast, the issues that the Court slid past obliquely in section II-B are at the very core of Justice Scalia's opinion. From his perspective, the Government's all but unconstrained freedom to set its priorities and choose what speech to subsidize, even if based on viewpoint, is more than sufficient to resolve the case in its favor.[94]

Justice Souter reached the opposite conclusion, noting that both *Regan* and *Rust* held that the selective-funding programs in issue were not viewpoint

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90. *Id*. (quoting 20 U.S.C. § 951(5) (1994)).
91. *See Regan*, 461 U.S. at 550-51.
92. *See Rust*, 500 U.S. at 179.
93. *See infra* notes 189-95 and accompanying text.
94. *See Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring).

discriminatory, and each had indicated that the programs would likely have been unconstitutional had they been viewpoint discriminatory.[95] This led him to conclude that these cases were off point and that *Rosenberger*, prohibiting viewpoint selective subsidization, was the case that really mattered.[96]

Section II-B of the majority's opinion has a tacked-on quality, suggesting that it was the product of or an offering to one or more Justices who did not fully agree with the approach in II-A, but who were willing to join in the opinion if the majority included some language suggesting, somewhat along the lines of the Scalia concurrence, that Congress has significantly greater discretion to engage in content and perhaps even viewpoint-based selectivity in a subsidization (as opposed to a regulation) context. This suggests that in future cases involving either NEA funding or other subsidization programs, at least some of the Justices who joined the *Finley* majority opinion may build on the section II-B qualification and possibly de-emphasize the language to the contrary in the preceding paragraph. From the standpoint of offering a forthright and coherent opinion in *Finley*, however, the Court should have directly confronted the issue raised but slighted in section II-B. Nevertheless, the Court was probably unable to build a majority to do so.

*5. Vagueness*

The final two paragraphs of the majority's opinion in section III addressed the issue of vagueness because the district court and court of appeals both found section 954(d)(1) unconstitutionally vague. The majority conceded that the terms in question are perhaps too opaque for a criminal statute. It concluded, however, that the terms possessed sufficient clarity for the subsidization context because artists were unlikely to be substantially chilled. The majority also asserted that some degree of generality is inevitable in a competitive program promoting excellence.[97] It noted that several other federal grant programs would be in jeopardy if the NEA criteria were unconstitutionally vague.[98]

As with the issue of content discrimination, Justice Scalia concluded that the vagueness doctrine had no application whatsoever to subsidization as opposed to regulation.[99] Justice Souter rejected the vagueness challenge in a footnote,

95. *See id*. at 2190-91 (Souter, J., dissenting).
96. *See id*. at 2191 (Souter, J., dissenting).
97. *See id*. at 2179-80.
98. *See id*. at 2180.
99. *See id*. at 2184 (Scalia, J., concurring).

agreeing with the majority that a degree of imprecision is unavoidable in the competitive grant context.[100]

Arguably, the vagueness issue was not as easy as the Supreme Court suggested. Both the district court and the court of appeals made credible arguments for vagueness. The fact that no member of the Supreme Court was troubled about vagueness suggests that they were indeed concerned with a precedent that might cut deeply into less controversial grant programs. All things considered, however, the majority's treatment of vagueness would be fairly unremarkable but for the fact that it had suggested earlier in its opinion that the terms decency and respect could scarcely be viewpoint discriminatory given that no two people could agree on what they meant.[101] In other words, the criteria were too vague to be unconstitutionally discriminatory but not too vague to be unconstitutionally vague.

*6. Summary*

In summary, the majority in *Finley* held that section 954(d)(1) is not viewpoint discriminatory, at least to an unconstitutional degree, because the criteria are mere factors rather than flat prohibitions. That is, Congress purported not to discriminate against point of view because the criteria are too vague to single out a particular viewpoint. Moreover, content-based criteria are inevitable in a competitive grant process. Such criteria are not unconstitutional on their face because they have obviously valid applications. The criteria might be unconstitutional if they were used to discriminate against particular points of view in an individual case. Then again, the Government has far more room to rely on content in a subsidization as opposed to a regulation case. Finally, the criteria are not vague.

This summary, however, makes the opinion seem more coherent than it is. In fact, the majority's opinion jumps from one argument to the next without any sense of logic or closure. It is self-contradictory from paragraph to paragraph and often from one sentence to the next. It labors to obscure the significant issues raised by the case. Finally, it appears to be largely oblivious to the forceful criticisms leveled at it by the concurrence and dissent.

*B. Justice Scalia's Concurrence*

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100. *See id*. at 2196 n.17 (Souter, J., dissenting).
101. *See id*. at 2176-77.

Much of Justice Scalia's concurrence is a point by point response to the majority opinion. To the extent I have noted these arguments above, I will not repeat them here in any detail.

In the first section of the concurrence, Justice Scalia establishes beyond argument that the obligation to take the disputed criteria "into consideration" means that they should have some substantive effect in the decision-making process with respect to individual applications.[102] This point was equally made by Justice Souter[103] and both lower court opinions.[104] Justice Scalia then pointed out that the decency and respect criteria need not be conclusive to have the type of impact that implicates freedom of speech.[105] This seems obvious despite the majority's attempts to obscure the matter. Then, as set forth above,[106] Justice Scalia argued that the terms decency and respect, as used in the legislation and as commonly understood, are viewpoint discriminatory.[107] Once again, Justice Scalia clearly got the best of this dispute with the majority.

The primary thrust of Justice Scalia's concurrence, however, is that Congress has every right to discriminate on the basis of viewpoint in a subsidy program because it is unlikely to have a coercive effect.[108] Justice Scalia instructed the Court, "The Statute Means What It Says."[109] The majority might well have replied, "So Does the Precedent." Unlike the majority, Justice Scalia grappled with the central issues in the case and built a clear and logical argument. But in order to treat viewpoint discrimination as a nonissue in the subsidization context, however, he had to disregard several cases in which the Court assumed that First Amendment principles do apply, at least to some extent, to Government subsidies.[110]

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102. *See id*. at 2180-81 (Scalia, J., concurring).

103. *See id*. at 2188 (Souter, J., dissenting).

104. *See* Finley v. NEA, 100 F.3d. 671, 676-77 (9th Cir. 1996); Finley v. NEA, 795 F. Supp. 1457, 1470-71 (C.D. Cal. 1992).

105. *See Finley*, 118 S. Ct. at 2181 (Scalia, J., concurring).

106. *See supra* Part III.A.

107. *See Finley*, 118 S. Ct. at 2181 (Scalia, J., concurring).

108. *See id*. at 2183-84 (Scalia, J., concurring).

109. *Id*. at 2180 (Scalia, J., concurring) (title of section I of his opinion).

110. First and foremost, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court invalidated a state statute that excluded certain magazines and journals from receiving a tax exemption. In order to support his argument in *Finley* that subsidies, whether direct or by exemption, are generally not sufficiently coercive to violate the First Amendment, Justice Scalia resorted to citing his own dissenting opinion in *Arkansas Writers' Project*. *See Finley*, 118 S. Ct. at 2183 (Scalia, J., concurring) (quoting *Arkansas Writers' Project*, 481 U.S. at 237 (Scalia, J., dissenting)). Curiously enough, the majority cited other language in Scalia's *Arkansas Writers' Project* dissent for the proposition that discriminatory subsidies could violate freedom of speech. *See id*. at 2178 (quoting *Arkansas Writers' Project*, 481 U.S. at 237 (Scalia, J., dissenting)).

Justice Scalia cited *Rust v. Sullivan* for the proposition that the Government can "'selectively fund a program to encourage certain activities . . . without at the same time funding an alternate program.'"[111] He failed to acknowledge, however, that *Rust* suggested that favoring a particular viewpoint through subsidization might not be acceptable in certain spheres of discourse in which free speech values predominate, such as a public forum or a public university.[112] Thus, if *Rust* supports the constitutionality of the NEA criteria, there should at least be some explanation as to why public arts funding should not be included in this "sphere of discourse" exception.

Justice Scalia rejected as mistaken the respondent's attempt to distinguish *Rosenberger* as a case in which the Government paid someone else to propagate its own message, instead of expending funds to encourage diverse viewpoints from private speakers.[113] Justice Scalia failed to acknowledge, however, that this was not merely the respondent's creative reading of *Rosenberger*, but rather the *Rosenberger* Court's explicit interpretation of *Rust*.[114] In explaining why such a distinction should not make a difference either as a matter of constitutional law or common sense, Justice Scalia assumed that if the Government decides to promulgate a message, it can either do so directly, hire others to promulgate it, or subsidize others to promulgate it.[115] Assuming that this is true, it seems to offer only strained characterizations of the NEA arts funding program. To Justice Scalia, the Congress, through the NEA, is spending money to promulgate excellent art that is neither indecent nor disrespectful of diverse beliefs and values. In contrast, to Justice Souter, Congress is spending funds to encourage a wide range of artistic creativity wholly apart from its viewpoint, as long as what is subsidized is excellent, decent, and respectful. Thus, while Justice Scalia believed that the conditions (decency and respect) define the program and *are* the messages that the Government desires to transmit, as in *Rust*, Justice Souter believed that these conditions subtract from an otherwise diverse marketplace of ideas created by the Government, as in *Rosenberger*. Arguably, neither characterization fully captures the arts funding program. Justice Souter, however, seems closer to the reality than does Justice Scalia.

Ultimately, Justice Scalia distinguished *Rosenberger* as a case in which the

111. *Id*. at 2183 (Scalia, J. concurring) (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).
112. *See Rust*, 500 U.S. at 200.
113. *See Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring).
114. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833-34 (1995).
115. *See Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring).

state established a limited public forum.[116] This is a strained reading of the case. But if Scalia is correct, he failed to explain why the subsidization program in *Rosenberger* was a public forum and the NEA program was not. Moreover, he failed to respond to Justice Souter's argument that forum type should not make a difference because, under the Court's precedents, regulation of nonpublic forums must be viewpoint neutral.[117]

Justice Scalia summarized his position by explaining, "I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable."[118] Unlike the majority opinion, Justice Scalia's approach is clear and as a matter of first impression intuitively sensible. The obvious drawback, however, is that he can derive this principle only by disregarding or mischaracterizing much of the relevant precedent.

### *C. Justice Souter's Dissent*

Only Justice Souter dissented. As with Justice Scalia's opinion, much of Justice Souter's dissent offers specific counterarguments to the majority opinion which have been discussed above and which will not be restated in any detail.

Justice Souter began by emphasizing the bedrock principle that the First Amendment prohibits viewpoint discrimination.[119] He then concluded that both the text and history of section 954(d) show that it was intended to, and does in fact, disfavor some speech because of its message.[120] Expounding on that conclusion, he argued that it is irrelevant from a First Amendment perspective whether the forbidden criteria are total prohibitions or merely factors in the decision-making process.[121]

Unlike the majority or Justice Scalia, Justice Souter attempted to develop carefully the distinctions between the Government as speaker or buyer, the Government as regulator (as suggested by *Rust* and *Rosenberger*), and the Government as patron (as suggested by the Solicitor General).[122] Noting that the Government conceded that it was acting as neither speaker nor buyer through the NEA program, Justice Souter found that *Rosenberger* rather than *Rust* was

116. *See id*. (Scalia, J., concurring) (citing *Finley*, 118 S. Ct. at 2178 (majority opinion)).
117. *See id*. at 2192 n.10 (Souter, J., dissenting).
118. *Id*. at 2184 (Scalia, J., concurring).
119. *See id*. at 2185 (Souter, J., dissenting).
120. *See id*. at 2188-90 (Souter, J., dissenting).
121. *See id*. at 2189-90 (Souter, J., dissenting).
122. *See id*. at 2190-91 (Souter, J., dissenting).

the most pertinent precedent.[123] He then concluded that consideration of decency and respect by the NEA is impermissible viewpoint discrimination in a program subsidizing private speech, just as the prohibition of funding publications with a religious perspective was in *Rosenberger*.[124] As noted above, Justice Souter rejected the majority's attempt to distinguish NEA funding from *Rosenberger* as a competitive selection process[125] as well as Justice Scalia's attempt to distinguish it as a nonpublic forum.[126]

Justice Souter explicitly addressed the Government's argument that the Court should recognize a new analytical category for Government patronage, but he rejected it on the ground that the Government failed to justify the need for such a creation.[127] Perhaps such a new characterization most accurately describes what is at stake. None of the existing characterizations quite capture the NEA funding program. The Government is not speaking. It is not buying art. It is not hiring private parties to propagate its message. It is not regulating speech. It is not simply creating a public forum to encourage discourse (although this comes closer than the alternatives). Rather, it is encouraging artistic expression within a framework of excellence, decency, and respect for diverse beliefs and values. It is not simply sponsoring a message or viewpoint as Justice Scalia would have it, nor is it creating an unconstrained public forum as Justice Souter suggests. It is doing something in between. The Government's characterization of the NEA as patron may not be perfect, but it comes closer to capturing the essence of the program than any of the competing characterizations.[128]

Justice Souter ended his opinion with a lengthy response to the majority's distinction between an as-applied invalidation and an on-the-face challenge of section 945(d)(1).[129] He maintained that the contexts in which decency and

123. *See id*. (Souter, J., dissenting).
124. *See id*. at 2191-92 (Souter, J., dissenting).
125. *See id*. at 2192 n.8 (Souter, J., dissenting).
126. *See id*. at 2192 n.10 (Souter, J., dissenting).
127. *See id*. at 2192-93 (Souter, J., dissenting).
128. Assuming the creation of a new analytical category might be helpful, at least as a descriptive matter, there remains the question of what to do with it. That is, what standard of review should apply when the Government acts as patron? The Government contended that a rational basis test should apply. Justice Souter dismissed this as too lenient in a case involving viewpoint discrimination. *See id.* at 2193. The concluding Part of this Article argues that patronage is different and that the Government should be permitted to condition its grants of patronage, at least in the arts, on an agreement to respect certain widely shared public sensibilities. The majority hinted at this in section II-B of its opinion, and Justice Souter briefly considered and rejected it in his dissent. Nevertheless, neither gave this argument the full consideration that it deserved.
129. *See id*. at 2193-96 (Souter, J., dissenting).

respect could be constitutionally taken into consideration are quite limited; thus the statute is substantially overbroad and ripe for facial challenge.[130] Moreover, he found it likely that section 954(d) will cause artists to modify their work to obtain grants or to forego the grant-making process, thus chilling artistic expression either way.[131] Justice Souter's analysis of the appropriateness of a full facial challenge under the circumstances is more consistent with the precedent than the majority's half-hearted suggestions to the contrary.

Justice Souter's opinion is the most satisfying of the three. Unlike the majority, he faced the issue squarely. Unlike Justice Scalia, he attempted to address and apply relevant precedent. His analysis is largely consistent with established doctrine. Yet, as noted above, Justice Souter attempted to cram the factual situation into doctrinal characterizations that fail to capture the dynamics of the controversy. Justice Souter's failure to convince even one other member of the Court to concur in his careful, craftsmanlike analysis suggests that this case offered something else that his doctrinally predictable approach failed to address.

## IV. THE DYNAMICS OF THE *FINLEY* CASE

In *Finley*, the Court addressed a legal issue that had been debated and analyzed in the law reviews for the better part of a decade. The Court benefited from a court of appeals decision with a strong dissent that presented the basic arguments with clarity. The Court received thorough briefs from many leading lawyers and law professors. In short, the Court had sufficient resources available to resolve the issue persuasively one way or the other. The Court decided the case, of course, but with an extraordinarily muddled opinion. Justice Scalia's concurrence was far more precise analytically but was too extreme and too disrespectful of precedent to attract more than Justice Thomas's vote. Justice Souter's dissent was largely consistent with current doctrine and under other circumstances might have attracted a majority of the Court. Yet, in *Finley*, it failed to garner another vote. Obviously, this requires explanation or at least invites speculation.

The most obvious explanation of *Finley* is that the Court simply decided to validate the political compromise that Congress and the NEA worked out in order to defuse the controversy swirling around the agency since 1989. Certain

130. *See id*. at 2194-95 (Souter, J., dissenting).
131. *See id*. at 2195 (Souter, J., dissenting).

factions in Congress largely created the NEA funding controversy in response to the Mapplethorpe and Serrano grants, forcing Congress to cope with it in some politically feasible manner.[132] Few members of Congress would relish explaining to constituents why they voted against decency in arts funding.

Following the report of the Independent Commission, Congress added section 954(d)(1) to stress artistic excellence, but with decency and respect for diverse beliefs and values taken into consideration. This provided Congress with political cover. Moreover, almost from the outset, the Chairperson of the NEA effectively read the decency clause out of the legislation by determining that he could meet his obligations under the statute by ensuring that membership on the panels comprised people of diverse beliefs and values.[133] During oral argument in *Finley*, Justice Scalia noted that such efforts might address the obligation to respect diversity, but he wondered whether the Chairperson also went out of his way to appoint decent people to the panels to fulfill the decency requirement.[134] As construed by the Chairperson, however, the decency and respect clauses, as such, posed little realistic threat to the arts community. But it became apparent that the NEA had internalized the lessons of the Mapplethorpe and Serrano controversies and had decided to attempt to steer clear of obviously controversial grants to the extent possible in order to avoid reigniting the controversy.[135] Consequently, the authority to award grants to individual performing artists such as Karen Finley recently has been cut back substantially.[136] Also, attempts to defund or eliminate the NEA have been

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132. *See generally* John E. Frohnmayer, *Giving Offense*, 29 GONZ. L. REV. 1, 5 (1993); Garvey, *supra* note 1, at 190-97.

133. *See Finley*, 118 S. Ct. at 2173-74.

134. *See* United States Supreme Court Official Transcript at *7, *Finley* (No. 97-371), *available in* 1998 WL 156955 (Mar. 31, 1998) (Oral Argument of Seth P. Waxman on Behalf of the Petitioners).

135. Anne-Imelda Radice, the Chairperson of the NEA who succeeded John Frohnmayer after he was forced to resign in 1992, made it clear that she would be sensitive to taxpayer sensibilities in considering grant applications. *See* Kim Masters, *Acting Arts Chief Vows to Keep It Clean; House Testimony by Anne-Imelda Radice Seen Reversing Frohnmayer*, WASH. POST, May 6, 1992, at A1.

Quite recently, the Chairperson of the NEA canceled a grant to fund the printing of a children's book entitled *The Story of Colors* written by a Mexican guerrilla leader. *See* Julia Preston, *N.E.A. Couldn't Tell a Book by Its Cover*, N.Y. TIMES, Mar. 10, 1999, at A1. The book refers to characters smoking pipes and making love and includes an illustration of "a reclining naked woman in a sexual embrace with a figure that appears to be a male God." *Id* at A8. The Chairperson explained that the grant was rescinded not because of the contents of the book but rather out of concern that the funds would be used to support guerrilla activity. *See id*.

From the newspaper description, it would not seem that the book would be considered indecent or disrespectful of the diverse beliefs and values of the American public although it might be deemed inappropriate for young children.

136. *See* Act of Nov. 14, 1997, Pub. L. No. 105-83, § 329, 111 Stat. 1543, 1600 (making appropriations for Department of Interior and related agencies for fiscal year ending Sept. 30, 1998).

beaten back politically, although its budget has been decreased significantly.[137] Essentially, before the Court decided *Finley*, the political process had worked out a rough compromise that gave opponents of the NEA some things to crow about, minimized the actual First Amendment threat, and protected the NEA against future political assault.

While the Court may have validated this political compromise, it does not deserve credit for saving the NEA as such. The NEA apparently had weathered the political storm, and it is unlikely that a judicial invalidation of the decency and respect clause would have led to a serious assault on its continued existence, especially considering the fact that the agency had been enjoined from enforcing section 954(d)(1) almost since its enactment. Had the Court invalidated the decency and respect criteria, Congress might have proposed new constraints on the NEA's discretion which probably would have led to further litigation. But even in the absence of any congressional limitation, the NEA would be unlikely to deliberately approve grants that might plunge it back into the political turmoil from which it had only recently escaped.

The easiest and quite possibly the most accurate explanation of the *Finley* opinion is that a majority of the Court examined the existing state of affairs, concluded that it had worked relatively effectively, and decided to leave well enough alone. The majority opinion then seems to be an attempt to preserve the status quo and minimize any long-term damage to First Amendment doctrine.

This interpretation fits nicely with the analysis set forth in two recent forewords to the *Harvard Law Review*'s Supreme Court Note. In an article entitled *Law as Equilibrium*, Professors William Eskridge and Philip Frickey argued that the Court generally is and should be hesitant to interfere with states of equilibrium achieved on controversial issues by competing political institutions.[138] The *Finley* decision appears to exemplify such strategic behavior.

The following year, Professor Cass Sunstein contributed a foreword entitled *Leaving Things Undecided*[139] in which he argued that when the Court agrees on a result but finds it difficult to agree on a satisfying legal rationale, it often writes opinions which he refers to as "incompletely theorized agreements."[140] That is, the Court decides the case but leaves to subsequent Courts the task of

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137. *See* Katharine Q. Seelye, *For Election Year, House Approves Arts Financing*, N.Y. TIMES, July 22, 1998, at A1.

138. *See* William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

139. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

140. *Id.* at 20 (emphasis omitted).

explaining how the decision fits into the existing doctrinal and theoretical frameworks.[141] The Court generally must say something, though what it says may be incomplete, confusing, and internally inconsistent.[142] Professor Sunstein used *Romer v. Evans*[143] as a prime example of such an opinion.[144] Had he written his foreword two years later, *NEA v. Finley* would have illustrated his thesis just as nicely. *Finley* is an example of "decisional minimalism" to use another of his characterizations,[145] in that it assiduously avoids bold doctrinal or theoretical pronouncements. Similarly, like many minimalistic opinions, its internal contradictions suggest that it was the product of severe disagreement within the Court regarding the appropriate rationale. In *Finley*, where the Court found itself probably facing some internal disagreement as well as wrestling with a politically controversial issue already largely resolved by other branches of the Government, the Court did what Professor Sunstein argued that it would and should do—it resolved the case with a narrow and shallow opinion, leaving larger doctrinal and theoretical issues undecided.

## V. THE DOCTRINAL IMPACT OF *FINLEY*

The Court in *Finley* may well have intended to decide a politically troublesome case in a way that would have been difficult to justify under existing doctrine while minimizing damage to that doctrine. The Court may have hoped that its opinion was sufficiently muddled so as to be of little use in the future, or it may have hoped to successfully limit its holding to the facts in subsequent litigation. Once the Court releases an opinion, however, it cannot control how it will be used by Justices in future cases, much less how lower federal and state courts will use it. Certainly, some of the language in *Finley*, if taken seriously, can cause analytical confusion in the future, particularly in two areas: viewpoint discrimination and unconstitutional conditions.

### *A. Viewpoint Discrimination*

The prohibition against viewpoint discrimination in the arts context is now one of the most central tenets in the Court's freedom of speech jurisprudence

141. *See id*. at 21-25.
142. *See id*.
143. 517 U.S. 620 (1996).
144. *See* Sunstein, *supra* note 139, at 57-70.
145. *Id.* at 4.

over the past two decades.[146] Stating the rule is easier than applying it, however. Commentators have faulted the Court for failing to define adequately the concept of viewpoint discrimination or even to distinguish it sufficiently from content discrimination, which though troublesome, is more permissible.[147] Not surprisingly, the Justices have not always agreed when classifying a particular regulation as viewpoint or content discriminatory.[148]

*Finley* should add to the confusion. The Court seemed to deny that section 954(d)(1) was viewpoint discriminatory, at least in any sharp and particular sense. It based this to a large degree on excerpts from the legislative history indicating that Congress did not intend to preclude any specific viewpoint, as well as on its own conclusion that the decency and respect criteria are too vague to prohibit any particular point of view.[149] The Court seemingly treated decency and respect as limitations on mode or style of speech rather than point of view or perspective, although it did not explicitly make this claim. It also seemed to suggest that singling out a particular viewpoint is essential to the success of an on-the-face as opposed to an as-applied challenge.[150]

None of this seems sensible or even consistent with existing precedent. Considering that precedent clearly has established viewpoint discrimination as one of the primary villains under the First Amendment, legislators who intend to burden viewpoints will likely proclaim the opposite. If a law appears to be viewpoint discriminatory, self-serving legislative disclaimers offer little more than an attempt to persuade the Court that the words do not mean what they say.

The Court's emphasis on the vagueness of the criteria seems to be used to bolster its argument that Congress neither intended to nor did in fact single out any specific viewpoint, such as "capitalism leads to inequality" or "affirmative action is a form of racism." Thus, indecent art could further either side of these or any other debates. As such, indecency or lack of respect is more of a style or

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146. *See* NEA v. Finley, 118 S. Ct. 2168, 2185-86 (1998) (Souter, J., dissenting) (compiling cases).

147. *See* DANIEL FARBER, THE FIRST AMENDMENT 28 (1998); Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 700 (1996); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 110 (1996); Elena Kagan, *The Changing Faces of First Amendment Neutrality*: R.A.V. v St. Paul, Rust v Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 70; Sabrin, *supra* note 36, at 1210; Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 105 (1998).

148. *Compare* R.A.V. v. City of St. Paul, 505 U.S. 377, 391-93 (1992) (Scalia, J.), *with id.* at 419-21 (Stevens, J., concurring). *Compare* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830-32 (1996) (Kennedy, J.), *with id.* at 894-97 (Souter, J., dissenting).

149. *See supra* notes 44-52 and accompanying text.

150. *See supra* notes 83-84 and accompanying text.

mode of argument than a viewpoint or perspective. Although there is a certain amount of truth in this argument, it misses another truth: the criteria of decency and respect essentially embody the viewpoint that it is inappropriate to be indecent and disrespectful.

The Court confronted a somewhat similar dispute over the meaning of viewpoint discrimination in *R.A.V. v. City of St. Paul*,[151] perhaps the Court's leading recent viewpoint discrimination case. The Court resolved that case contrary to the way it resolved *Finley*. In his concurrence, Justice Stevens argued that the criminalization of fighting words using race or religion was viewpoint neutral because either side of a debate could use them.[152] The majority in that case rejected this approach, however, explaining that, as compared to someone who chose not to rely on racially based fighting words, the person who did was disadvantaged on the basis of viewpoint.[153] Likewise, in *Rosenberger*, Justice Souter argued in his dissent that the prohibition against subsidizing religious perspectives was not viewpoint discriminatory because it would apply to all religion-oriented advocacy, including advocacy by atheists and agnostics.[154] The majority in that case disagreed, however, pointing out that the person who wished to discuss an issue from a religious perspective would be disadvantaged as compared to the person who wanted to discuss it from a nonreligious perspective.[155] Thus, prior to *Finley*, the state clearly did not need to explicitly single out a specific or narrow point of view in order to commit viewpoint discrimination. Focusing on one category, approach, or perspective that was itself defined by viewpoint or message was more than sufficient, even though it could encompass many disparate subviewpoints or counterarguments.

To the extent that the Court suggested that decency and respect are best considered modes or styles of speech with no particular message or viewpoint, the *Finley* opinion also seems inconsistent with both the common understanding of the terms and the precedent. Justices Scalia and Souter illustrated that decency and respect are not simply content-hollow terms but do indeed have well-understood meanings that encompass particular perspectives.[156] Moreover, to treat decency and respect as nothing more than styles of speech seems

151. 505 U.S. 377 (1992).
152. *See id*. at 424-25 (Stevens, J., concurring).
153. *See id.* at 391-92.
154. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 895-96 (1996) (Souter, J., dissenting).
155. *See id*. at 831-32.
156. *See supra* notes 53-54 and accompanying text.

inconsistent with well-established precedents such as *Cohen v. California*[157] and *Texas v. Johnson*.[158] In *Cohen*, the Court confronted the question of whether the state could prohibit displaying the word "fuck" under an offensive conduct statute.[159] In an oft-quoted opinion written by Justice Harlan, the Court reasoned that such offensive language was not simply a regrettable style of expression but carried both communicative and emotive impact.[160] Likewise, in *Johnson*, Justice Rehnquist argued in his dissent that the state statute criminalizing desecration of a flag as applied to the burning of an American flag in protest did not single out a message, but merely prohibited one means of communication that the Chief Justice compared to an inarticulate grunt.[161] The majority rejected this interpretation, however, holding that the statute was clearly viewpoint discriminatory.[162] Thus, if *Finley* suggests that the decency and respect criteria of section 954(d)(1) simply focus on content empty modes of communication, then it conflicts with well-regarded precedent.

Although disingenuous and inconsistent with a great deal of well-established doctrine, there is every reason to believe that the *Finley* Court's treatment of the viewpoint discrimination issue does not signal a significant change of direction by the Court. At the outset, *Finley* may present a very limited threat to the current jurisprudence of viewpoint discrimination simply because the reasoning of the case is so obscure. The Court seemed to believe that viewpoint discrimination did not present a major problem in the case but it never clearly explained why. By leaving the reader to wonder what the Court meant, subsequent courts will have the opportunity to reject troublesome interpretations of the opinions as misunderstandings or overreactions.

The Court seemed to hedge its discussion of viewpoint discrimination by limiting its consideration to an on-the-face challenge. It suggested that it would be far more troubled if an applicant could actually demonstrate that the section 954(d)(1) criteria had been applied in a viewpoint discriminatory manner. Indeed, the overwhelming number of viewpoint discrimination cases involve as-applied challenges. *Finley* may simply mean that viewpoint discrimination can only be established in an on-the-face challenge by demonstrating that the regulation does and was intended to single out a very specific point of view.

157. 403 U.S. 15 (1971).
158. 491 U.S. 397 (1989).
159. *See* 403 U.S. at 16.
160. *See id.* at 25-26.
161. *See* 491 U.S. at 431-32 (Rehnquist, C.J., dissenting).
162. *See id.* at 411-12.

Although this may not make much sense, it may not do much harm either.

Finally, *Finley's* discussion of viewpoint discrimination arose in the context of subsidized speech rather than regulation. A fair amount of precedent suggests that this should not matter,[163] but the *Finley* majority seemed to suggest otherwise. As the final Part of this Article will clarify, perhaps the lesson of *Finley* should be that the state may engage in some viewpoint discrimination in subsidy programs that would not be permissible elsewhere.

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163. *See supra* note 110 and accompanying text; *infra* notes 171-80 and accompanying text.

### *B. The Unconstitutional Conditions Doctrine*

The other major doctrinal area implicated by *Finley* is the unconstitutional conditions doctrine. This doctrine, broadly construed, states that the Government may not require a person to relinquish a constitutional right in order to receive a Government benefit and vice versa.[164] The Court has applied the doctrine with great inconsistency and confusion, and it is widely considered one of the most difficult areas in all of constitutional law.[165]

Section 954(d) certainly could be analyzed pursuant to the unconstitutional conditions doctrine. The rhetoric of unconstitutional conditions, however, was not an important part of the *Finley* case and its history. Although the district court invalidated section 954(d)(1) primarily on vagueness grounds, it noted that the record was insufficiently developed to warrant summary judgment on the unconstitutional conditions theory.[166] The court of appeals hardly addressed the unconstitutional conditions doctrine, noting that it had not been properly presented.[167] The respondent addressed the doctrine very briefly in its brief to the Supreme Court, but it clearly was not the primary focus of its argument.[168] The Court itself addressed the unconstitutional conditions doctrine but rather obliquely.

The Court's precedents, particularly *Rosenberger*, which indicate that viewpoint discrimination in a subsidy program is generally unconstitutional, largely overshadow the unconstitutional conditions doctrine in the arts funding context because they provide a far less complicated challenge.[169]

In *FCC v. League of Women Voters*,[170] the Court ruled that the state could not require public television stations to refrain from editorializing in exchange

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164. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

165. *See generally* FARBER, *supra* note 147, at 203; Sullivan, *supra* note 164; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

166. *See* Finley v. NEA, 795 F. Supp. 1457, 1472 (C.D. Cal. 1992).

167. *See* Finley v. NEA, 100 F.3d 671, 674 n.1 (9th Cir. 1996).

168. *See* Respondents' Brief at *48-*49, NEA v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371), *available in* 1998 WL 47281 (Feb. 6, 1998).

169. During the course of oral argument, one of the Justices suggested to David Cole, counsel for respondents, that his entire case rested on *Rosenberger*. *See* United States Supreme Court Official Transcript at *52, *Finley* (No. 97-371), *available in* 1998 WL 15955 (Mar. 31, 1998). He denied that this was the case, citing *Lamb's Chapel v Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985), both of which are viewpoint discrimination precedents.

170. 468 U.S. 364 (1984).

for federal funding, especially considering that these subsidies constituted only a small portion of the stations' revenues.[171] Conversely, in *Regan v. Taxation with Representation*,[172] the Court allowed the state to condition tax exemptions granted to organizations on an agreement not to use tax exempt funds to lobby because the organizations could set up separate structures for lobbying with non-tax exempt funds.[173] Thus, a requirement to refrain from exercising a constitutional right as a condition for receiving a Government subsidy is especially vulnerable to challenge if the condition extends to funds or conduct beyond the subsidy itself.

*Rust v. Sullivan*[174] added a new wrinkle to the analysis. There, the Court considered a federal regulation requiring recipients of a federal subsidy for family planning projects to agree not to discuss abortion as an option or engage in abortion referral.[175] The Court upheld the regulation on the ground that it was not an unconstitutional condition, but simply the definition of the program's scope.[176] In other words, the state has the right to subsidize one type of activity (preconception family planning counseling) rather than another (postconception counseling considering abortion). Further, to protect the integrity of the program, it may condition the receipt of the funds on an agreement to use them for the former purpose but not the latter. An obvious difficulty with this approach, as commentators have pointed out, is that it places few constraints on the Government's ability to skew public debate through its initial decisions as to funding priorities and program definition.[177] The *Rust* Court did place some limit on the discretion of the state in this regard by declaring in dicta that the state's ability to limit speech through conditional spending would be far more constrained in areas traditionally dedicated to freedom of speech such as public forums and public universities.[178] *Rosenberger v. Rector and Visitors of University of Virginia*[179] presented such a case, and the Court invalidated as viewpoint discriminatory a rule that prohibited the University from paying the printing costs of a student publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[180]

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171. *See id*. at 370-73.
172. 461 U.S. 540 (1983).
173. *See id*. at 550.
174. 500 U.S. 173 (1991).
175. *See id*. at 179.
176. *See id*. at 193-94.
177. *See, e.g.*, Redish & Kessler, *supra* note 36, at 576.
178. *See Rust*, 500 U.S. at 200.
179. 515 U.S. 819 (1995).
180. *Id*. at 822-23.

To place the *Finley* challenge to section 954(d)(1) in an unconstitutional conditions framework, the Government argued that the criteria of decency and respect simply defined the scope of the program as in *Rust* and did not interfere with the artist's ability to create indecent and disrespectful art with private funds.[181] In response, the challengers argued that publicly funded art was an example of an institution dedicated to free speech similar to the public forum and the public university mentioned in *Rosenberger*. As such, the state could no more place viewpoint-based restrictions on NEA grants than could the University on its subsidies in *Rosenberger*.[182] Moreover, NEA grants have an impact on art produced by private funds because, by law, the grants can only subsidize fifty percent of the project's cost. Also, the grants play an important role in attracting private support to artists and institutions.[183]

Several leading commentators have developed extensive theoretical frameworks for analyzing unconstitutional conditions issues.[184] As is generally the case, however, the Court has shown no interest in them. The Court is more than content to build on its precedents incrementally, however confused they may be.

Essentially, the Court put an additional qualification on the unconstitutional conditions doctrine as it had developed from *League of Women Voters* and *Regan* to *Rust*. The challengers hoped to avoid *Rust* and ride *Rosenberger* to the victory circle. The Court foiled the plan, however, by distinguishing *Rosenberger* as a case of a viewpoint-based condition on an otherwise widely available subsidy; NEA grants, conversely, are competitive in nature and as such must be judged by criteria that to some extent will be content oriented.[185] Thus, *Rosenberger* might control a widely available, first-come-first-served arts funding program, but not a selective program based on artistic excellence. But even if the state may rely on relatively viewpoint-neutral criteria (such as artistic excellence in a competitive grant process), it may not necessarily rely on obviously more viewpoint-based considerations (such as decency and respect).

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181. *See* Petitioner's Brief at *37-*40, NEA v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371), *available in* 1998 WL 11935 (Jan. 9, 1998).

182. *See* Respondent's Brief at *30-*33, *Finley* (No. 97-371), *available in* 1998 WL 47281.

183. *See id*. at *37-*38.

184. See Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Sullivan, *supra* note 164.

185. *See supra* notes 67-70 and accompanying text.

Nevertheless, the majority was not inclined to address that response.

Under the majority's approach, an unconstitutional conditions analysis will not carry the day in a dispute regarding a competitive process. As with viewpoint discrimination, however, the majority limited its analysis to the context of an on-the-face challenge.[186] The majority cautioned that the case would present a different problem if the NEA denied a specific grant based on its viewpoint. Perhaps, then, the competitive-process exception evaporates in as-applied challenges. Yet immediately after suggesting this distinction, the majority cited *Rust v. Sullivan* and *Maher v. Roe* for the proposition that the Government can selectively fund whatever it chooses without obligation to underwrite alternative approaches or points of view.[187] This suggests that *Rust* may have seriously undermined much of the existing unconstitutional conditions precedent, *Rosenberger* notwithstanding.

The majority did not necessarily disregard the unconstitutional conditions doctrine. Because the precedents in this area are sufficiently malleable, the Court is able to do generally whatever it chooses. Nevertheless, the majority left unconstitutional conditions analysis more confused than it found it, and that is no mean feat. Unconstitutional conditions analysis may now play a seriously diminished role in the viewpoint-conditioned subsidy case because straightforward viewpoint discrimination analysis seems more appropriate, at least when it is applicable. That seemed to be the case throughout the *Finley* litigation.[188]

## VI. A SUGGESTED RERATIONALIZATION OF *FINLEY*

The majority opinion in *Finley* is a confusing stew of partially complete and inconsistent arguments. Justice Scalia's concurrence was clearly developed but too radical a break from existing doctrine to attract a majority of the Court. Justice Souter's argument was well reasoned and largely consistent with existing doctrine and yet he was unable to obtain even one other vote. The Court did not provide even a minimally persuasive rationale for its holding.

Inconsistencies in the opinion suggest that this may largely be attributable to sharp doctrinal and theoretical disagreements on the Court. Under such

186. *See supra* note 83 and accompanying text.

187. *See supra* notes 85-92 and accompanying text.

188. Arguably, *Finley* is additional evidence that the unconstitutional conditions doctrine serves no useful purpose that is not already achieved by more pertinent doctrines and thus should be abandoned. *See* Sunstein, *supra* note 165. Professor Schauer has suggested that the Court's opinion in *Finley* may be the "epitaph" for the unconstitutional conditions doctrine. *See* Schauer, *supra* note 147.

circumstances, it would be pointless to ask the Court to convincingly explicate a rationale that a majority of the Justices refused to accept.[189] The Court can only provide as much guidance and explanation as is practicable.

On the other hand, it is also possible that the Court deliberately obscured its analysis for strategic reasons. Perhaps it decided that upholding the existing political compromise was definitely in the public interest but difficult to achieve under present First Amendment doctrine that the Court felt should not be altered. A solid majority may have coalesced around the result and agreed to produce an opinion that, through its obscurity, does as little damage as possible to free speech jurisprudence. *Finley* might then be compared to some of the Court's decisions in the early 1950s that undermined the Smith Act and other anticommunist legislation without provoking a direct constitutional confrontation.[190]

It is also possible, however, that some of the Justices who joined the opinion of the Court, indeed perhaps all of them, believed that upholding section 954(d)(1) represented the correct understanding of the First Amendment and not simply a prudentially defensible result. If so, the majority failed to explain adequately why that was the case. This Part argues that the decency and respect criteria are intuitively defensible and can be accommodated with free speech doctrine and theory with a minimum amount of destabilization. Still, it is debatable whether a clearer and more forthright approach that alters existing First Amendment doctrine is preferable to an obscure and disingenuous approach that may do less harm.

### *A. Attempted Justification*

#### *1. Deference to Legislative Compromise?*

The question that should have dominated the *Finley* decision is whether any legitimate public justification exists for the decency and respect clauses of section 954(d). Some explanation of purpose or justification seems particularly warranted given that the provision seems to be viewpoint discriminatory. Thus,

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189. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

190. In a series of cases in the 1950s following *Dennis v. United States*, 341 U.S. 494 (1951), in which the Court sustained the constitutionality of the Smith Act, the Court narrowed the impact of anticommunist control legislation on free speech values through statutory construction and evidentiary rulings rather than broader and possibly more controversial First Amendment holdings. *See, e.g.*, Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957).

the quest for justification starts with recognition that section 954(d) appears to be highly problematic under the First Amendment. Is there a public purpose capable of sustaining this legislation? One of the most striking aspects of the majority opinion in *Finley* is that it never attempts to define the contours of that public purpose or justification. At most, it describes the statutory amendment as an attempt to strike a compromise between those who favored elimination of the NEA, those who favored strict prohibition of specific types of artwork, those who favored some less particular but still meaningful restraint on NEA discretion, and those who favored no restriction beyond artistic excellence.[191] The attempt to find a politically acceptable compromise among these various factions may go a long way toward explaining how section 954(d) emerged as the resolution of the arts funding controversy, but it does not explain why this specific vehicle—the decency and respect clause—serves a sufficiently important public purpose to justify its inherent viewpoint-discriminatory nature. The reader of *Finley* is left with the feeling that the Court was afraid to discuss the purpose of the provision for fear that this purpose was indefensible or at least insufficient.

If the purpose of the amendment was simply to prohibit, discourage, or punish the creation and display of a category of offensive views and perspectives (artwork that is indecent or disrespectful)—either because those views were unpopular or as a means of skewing debate in favor of alternative views—then it would seem that the law should be considered a forbidden example of viewpoint discrimination. Not only would this purpose be insufficient, it would even be illegitimate. Such a law could be saved only by concluding, as Justice Scalia did, that First Amendment principles do not apply to subsidization decisions.

*2. Concern for Taxpayer Sensibilities*

The Court did set forth another justification that it never really considered. Congress created this justification when it enacted section 954(d) along with amendments to the declaration of findings and purposes of the Act, stating that arts funding should "contribute to public support and confidence in the use of taxpayer funds."[192] Presumably, Congress was exhibiting a legitimate interest in protecting the taxpaying public from being forced to subsidize art that deeply

191. *See* NEA v. Finley, 118 S. Ct. 2168, 2176 (1998).
192. 20 U.S.C. § 951(5) (1994).

offends a large segment of society (most likely a majority) because of its indecency or disrespect for widely shared beliefs and values. As a result, the decency and respect clause was not intended to censor or discourage the creation of offensive art or to skew the marketplace of art and ideas in favor of Government approved orthodoxy. Accordingly, artists may continue to be as indecent and disrespectful as they desire. They simply should not be allowed to inflict on the taxpaying public the indignity of having to pay for such art.

Congressional debates reflected such a position. Representative Rohrabacher concisely summarized the principle as "on their time with their dime."[193] In an earlier debate, Senator Helms, a leading proponent of restricting the NEA, argued that the American people "have a right not to be denigrated, offended, or mocked with their own tax dollars" and that "no artist has a preemptive claim on the tax dollars of the American people."[194] During the debate before the House of Representatives in 1990, Representative Coleman, a cosponsor of the provision that became section 954(d), explained:

> [W]e want more accountability to the taxpayer without intruding on the constitutional creativity and rights of all Americans. . . .
>
> . . . Works which deeply offend the sensibilities of significant portions of the public ought not be supported with public funds. That is a statement of common sense, of prudence, of sensibility to the beliefs and values of those who, after all, pay the taxes to support this Federal agency."[195]

Several other members of Congress expressed similar sentiments.[196]

Section 954(d) is arguably aimed at a type of harm distinct from the harm prohibited by the rule against viewpoint discrimination. The latter precludes the state from suppressing dangerous or offensive ideas, punishing purveyors of such ideas, or skewing the debate against such ideas. In contrast, the respect and decency clauses simply seek to relieve the public of the indignity of compelled

193. Frohnmayer, *supra* note 132, at 2 (quoting Representative Rohrabacher).

194. 135 CONG. REC. 16,278 (1989) (statements of Sen. Helms).

195. 136 CONG. REC. 28,623, 28,624 (1990) (statement of Rep. Coleman).

196. *See id*. at 28,636 (statement of Representative Roth) ("the American people have really been outraged by what is taking place because they feel that their hard-earned tax dollars are being used to fund obscene and blasphemous art, and I think that is pretty well the long and short of it"); *id*. at 28,639 (statement of Representative Armey) ("I do not believe we should spend NEA money for the enjoyment of artists. I believe we should spend NEA money for the enjoyment of the public, if we spend it at all, and that NEA grants should reflect the public's sensibilities and values."); *id*. at 28,651 (statement of Representative Walker) ("It is a question of whether or not tax money should be coerced away from hard-working Americans in order to pay for things which they regard as very obscene.").

sponsorship of a certain category of highly offensive artwork. If this is true, a number of issues remain open. Is the interest in protecting the taxpayer from the harm caused by compelled sponsorship of indecent or disrespectful art a legitimate interest, and is it significant enough to justify viewpoint discrimination in the subsidization context? Does the protection of this interest nevertheless inflict too much harm on free speech values in the arts funding context to permit its recognition? Finally, would recognizing such an exception to the viewpoint-discrimination principle cut too deeply into established First Amendment doctrine to be tolerable?

These issues are serious, and for many they are insurmountable. Nevertheless, section 954(d) can be justified on the grounds of protecting taxpayers from being forced to sponsor indecent and disrespectful work. Notwithstanding the justification, whether it is preferable to the Court's somewhat messier approach remains uncertain.

### *B. Consideration of Taxpayer Sensibilities as a Justification for Viewpoint Discrimination*

Easily the cleanest way to justify section 954(d) is to contend, as does Justice Scalia, that free speech principles simply do not apply to subsidization decisions. Once that step is taken, it scarcely matters what Congress did or why. Assuming that section 954(d) is constitutionally acceptable, it is easy enough to conjure up subsidization decisions that should not be. Presumably, most would agree that a decision by Congress to subsidize only speech by Democrats, or white people, or speech supportive of Government policy should be unconstitutional. Justice Scalia indicates that he would handle such a parade of horribles through other constitutional provisions,[197] presumably equal protection. Perhaps that would work if equal protection analysis was applied with sufficient rigor. Given that these examples present the type of viewpoint discrimination harm central to the First Amendment, however, it seems bizarre to declare free speech analysis off limits. Instead, the First Amendment should tolerate the decency and respect clause but not these other examples because the harm to the taxpayer from being forced to fund indecent and disrespectful art is a distinct and cognizable type of harm from which Congress should be able to provide protection. In the context of federal arts funding, the discouragement if not the outright prohibition of grants for indecent and disrespectful art will not

197. *See* NEA v. Finley, 118 S. Ct. 2168, 2184 n.3 (1998) (Scalia, J., concurring).

undermine free speech values to an unacceptable degree. Moreover, the recognition of such an exception to the general principles against viewpoint discrimination will not destabilize the existing doctrinal framework.

*1. Protection Against Compelled Subsidization*

Direct civil or criminal prohibition of indecent or disrespectful art clearly would violate the First Amendment. To the extent that indecent art sends a message or expresses a point of view that deeply offends some significant segment of the public, this type of harm is simply a legitimate cost of freedom of speech that the offended viewers must bear. They may "avert[] their eyes," as the Court has put it.[198] It is the additional indignity of forcing the taxpayers to pay for art that assaults their most deeply held values in a manner violating widely shared social norms that distinguishes this from the constitutionally acceptable harm caused by the message itself.

The artist, with the help of the NEA, is to some extent compelling the taxpayer to sponsor the creation of deeply offensive artwork. In this sense, Senator Helms' statement that the taxpayer has a right not to be mocked rings true. The taxpayer certainly has no right to avoid being criticized, even with the fruits of his labor, but taxpayers arguably should be able to preclude the Government from forcing them to underwrite indecent assaults on their basic values.[199]

In a series of cases, the Court has recognized that the First Amendment precludes the state from compelling an individual to engage in expressive activity to which he objects.[200] The Court has also recognized a limited First Amendment right to be free from having to pay fees or assessments that will be used to promote causes or speech the individual finds objectionable, at least where the promotion is not central to the mission of the institution.[201] These cases illustrate the significance of the interest in not being compelled to support or fund objectionable messages. These compelled speech cases do not

198. Cohen v. California, 403 U.S 15, 21 (1971); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975).

199. For the argument that in its managerial capacity the Government may permissibly use its subsidization decisions to reenforce widely shared social norms such as decency and respect for diverse beliefs and values, see Post, *supra* note 36, at 184-92.

200. *See* Hurley v. Irish-American Gay, Lesbian and BiSexual Group, 515 U.S. 557 (1995); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

201. *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Keller v. State Bar of Cal., 496 U.S. 1 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

necessarily control the arts funding issue, however. While it is fair to say that the taxpayer is imposed upon by NEA grants to artists who create indecent and offensive works, the taxpayer is not required to participate in the creation of the work in any active sense, nor is the taxpayer compelled to endorse or display the message. Moreover, the decency and respect amendment presents the converse of the Court's mandatory funding cases. For instance, in *Abood v. Detroit Board of Education*,[202] an individual asserted a First Amendment right to be free from contributing funding to an objectionable cause that a majority of union members presumably supported. Conversly, in the arts funding context, the majority (through congressional legislation) decided to respect taxpayers' claims of conscience while a third party, the potential grant recipient, raised a First Amendment objection to that decision. Compelled funding cases like *Abood* do not resolve this controversy, but they bolster the contention that the interest in not forcing taxpayers to financially support objectionable speech is a distinct and cognizable injury worthy of legal recognition and respect.

That this is a legitimate interest does not suggest that every disgruntled taxpayer has the right to complain about any disbursement of federal funds to promote a message or cause with which he disagrees. Unlike the First Amendment based compelled speech cases like *Abood*, the interest in protecting the taxpayer in the arts funding context is asserted not by a dissenting member of the polity but by the majority of Americans through the legislative process. As a result, not every malcontent would have the power to bring the Government to a halt. Professor Fiss argues that it is inappropriate to think of Government funds as contributions from citizens in which they still have some cognizable stake.[203] Rather, it is the Government's money to spend as it sees fit. Doubtlessly, most Americans would reject this characterization. Assuming they accept it, though, it would only be pertinent if dissenting taxpayers objected to the Government's actual disposition of the funds. In arts funding, the Government allocates the funds in a way that attempts to take account of taxpayer sensibilities.

### *2. Protecting Legitimate Taxpayer Sensibilities*

Still, to contend that protecting taxpayer sensibilities is a legitimate governmental interest is radically incomplete. The obvious question is protection

202. 431 U.S. 209.
203. *See* FISS, *supra* note 36, at 107 .

against what. Section 954(d) provides the answer: protection against art that is either indecent or disrespectful of the diverse beliefs and values of Americans. Nevertheless, whether the taxpayer has a valid interest in being free of having to sponsor art that infringes these values is a question section 954(d) does not answer.

*a. Decency*

The concept of decency expresses a widely shared norm and has in certain contexts withstood First Amendment challenge. Section 954(d)(1) did not define indecency but rather referred to "general standards of decency." At least one source for such standards is from the definition that has made its way into the law in the broadcasting context. It focuses on language and graphic depictions that are patently offensive by contemporary community standards because they depict sexual or excretory activities or organs.[204] This reflects a widely held though scarcely universal belief that graphic depictions of sexuality and excretory activity are inappropriate, at least in public. This would cover the most controversial of the Mapplethorpe photographs that ignited the NEA funding controversy, and arguably Serrano's *Piss Christ* as well. It is fair to say that much if not most of the anger directed at NEA funding decisions was provoked by the knowledge that the taxpayer was paying for patently offensive art of a sexually explicit nature.

While indecent but nonobscene speech (and art) is protected by the First Amendment, the state has the right to prohibit its broadcast over the public airwaves during those hours when children are most likely to be listening or watching.[205] Admittedly, section 954(d)(1) has nothing to do with protecting children. Nevertheless, at the heart of the concept of indecency is the rather obvious recognition that for most people, sexuality is largely a private and deeply personal matter—for many, a sacred matter. Thus, for a large segment of the public, sexually explicit art is extraordinarily offensive, inappropriate, and indeed immoral. Although the First Amendment protects indecent but nonobscene speech, the fact that the Court has addressed the constitutionality of legislative and administrative attempts to regulate indecent speech in so many

204. *See* FCC v. Pacifica Found., 438 U.S. 726, 732 (1978) (quoting *In re* Pacifica Found., 56 F.C.C. 2d 94, 98 (1975) (declaratory order)).

205. *See id*.; *see also* Action for Children's Television v. FCC, 58 F.3d 654 (1995), *cert. denied*, 516 U.S. 1043 (1996).

different media contexts during the past twenty years[206] indicates that the value of decency is a widely shared and deeply felt societal norm.[207]

*b. Respect for Diverse Beliefs and Values*

Unlike indecency, the concept of respect for the diverse beliefs and values of the American people has no established legal pedigree.[208] Read literally, it might disfavor any artwork that is highly critical of almost anything that some segment of the population holds dear. Such a reading would cut deeply into free discourse in the art world because it would suggest that anything controversial is almost by definition a problematic candidate for funding. In context, however, there is no reason to read the phrase so broadly. When coupled with indecency and considered with the circumstances giving rise to the adoption of section 954(d), the concept of respect for diverse beliefs and values should be read to encompass works, such as Serrano's *Piss Christ*, that deliberately assault deeply cherished values or deliberately inflict pain in a manner that transgresses widely shared norms of propriety.

Blasphemous art would often be considered sufficiently disrespectful of diverse beliefs and values. Likewise, racial hate speech or particularly offensive depictions of women or homosexuals would also violate this norm as would particularly insensitive treatment of the dead. If limited to artwork that a large segment of the public would consider to be well beyond the bounds of legitimate comment and criticism, the respect criteria does not prohibit vigorous and pointed criticism of the status quo through publicly financed art. Indeed, the emphasis on "diverse" beliefs and values ensures that it does not simply enshrine majoritarian preferences. Rather, it applies only to that art which is clearly beyond the pale of civil discourse.

One difficulty with the foregoing construction is that it arguably attempts to achieve the same goals as the Rohrabacher amendment that was rejected in

206. *See* Reno v. ACLU, 521 U.S. 844 (1997) (indecency on Internet); Denver Area Educ. Television Consortium v. FCC, 518 U.S. 727 (1996) (indecency on leased and public access cable channels); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (indecency over telephone); FCC v. Pacifica Found., 438 U.S. 726 (1978) (indecency on public radio airwaves).

207. *Cf.* Post, *supra* note 36, at 191 (making observation that "the fact that family values are popular and commonly shared, or, in Fiss's demeaning term, 'orthodox,' would not be grounds for abandoning a posture of judicial deference because, as we have seen, these attributes are precisely what authenticate the government's support of family values as reasonable and legitimate").

208. Respect for diverse beliefs and values presents greater First Amendment problems than the concept of decency, but if construed narrowly, it is also can coexist with freedom of speech in the subsidization context.

favor of the current section 954(d). Congressman Rohrabacher's alternative would have prohibited the use of NEA grants for the depiction, promotion, distribution, or dissemination of, among other things: denigration of "the beliefs, tenets, or objects of a particular religion" or of a group or individual "on the basis of race, sex, handicap, or national origin," or of work in which the U.S. flag is "mutilated, defaced, physically defiled, [or] burned."[209] Arguably, Congress may not have intended respect for diverse beliefs and values to bear the interpretation offered here simply because it largely parallels the rejected Rohrabacher approach. This is not a particularly persuasive objection, however. Certainly, Congress meant something by the phrase "respect for diverse beliefs and values." From a free speech standpoint, a narrower or limited interpretation seems preferable to one that would disfavor art work that was to any extent critical or disrespectful. More significantly, despite an overlap in purpose between the Rohrabacher amendment and any plausible construction of the "respect" criteria, section 954(d) is easily distinguishable and was no doubt preferable to a majority of the House. Section 954(d) merely required the NEA to take decency and respect into consideration as opposed to flatly prohibiting funding. Additionally, it did not specify the prohibited perspectives with the troublesome particularity exhibited by the Rohrabacher amendment.

### *C. Impact on Freedom of Speech*

#### *1. The Selective Subsidization Context*

Decency and respect for diverse beliefs and values are widely shared social norms that deserve consideration and support. It is well settled, however, that the First Amendment protects indecent and disrespectful speech, and the state cannot prohibit or censor such speech.[210] This is certainly the case with respect to blasphemy,[211] racial hate speech,[212] and nonobscene pornography,[213] even though these types of speech can inflict significant personal and societal harm. Therefore, if section 954(d) is constitutionally acceptable, it must be because the state has greater authority to employ viewpoint-oriented criteria in the

209. 136 CONG. REC. 28,657 (1990) (amendments en bloc offered by Congressman Rohrabacher).

210. *See, e.g.*, *Reno*, 521 U.S. 844; *see also, e.g.*, Lackland H. Bloom, Jr., *Fighting Back: Offensive Speech and Cultural Conflict*, 46 SMU L. REV. 145 (1992).

211. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

212. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

213. *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

subsidization context.

There are good reasons why this should be the case. First, as previously noted,[214] there is the significant interest in a subsidization context in avoiding the potential indignity suffered by the taxpayer as a result of compelled sponsorship that does not exist in a regulatory setting. Equally as important, the use of the decency and respect criteria in competitive subsidization decisions generally results in less harm to free speech values. Critical to this analysis is the fact that the Government has no affirmative duty to subsidize speech or art.[215] Thus, any cognizable harm to free speech interests flows from a decision to selectively subsidize, as in the NEA funding context, rather than from a decision not to subsidize at all. This is critical because subsidization of speech, indeed even viewpoint-based selective subsidization, will generally increase rather than diminish the amount of speech or art available. By definition, a competitive grant program, such as the NEA arts funding, awards funds to one artist and inevitably denies them to many others. If selective subsidization decisions harm free speech interests, it is not because many artists find it more difficult to create their work due to lack of Government funding. Rather, it is because Congress created selection criteria or the process that has skewed the marketplace in favor of or against a particular topic, perspective, or viewpoint.[216]

Because decency and respect for diverse beliefs and values are viewpoint oriented, the risk of distorting the source of harm to free speech is certainly present. Art that challenges social conventions through indecency or disrespect for beliefs and values will be disadvantaged, at least with respect to federal funding. Two factors, however, should significantly mitigate the impact on the marketplace of ideas. First, as the *Finley* majority observed, Congress did not target narrower or more specific viewpoints. As previously noted,[217] this does not render the decency and respect criteria viewpoint neutral, but it does minimize the degree to which an artist would be precluded from creating art that conveys a critical perspective. Second, although the impact of NEA funding on the production of art is hotly contested,[218] it seems highly unlikely that indecent and disrespectful art are even minimally dependent on federal subsidization for continued existence.[219] The very notion that artists could not adequately

214. *See supra* Part VI.A.2.

215. *See* NEA v. Finley, 118 S. Ct. 2168, 2186 n.2 (1998) (Souter, J., dissenting).

216. *See* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 831-32 (1995).

217. *See supra* note 56 and accompanying text.

218. *See* Post, *supra* note 36, at 193-94 n.208 (summarizing research on this issue).

219. *See* Hamilton, *supra* note 36, at 118 (arguing that the art world is not dependent on federal funding for its vitality much less its survival). *But see* Donald W. Hawthorne, *Subversive Subsidization:*

challenge social norms by violating those norms absent the financial support of the very people whose norms are being violated seems too bizarre to be taken seriously.[220] Consequently, the danger of skewing the marketplace against indecent and disrespectful art, though hardly nonexistent, is certainly insubstantial in this context. Finally, section 954(d) only calls for consideration of decency and respect. As the Court mentioned, Congress has not totally precluded the subsidization of indecent or disrespectful art.[221] This further mitigates the actual impact of the decency and respect criteria on the artistic marketplace of ideas. It should be noted, however, that a focus on the harm to the taxpayer would not necessarily distinguish between taking these factors into consideration and prohibiting funding outright. Arguably, "consideration" is the most that freedom of speech can afford to grant the taxpayer. But if the taxpayer truly has a significant interest in not being compelled to sponsor offensive art, the interest would be protected more effectively by outright prohibition than by mere consideration. That type of taxpayer protection, however, cuts more deeply into First Amendment interests than does the Court's approach. Because Congress only required consideration in section 954(d), this problem need not be confronted.

*2. An Exception to the Rule Against Viewpoint Discrimination*

Permitting Congress to protect the taxpaying public against having to subsidize highly offensive art may cause only minimal harm to the artistic marketplace of ideas, but it might cause more serious harm to the Court's established free speech doctrine. As Justice Souter noted, the prohibition against viewpoint discrimination is a fundamental principle of modern free speech doctrine.[222] At the very least, viewpoint discrimination is not constitutionally permissible absent a compelling state interest.[223] Protecting the taxpayer against compelled subsidization of offensive speech is a legitimate interest, arguably even a substantial interest, but scarcely a compelling state interest as the Court uses the term.[224] Thus, conceding that the state could use at least certain

*How NEA Art Funding Abridges Private Speech*, 40 U. KAN. L. REV. 437, 443-44 (1992).

220. *See generally* Daniel Shapiro, *Free Speech and Art Subsidies*, 14 LAW & PHIL. 329, 344 (1995).

221. *See* NEA v. Finley, 118 S. Ct. 2168, 2176 (1998); *see also supra* note 44 and accompanying text.

222. *See Finley*, 118 S. Ct. at 2185 (Souter, J., dissenting).

223. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

224. There is no clear agreement as to what interests are compelling under the First Amendment, but

viewpoint-discriminatory criteria in the subsidization context would create an ad hoc exception to well-established doctrine. Considering the foregoing analysis, however, such an exception is justifiable and readily limited to the subsidization context. Nevertheless, any explicit exception to the rule against viewpoint discrimination is cause for some concern.

Presumably, such concern is why the *Finley* majority was so reluctant to acknowledge that decency and respect were viewpoint oriented. Justices Scalia and Souter demonstrated that the criteria are in fact viewpoint based. Because they were probably correct in their demonstrations, although, as the majority believes, the criteria could have been much more viewpoint oriented, the options are to follow Justice Souter and conclude that section 954(d) is unconstitutional on its face, to follow Justice Scalia and conclude that First Amendment principles do not apply to subsidies at all, or to contend that this particular instance of viewpoint discrimination is constitutionally justifiable.[225]

### *3. The Advantages of a Taxpayer Exception*

The third alternative above is more candid and less confusing than the majority's approach. Also, it inflicts less damage to established First Amendment doctrine than Justice Scalia's approach. It cannot be executed, however, without at least some deviation from the Court's seemingly ironclad rule against viewpoint discrimination promoted by Justice Souter. Much can be said in favor of constructing and honoring bright-line rules to preserve freedom of expression.[226] If doctrine were inviolable, however, Justice Souter would have written the majority opinion in *Finley* invalidating section 954(d). Dissenting from the court of appeals' opinion in *Finley* that followed existing doctrine to its logical conclusion, Judge Kleinfeld observed that "[t]he First Amendment does

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one may assume that these would be interests of the highest social order, such as protecting national security or preventing imminent acts of violence. *See generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

225. For the recognition that "some forms of viewpoint discrimination by government enterprises are permissible and some forms are not," see Schauer, *supra* note 147, at 106.

226. *See* Schauer, *supra* note 147, at 111; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474-80 (1985). *See generally* Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 313-15; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (discussing "categorization" in First Amendment jurisprudence); Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing advantages of rules over standards and vice versa).

not prohibit the free exercise of common sense."[227] A limited exception to the rule against viewpoint discrimination in the arts funding context makes sense, can be confined (at least to the subsidization context), and arguably explains and justifies the *Finley* decision—and hence the current state of the law—more adequately than the *Finley* majority opinion.

*a. A Sensible Fit with* Rosenberger

Perhaps the most significant challenge to any attempted justification of section 954(d) is whether it can be squared with the recent decision in *Rosenberger*. Although *Rosenberger* was decided by a far narrower margin than *Finley*, it seems correctly decided and nothing in *Finley* advocates its reconsideration. Indeed, the author of the primary dissent in *Rosenberger*, Justice Souter, considered it to be the controlling precedent in *Finley*. Thus, an explanation of the result in *Finley* must account for the decision in *Rosenberger*.

One might distinguish *Rosenberger's* holding on the ground that publishing material with a distinct religious perspective is not nearly as offensive, and thus not as great of an imposition on the unwilling taxpayer, as is indecent or disrespectful art. A lengthy Establishment Clause tradition, however, dating at least as far back as Jefferson's Bill of Religious Liberties[228] and Madison's *Remonstrance*,[229] could be cited to the contrary. Instead, the focus on the harm to the taxpayer as a result of compelled subsidization provides the best basis for distinguishing *Rosenberger*.

The majority in *Finley* distinguished *Rosenberger* on the ground that the subsidy in that case was widely available while the one at issue in *Finley* was awarded on a competitive basis. The majority failed, however, to adequately explain why this should matter. Arguably, this distinction is significant. The offense to the taxpayer should not be as great where it is understood that the recipient of a subsidy who uses it to engage in offensive speech or to create offensive art was entitled to the grant as a matter of course, and was not subject to a discretionary choice by the Government to single out offensive art and reward it. In the context of a broad-based nondiscretionary grant program such

227. Finley v. NEA, 100 F.3d 671, 684 (9th Cir. 1996) (Kleinfeld, J., dissenting).

228. *See* An act for establishing religious freedom, 12 WILLIAM WALLER HENING, HENING'S STATUTES AT LARGE 84 (University Press of Virginia 1969) (1823) ("An act for establishing religious freedom").

229. *See Memorial and Remonstrance Against Religious Assessments*, *in* 2 WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901).

as in *Rosenberger*, the taxpayer should obviously understand that the Government had little choice but to award the grant. That fact may not wholly eliminate the indignity of being forced to subsidize offensive speech, but it should go a long way toward minimizing it.

In a sense, Justice Scalia's distinction of *Rosenberger* as a public-forum case makes the same point. Allowing speakers to use a public forum is a type of subsidy, but because it is made available on a nondiscretionary basis, the taxpayer should understand that the Government is not using public funds to select and prefer an offensive assault on community norms; rather, it is simply playing host to all points of view. The Court recognized this understanding in *Capitol Square v. Pinette*,[230] in which the plurality opinion explained that a cross erected by the Ku Klux Klan in a public forum on the capitol grounds would be perceived as private speech rather than as a Government endorsement of religion.[231]

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230. 515 U.S. 753 (1995) (plurality opinion).
231. *See id*. at 760-63.

*b. A Narrow Focus Limiting Future Misuse*

A rationale of *Finley* focusing on the harm to the taxpayer is significantly narrower than both Justice Scalia's approach and the approach hinted at in section II-B of the Court's opinion, each to the effect that the First Amendment has little if any application to subsidization decisions. Such a rationale assumes that free speech principles, including the rule against viewpoint discrimination, generally apply to Government subsidies, at least to the extent left open by *Rust v. Sullivan*. The rationale also simply recognizes a specific exception.

A taxpayer-focused explanation of *Finley* presents both advantages and disadvantages compared to the majority's approach. Perhaps its greatest advantage, its simplicity and clarity, is also its greatest disadvantage. As a general rule, clarity in judicial opinions is desirable because they explain the law and provide guidance for the future. An opinion such as the majority opinion in *Finley*, which seems based on a complicated combination of several considerations, some of which seem inconsistent with others, offers little guidance or predictability. Nevertheless, if *Finley* represents a prudential decision to validate a political compromise designed to lay to rest a nagging controversy, then perhaps guidance and predictability are not paramount. If the *Finley* Court needed to deviate from established doctrine in order to bring closure to the arts funding controversy, then doing so in a clear and precise manner may not necessarily have been a virtue. A muddled opinion may inflict less harm on First Amendment values than one which attempts to stake out a more clearly understandable exception. On the other hand, it may cause greater harm. Several themes could be extracted from the *Finley* opinion and used to limit free speech. For example, the *Finley* opinion could be used to argue that viewpoint-based criteria are not viewpoint based after all. Also, it could be used to argue that only the most specific viewpoint discrimination can be challenged in an on-the-face attack. Additionally, it could be used to argue that there is a wide berth for the use of viewpoint-oriented criteria in a competitive selection process. Finally, it could be used to argue that the First Amendment scarcely applies in the subsidy context. While the confused nature of the opinion might limit its impact, it might also render it capable of producing all sorts of mischief.

A rationale focusing on the harm to taxpayers creates an exception to the protective prohibition against viewpoint discrimination, but it is a narrow and defined exception, limited to highly offensive speech in the subsidization context. Any precedent can be misused, but there is arguably less danger lurking within this focused rationale than in the scattershot approach of the *Finley*

majority opinion.

*c. A More Satisfying Explanation*

The taxpayer-focused approach is an arguably sounder approach because it addresses the central question of the purpose of section 954(d) that the majority opinion completely ignores. Generally, it is difficult to explain why a controversial limitation on freedom of speech is constitutional without confronting what the limitation is intended to accomplish; yet, that is precisely what the *Finley* Court seemed to do. The *Finley* majority treated section 954(d) as simply the result of a political compromise designed to salvage the NEA, offering no further independent justification. The Court made no attempt, aside from emphasizing pure political expediency, to explain why decency and respect were chosen rather than some other alternative. This hardly seems sufficient to justify viewpoint-discriminatory criteria.

Arguably, the Court may have avoided consideration of a taxpayer-protective justification because it appeared to be an improper statutory purpose. The respondents so argued in their brief, asserting that the congressional emphasis on taxpayer confidence was simply a thinly disguised rationalization of viewpoint discrimination.[232] Notwithstanding the Court's possible concerns, the justification should be acceptable as long as its purpose or impact is not to suppress offensive artwork or to exclude such artwork from the marketplace, but rather to channel the funding of such artwork from the public to the private sphere. If the Court believed that protecting the confidence or sensibilities of the taxpaying public was an improper or inadequate justification, and if it was unable to identify any other acceptable purpose, then it should have invalidated the law.

*D. Three Other Possible Criticisms*

Three other possible criticisms of this alternative rationale of *Finley* can be made, all of which can also be leveled at the majority opinion itself, at least to some extent. First, one might argue that an explicit exclusion of indecent and disrespectful art from public subsidization fails to appreciate the role of art. It critiques, often quite mercilessly, society, dominant culture, the status quo, and

232. Respondents Brief at *13, NEA v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371), *available in* 1998 WL 47281.

previous artistic movements.[233] Much of the art that is likely to encounter resistence under the decency or respect clause is oppositional art; that is, art intended to assault, outrage, and even repel the viewer, presumably in an attempt to get him or her to reconsider entrenched biases.[234] Arguably, if the purpose of at least some art is to engage in a radical critique of the status quo, it is antithetical to deprive it of funding simply because it does what it is supposed to do well.

Nevertheless, the critical function of art can be overstated. Even assuming that good art is often critical, it does not follow that any more than a small percentage of art will be indecent or disrespectful of diverse beliefs and cultures (at least in the extreme sense that the phrase used in section 954(d)(1) should be interpreted). Artists have an all but infinite number of ways to mount scathing attacks on contemporary mores with little fear of running aground of the decency and respect criteria. To the extent that oppositional art and section 954(d)(1) are on a collision course, it is not due to a failure to understand or appreciate such art, but rather to a deliberate value choice to limit the extent to which the public must suffer the insult of having to pay for art that attacks its most basic beliefs and values in a particularly offensive way. Proponents of oppositional art will disagree with this choice, but they must understand that it is not a choice that can be explained only as a consequence of artistic ignorance.

A second criticism is that section 954(d) and virtually any of its defenses fail to appreciate the degree to which the art world generally, or publicly subsidized art in particular, is a traditional sphere of robust and unrestrained discourse.[235] As such, publicly subsidized art is the equivalent of a public forum in which viewpoint discrimination is strictly prohibited.

The short response to this criticism, as the Court recognized, is that the competitive and selective nature of the NEA grant program distinguishes it from an open forum. A program that, by definition, is limited to works judged to be

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233. *See generally* Hamilton, *supra* note 36, at 77-107; Courtney Randolph Nea, *Content Restrictions and National Endowment for the Arts Funding: An Analysis from the Artist's Perspective*, 2 WM. & MARY BILL RTS. J. 165, 174-77 (1993); Shapiro, *supra* note 220, at 344. It can even be argued that postmodern movements in art, which challenge the very idea that there can be determinations of artistic excellence or that art is to be taken seriously, ensure that NEA grants will be sought for the type of offensive artwork that led to the initial arts funding controversy. *See* Pamela Weinstock, Note, *The National Environment for the Arts Funding Controversy and the* Miller *Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. REV. 803 (1992).

234. *See* FISS, *supra* note 36, at 104.

235. *See generally* Cole, *supra* note 36; Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of* Rust v. Sullivan, 45 AM. U. L. REV. 353 (1995).

artistically excellent and is structured to provide support primarily to well-established institutions will operate like a public forum more by happenstance than by design. An arts subsidy program could be created with the primary purpose of encouraging vigorous debate and critique, but, rhetoric in the legislation notwithstanding,[236] Congress did not create such an arts funding program. To so characterize it is to mischaracterize it.

A final criticism, building on the work of Owen Fiss, would take the prior argument a step further and maintain that the point of an art subsidy program is to promote democratic discourse enabling people to engage in intelligent self-government.[237] As such, the state is under a First Amendment based obligation to favor art that is critical and expresses a perspective that is less likely to be favored by market forces alone.[238] Under this approach, the state must not only tolerate art such as Mapplethorpe's photographs, it must also affirmatively seek it out and promote it, even at the expense of favoring it over more artistically meritorious work.[239] Professor Fiss makes clear that his approach is based on a communal-interventionist view of the First Amendment that is quite incompatible with the individualistic approach favored by the Court over at least the past three decades[240] (and indeed throughout most of the entire history of the Court's encounters with the First Amendment).

Section 954(d)(1), which Professor Fiss conceded would be upheld under the Court's dominant approach,[241] and the *Finley* decision, whether justified by the majority, by Justice Scalia, or by a taxpayer-oriented rationale, both conceived of freedom of speech from a totally different perspective than does Professor Fiss. Even Justice Souter's dissent falls squarely within the individualistic tradition of which Professor Fiss disapproves. A vision of the First Amendment that imposes on the state an obligation to subsidize ideas or perspectives that are often too indecent or offensive to survive in our rather vulgar marketplace of ideas is fortunately not the vision of freedom of speech adopted by our dominant legal culture.

## VII. CONCLUSION

Perhaps the arts funding controversy is over. If so, the Court played a role,

236. *See* 20 U.S.C. § 951 (1994).
237. *See* FISS, *supra* note 36, at 101.
238. *See id*. at 101-04.
239. *See id*.
240. *See id*. at 12-15.
241. *See id*. at 97.

though not a decisive one, in laying it to rest. In most respects, the decision in *NEA v. Finley* is anticlimactic. It did not solve the problem; it only blessed the solution. Nor did it take the occasion to develop clear and coherent legal principles for meeting the challenge. Instead, it went out of its way to do the opposite, perhaps because of internal disagreement, perhaps because of doctrinal constraints, or perhaps because of prudential considerations. This Article has attempted to show that the Court could have offered a somewhat clearer and arguably more intuitive and candid justification for its decision. Even so, it is uncertain whether it should have. In view of the eight to one vote in *Finley*, it seems obvious that the decency and respect criteria of section 954(d) were destined to survive constitutional challenge. The result is a Supreme Court decision upholding viewpoint-discriminatory legislation, whether or not the Court is willing to admit it. Such a decision arguably sets a dangerous precedent for freedom of speech values, although much can be said for the Court's minimalistic, "incompletely theorized" approach, as Professor Sunstein might describe it. The Court could have offered a simpler and more direct explanation that, if limited to the context in which it arose, would not unduly damage the Court's speech protective doctrinal framework. Such a rationale in *Finley* required five members of the Court willing to accept it, and there is no reason to believe that might have been the case. The fact that this justification was raised at least obliquely by the Government in its brief suggests that it may not have been attractive to a majority of the Court. Nevertheless, it is the most candid and intuitively sensible way to uphold the decency and respect criteria.