National Endowment for the Arts v. Finley: Painting a Grim Picture for Federally-Funded Art

Karen M. Kowalski

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol49/iss1/6
"[To simplify] is very nearly the whole of the higher artistic process; finding what conventions of form and what detail one can do without-and yet preserve the spirit of the whole."\(^1\)

"Art is hard; physics is easy."\(^2\)

**INTRODUCTION**

The word "art" is somewhat a "term of art." Paintings of flowers, royal portraits, and amorphous sculptures are readily labeled as "art" by the American public and accepted as valuable. In contrast, people readily refuse to label as "art" creations such as nude photographs, live performances with homosexual subject matter, and pieces that are seemingly critical of religion. Oftentimes, the public is only willing to describe these works as "indecent art." For the past ten years, right-wing Congressmen and religious groups have battled to eliminate federal funding of such controversial artwork.\(^3\) In *National Endowment for the Arts v. Finley* ("Finley"),\(^4\) the Supreme Court held constitutional a 1990 amendment authorizing the National Endowment for the Arts ("NEA") to consider "general standards of decency" and "respect for the diverse beliefs and values of the American public" when reviewing applications for artistic grants.\(^5\) By holding that it is consti-

---


   (d) APPLICATION FOR PAYMENT; REGULATIONS AND PROCEDURES. 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—

   (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

   (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.
stitutionally permissible to utilize these viewpoint-based factors, the Court eased the way for the potential suppression of disfavored, unconventional, and political speech typically protected under the First Amendment. This amendment does more than merely prioritize decency, it coerces artists to create politically neutral and homogenous artwork. The effect will be that Americans will have the opportunity to view only artwork that a senator finds acceptable, and this artwork will have little to do with our diverse reality. This precedent will substantially limit artists’ ability to convey to audiences their views about government, religion, and our human existence.

Part I of this Note examines the background surrounding the amendment of NEA application review procedures, and includes a description of the events that prompted the creation of 20 U.S.C. 954(d) ("the decency clause").

I. BACKGROUND

A. The History of the NEA and the Rise of Controversy

Created in 1965, the NEA is one of three branches of the National Foundation on the Arts and the Humanities. The Foundation is

6. See infra notes 11-153 and accompanying text.
7. Id.
8. See infra notes 154-246 and accompanying text.
9. See infra notes 247-333 and accompanying text.
10. See infra notes 334-368 and accompanying text.
11. JOSEPH ZEIGLER, ARTS IN CRISIS 16-17 (1994). Although the NEA was not created until 1965, interest in creating the organization materialized long before. CHARLES CHRISTOPHER MARK, RELUCTANT BUREAUCRATS: THE STRUGGLE TO ESTABLISH THE NATIONAL ENDOWMENT FOR THE ARTS 15-18 (1991). Since the Nineteenth century, a bill to establish a National Council on the Arts was repeatedly introduced but never approved. Id. Presidents Buchanan, Harrison, and Roosevelt attempted to create such a council, but were unsuccessful. Id. President Taft created the U.S. Commission of Fine Arts to oversee architecture in Washington, D.C., excluding Capitol Hill. Id. When President Kennedy’s bill to create a council was defeated by Congress, he created an advisory body on the arts through an Executive Order. Id. Finally, in August of 1964, President Johnson signed a bill creating the National Council on the Arts. Id. 12. 20 U.S.C. § 953(a) (1994).
headed by the Chairperson of the NEA who is appointed by the President of the United States, aided by the Senate, and serves a term of four years with eligibility for reappointment.\textsuperscript{13} The Chairperson, with the advice of the National Council on the Arts ("the Council"), is authorized to give grants to groups or individuals to support artistic projects and productions.\textsuperscript{14} The Council is comprised of members of the House of Representatives, members of the Senate, and fourteen people known for their artistic expertise who are appointed by the President with the advice of the Senate.\textsuperscript{15} The Council makes recommendations to the Chairperson\textsuperscript{16} as to whether to approve applications for grants and the amount of financial assistance that should be allotted to each approved applicant.\textsuperscript{17} Although the Chairperson has the ultimate authority to approve grants, he or she may not approve or reject an application prior to receiving the recommendation of the Council.\textsuperscript{18} The Chairperson also has the authority to receive money and other property donated to the NEA.\textsuperscript{19}

\textsuperscript{13} Id. § 954(b)(1)-(2).
\textsuperscript{14} Id. § 954(c).
\textsuperscript{15} 20 U.S.C.A. § 955(b) (West Supp. 1999). For the most recent list of Council members, see The National Endowment for the Arts: Learn about the NEA, supra note 15 (reporting that the Council also gives input concerning procedures and criteria for application review, the agency’s budget, funding priorities, the national arts in general, and also makes recommendations to the President concerning the National Medal of Arts).
\textsuperscript{16} 20 U.S.C. § 955(f) (1994). See Thomas Peter Kimbis, Planning to Survive: How the National Endowment for the Arts Restructured Itself to Serve a New Constituency, 21 COLUM.-VLA J.L. & ARTS 239, 246-47 (1997) (reporting that since 1996 the NEA has restructured its application review system). The new system is structured as follows: [T]he roles of the Council and Chairman remain the same, but the initial steps of review have been dramatically changed. First, applications go to a review group comprised of experts in the appropriate artistic discipline. The review committees rank the applications in order of strength within their discipline. There are no longer individual program groups or program budgets. The instructions to the review committees states [sic] that no particular fiscal allocation, percentage or number of applications need be recommended for approval, although a high and low financial recommendation as to grant amount is expected.
\textsuperscript{17} Id. at 246-47.
In 1987, Andres Serrano, an African-American artist from Brooklyn, received a visual arts award and a $15,000 grant from the Southeastern Center for Contemporary Art ("SECCA") in Winston-Salem, North Carolina.\textsuperscript{20} SECCA received funding for its visual arts program from the Rockefeller Foundation, Equitable Life (a corporation), and the NEA.\textsuperscript{21} The works of Serrano and nine other artists were scheduled to appear in Los Angeles, Pittsburgh, and Richmond.\textsuperscript{22} One of Serrano's works, entitled "Piss Christ,"\textsuperscript{23} which featured a crucifix submerged in what was identified as urine, appeared in Los Angeles and Pittsburgh without controversy, but faced harsh criticism when it was displayed in Richmond, Virginia.\textsuperscript{24} A computer designer, Philip Smith, who viewed Serrano's "Piss Christ," was outraged by it, and wrote a letter to the Richmond Times-Dispatch.\textsuperscript{25} An advocate of the Reverend Donald Wildmond\textsuperscript{26} read the letter sent by Smith to the newspaper. When Reverend Wildmon received notice from his advocate about the display of "Piss Christ," he sent out a letter to his supporters.\textsuperscript{27} He also sent a protest letter to Congress with a

\begin{itemize}
  \item \textsuperscript{20} \textsc{Zeigler, supra} note 11, at 69.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} \textsc{Zeigler, supra} note 11, at 69.
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} \textit{Id.}
\end{itemize}
reproduction of “Piss Christ” enclosed. 28 Some Senators reacted strongly 29 to news of the “Piss Christ” showing and sent letters to the acting chair of the NEA, Hugh Southern, to complain about the use of taxpayer dollars to fund this work. 30

A second incident in June of 1989 also helped fuel the fire of controversy surrounding federal funding of the arts. Washington’s Corco-

\[\text{We should have known it would come to this. In a recent art exhibition displayed in several museums throughout the country, one “work of art” was a very large, vivid photograph of a crucifix submerged in urine. The work, by Andres Serrano, was titled “Piss Christ.” When asked, since he had worked with urine, what could be expected next, Mr. Serrano said, “Semen.”} \]

\[\ldots\]

As a young child growing up, I would never, ever have dreamed that I would live to see such a demeaning disrespect and desecration of Christ in our country that is present today. Maybe, before the physical persecution of Christians begins, we will gain the courage to stand against such bigotry. I hope so.

\textit{Id.} at 70-71.


The images I make are somewhat ambiguous in that they do not offer any absolute statements. The picture in question, “Piss Christ,” is not meant to give offense although I leave its interpretation entirely up to the viewer. The title is descriptive and refers to my ongoing investigations of such bodily fluids as milk, blood and urine. Over the years I have addressed religion regularly in my art work. Complex and unresolved feelings about my own Catholic upbringing inform this work which helps me to redefine and personalize my relationship with God. For me art is a moral and spiritual obligation that cuts across all manner of pretense and speaks directly to the soul. Although I am no longer a member of the Catholic Church I consider myself a Christian and I practice my faith through my work.

\textit{Id.} at 70-71.

29. See \textit{ZEIGLER, supra} note 11, at 71-72 (reporting that Senators Alphonse D’Amato (R-NY) and Jesse Helms (R-NC) led the criticism of the NEA); see also Elizabeth Nau Smith, \textit{Children’s Exposure to Indecent Material on Cable: Denver Area Educational Telecommunications Consortium, Inc. v. FCC, An Interpretation of the Cable Television Consumer Protection and Competition Act of 1992, 47 DEPAUL L. REV. 1041, 1049-52 (1998) (describing Senator Helms’ and Senator Thurmond’s attempts to enact legislation that restricted indecent programming on cable stations). In addition to his crusade against the NEA, Senator Helms also actively promoted the enactment of the Cable Television Consumer Protection and Competition Act of 1992. \textit{Id.} at 1049. His motivation was to circumscribe cable access programs from showing sexually explicit material. \textit{Id.} at 1050. Section 10(b) of the Act required cable operators to restrict indecent programming to a separate channel, and to block such a channel until the cable subscriber requested it. \textit{Id.} at 1050-51. This section was declared unconstitutional in Denver Area Educational Telecommunications Consortium Inc. v. FCC, 518 U.S. 727 (1996). \textit{Id.} at 1049-52.

30. \textit{ZEIGLER, supra} note 11, at 72-73. However, in spite of conservative groups’ objections to Serrano’s art, a private organization funded his future exhibitions. See Amei Wallach, \textit{Serrano Show Gets $50,000 Boost, NEWSDAY, Dec. 9, 1994, at B08, available in 1994 WL 7451102 (reporting that when asked about The Henry Luce Foundation’s $50,000 grant to Serrano, Henry Luce III stated that “while confrontational, [Serrano’s images] have a deep piety woven into them”).}
ran Gallery canceled a 150 piece exhibition of the photographs by Robert Mapplethorpe, entitled "A Perfect Moment," that was arranged by Pennsylvania’s Institute of Contemporary Art with a $30,000 NEA grant. The museum was concerned that the Mapplethorpe exhibit, like the Serrano exhibit, would incite violent and negative public reaction. The exhibit displayed a variety of Mapplethorpe’s artwork, including photos of flowers, ordinary people, and celebrities. The photos that were feared to cause controversy were homoerotic because they showed naked men engaged in gay activity.

B. Reaction to the Flood of Protest Letters Against the NEA

Congress took notice of the negative response from conservative groups and public citizens, and reacted by proposing a variety of leg-

31. ZEIGLER, supra note 11, at 72-73.
32. Id. at 95-96. The Director of the Corcoran gallery, Christina Orr-Cahall, commented that the exhibit could cause the Gallery to be “embroiled in a political battle over federal funding of artistic work that may offend.” Id. at 74. While the decision to cancel the exhibit was praised by a former NEA Chairperson, there was negative reaction within the arts community. Id. at 75-76. Artist Lowell Nesbit eliminated a clause in his will which would have bequeathed a $1 million gift to the gallery. Id. By October of 1987 the gallery lost 10% of its members. Id. at 75. In December, Orr-Cahall resigned from her position as Director. Id.

In 1990, the Cincinnati Contemporary Art Center ("CCAC") was indicted on obscenity charges for showing Mapplethorpe’s exhibit. Id. at 96. The CCAC was the first American museum or gallery to be prosecuted for the exhibits it displayed. Id. After a jury trial, the museum was found not guilty. City of Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214, 215 (Ohio 1990).

34. ZEIGLER, supra note 11, at 73.
35. See STYCHIN, supra note 3, at 13 (reporting that the gay male imagery contained in the exhibit “A Perfect Moment” was entitled “The X Portfolio” and was largely sadomasochistic); Porn to Raise Hell. (Jesse Helms Uses Reproductions of Robert Mapplethorpe Nudes in His Re-Election Campaign), Time, Sept. 10, 1990, at 17, available in 1990 WL 2758318. Senator Helms would later use reproductions from “A Perfect Moment” in his re-election campaign. Id. At a barbecue in Burlington, Senator Helms gave a speech that included an invitation for only men to examine the Mapplethorpe photos, stating “[y]ou won’t look long because you just ate.” Id. For an interesting report on the current market for Mapplethorpe and Serrano’s work, see Daniel S. Levy, Mail-order Mapplethorpe: a foundation tries catalog shopping to support the arts, Time, Nov. 6, 1995, at 81, available in 1995 WL 9022052.

In light of rapidly decreasing funding, Art Matters, a New York art foundation, decided to pump half of its $2 million endowment into a mail order business. Id. An artist who created tumbler for the catalog featuring the slogan “What Urge Will Save Us Now That Sex Won’t?” stated, “I suspect that a lot of nonprofits and foundations will have to be very creative in how they acquire money so that they can give money.” Id.

36. For example, in Fordyce v. Frohmayer, private citizens voiced more personal reactions to the art funded by the NEA. 763 F. Supp. 654, 655 (D.D.C. 1991). Four individuals claimed to have suffered spiritual injury because of an art exhibition, entitled “Tongues of Flame,” in which an image of Christ appears injecting a hypodermic needle into his arm, and claimed that the
islation to modify NEA funding procedures to prohibit grants for objectionable artwork. The most noteworthy and restrictive legislation was suggested by Senator Jesse Helms on July 26, 1989. This legislation, Amendment 420, which came to be known as the Helms Amendment, provided that:

None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; and (2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.

The Helms Amendment was passed and added to the bill after only a minority of senators objected to it. Although arts groups and academia were vehemently opposed to the Helms Amendment, Helms employed the help of religious and conservative family values groups to support his cause. The mass media coverage and the mo-
bilization of these ideological groups helped the Amendment pervade the appropriations process in 1989.42

The appropriations process followed on the heels of the controversy surrounding the Mapplethorpe and Serrano artwork and the proposed legislation of conservative senators, such as Helms.43 As a consequence, it was no surprise that the appropriations process did not favor the NEA. The Appropriations Act44 demonstrated that the NEA budget did not successfully weather this storm of protest. In July of 1989, the Senate Appropriations Committee cut $45,000 from the NEA budget, the amount that had been spent on Serrano ($15,000) and Mapplethorpe ($30,000), and imposed a five-year ban on NEA grants to SECCA and the Institute of Contemporary Art (sponsors of Serrano and Mapplethorpe respectively).45 Congress also called for the creation of a temporary Independent Commission to monitor and review the NEA’s grant-making procedures.46 Most importantly, although Congress did not adopt the Helms Amendment verbatim,47 it did pass Public Law 101-121, which prohibited the use of NEA funds for materials which in the judgment of the NEA may be considered obscene.48 In November of 1989, John Frohnmayer,49 the

at 4-5 (reporting that “The MARS Artspace in Phoenix displayed ‘Piss-Helms,’ a photo of the Senator that is submerged in what looks like urine but is actually beer .... All this added to the fury of Helms’s supporters and cost the arts community support of some moderates”).

42. Id. at 67-80.
43. Id.
45. ZEIGLER, supra note 11, at 79.
46. Id. at 80-81, 123-24. The Commission had twelve appointed members, four by the President, four by the President upon recommendation of the Speaker of the House, and four by the President upon recommendation of the President pro tempore of the Senate. Id. at 123. A vote of the Commission members would decide who would act as the Chairman of the Commission. Id.

None of the funds ... may be used to promote, disseminate, or produce materials which ... 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.

Id. The bill was based on Miller v. California, 413 U.S. 15 (1972), which defined obscene art as works that: (1) an average person, applying community standards, finds appealing to purient interests; (2) depict or describe sexual conduct in a patently offensive way; and (3) taken as a whole, lack serious literary, artistic, political, or scientific value. ZEIGLER, supra note 11, at 81.
48. ZEIGLER, supra note 11, at 81.
49. See John E. Frohnmayer, Giving Offense, 29 GONZ. L. REV. 1 (1993-1994) (stating Frohnmayer’s personal thoughts on the funding of controversial artwork). Frohnmayer was the Chairman of the NEA from 1989 to 1992. Id. at n.a. He holds a B.A. in American History from Stanford University, an M.A. in Christian Ethics from the University of Chicago, and a J.D. from the University of Oregon. Id.
Chairperson for the NEA, inserted this provision into all grant applications.\(^5\) This would later become known as the "obscenity oath"\(^6\) and would be declared unconstitutional.\(^7\)

In June of 1990, after the obscenity oath was constitutionally challenged,\(^8\) Congress decided it was again appropriate to consider the mechanics of the NEA grant-making process.\(^9\) At this meeting, the Commission determined that the NEA should not make legal determinations of obscenity in the grant-making process.\(^10\) The House came up with alternative amendments, including an amendment proposed by two Democratic Representatives, Pat Williams and Ronald D. Coleman.\(^11\) The Amendment would come to be known as the “decency clause” and was approved by the House on October 11, 1990.\(^12\) The NEA charter outlining the procedures for approving funding for grant applicants required only that the Chairperson ensure that “artistic excellence and artistic merit are the criteria by which applications are judged.”\(^13\) The decency clause added that the Chairperson must take into “consideration general standards of decency and respect for

\(^{50}\) ZEIGLER, supra note 11, at 105.

\(^{51}\) Id. at 81. The oath required that before a grant was released, the grantee was required to certify in advance that none of the funds awarded would be used “to promote, disseminate, or produce materials which in the judgement of the NEA ... may be considered obscene.” Id.

\(^{52}\) See Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991). In Frohnmayer, the plaintiffs challenged the constitutionality of the NEA’s grant requirements, specifically the Obscenity Oath. Id. at 781. The court concluded that the oath was unconstitutional, reasoning that under Miller, the court, and not the NEA, should determine what constitutes obscenity. Id. at 782. The court also stated that the legislation had a chilling effect on the creative process because applicants for NEA funding may avoid creating legitimate works of art out of fear that they would violate the Obscenity Oath. Id. at 783.

\(^{53}\) The Obscenity Oath was also challenged in New School for Social Research. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 184, 176 (1992) (citing New School for Social Research, No. 90 Civ 3510 (LLS) (S.D.N.Y. Feb. 19, 1991)). The NEA gave the school a grant to remodel a courtyard in the New York City campus. Id. The New School refused to sign the Obscenity Oath and argued that the oath was an unconstitutional prior restraint. Id. The court did not address these arguments because the NEA agreed that the school would receive the grant without having to sign the oath. Id.

\(^{54}\) ZEIGLER, supra note 11, at 117.


\(^{56}\) Id. at 128. The Committee on Labor and Human Resources submitted an alternative amendment by Senator Orrin Hatch (R-UT) which the Senate approved. Id. The amendment provided that if a recipient of a grant created work that was found by a court to be obscene or to violate child pornography laws, they would have to repay the funds and would be barred from receiving NEA funding for at least three years or until the funds were repaid. Id. at 129. A segment of this amendment appears in 20 U.S.C. § 954(k)(1)(1) (1994). This section enables the NEA Chairperson to demand repayment of all NEA funding if an applicant creates a project that, after a hearing, the Chairperson deems obscene. 136 Cong. Rec. H12,415 (daily ed. Oct. 27, 1990).

\(^{57}\) ZEIGLER, supra note 11, at 128.

the diverse beliefs and values of the American public” when making these evaluations.59

C. The “NEA Four”

Prior to the enactment of the decency clause, the Council recommended four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, for individual grants.60 In 1990, Chairperson Frohnmayer announced to arts professionals that “political realities” might require vetoing some grants, in particular those to these four artists.61 John Fleck, Holly Hughes, and Tim Miller are openly homosexual and their works center on the gay experience and AIDS.62 Karen Finley is a feminist whose live performance, entitled “We Keep Our Victim’s Ready,” includes a scene where Finley smears chocolate all over her body to symbolize society’s degrading treatment of women.64 The four artists filed suit against Frohnmayer's veto,65

59. Id. For the full text of the amendment, see supra note 5.
60. ZEIGLER, supra note 11, at 110.
61. Id. at 112.
62. See Michael Fox, Solo Mio Festival/John Fleck Takes Crack at Media/Snowballs Chance' follows NEA debacle, THE S.F. CHRON., Sept. 6, 1992, at 44, available in 1992 WL 6279097 (reporting that “Fleck was particularly irked at being categorized in the press as ‘Karen Finley and the three gay performance artists,” and that in his work he likes to deal with the ambiguity of the sexes by blurring male and female roles and identities). See also Carmela Rago, Holly Hughes a funny, insightful storyteller, CHI. TRIB., Apr. 11, 1993, at 5, available in 1993 WL 11059427 (reporting that Hughes' one woman show “Sins of Omission...provides some of the best and most vividly colorful performance monologues... Most powerful...was a story in which she described her relationship to her lesbian lover. The story was touching in the description of her lover as fire... The tragedy within the monologue was the sense of shame she felt and which love alone would not allow her to transcend”); Carmela Rago, Tim Miller Busy Keeping Himself In Spotlight, CHI. TRIB., June 12, 1994, at 7, available in 1994 WL 6500231 (describing Tim Miller's performance in "Naked Breath"). The author stated:
A [p]retty boy with an attitude[,]... teacher, performance artist, former New York carpenter construction worker and AIDS activist[,]...is one busy, intensely passionate young man. [His show] is performed with a sweetness and naivete that are somehow charming. But his concepts need to go beyond the superficial. We don't hear the pained voices of those left in his wake. Nor do we hear about his own pain, his perceptions of where he falls in society, or even within his family.

63. See ZEIGLER, supra note 11, at 110 (reporting that Finley was raised in Evanston, Illinois and that her father, a jazz musician, committed suicide in 1977); see also Robert Hughes, Whose Art Is It Anyway: Desperate For An Enemy, The Radical Right Accuses Washington of Subsidizing Obscene, Elitist Art. The Facts Paint A Different Picture, TIME, June 4, 1990, at 46, available in 1990 WL 2759183 (describing critics' responses to Finley's performance in "We Keep our Victims Ready"). The author reports that Finley stated, "[m]y work is not about entertainment...[p]eople usually leave my shows crying." Id. After seeing one of her performances, her grandmother sent her a note which Finley summed up by stating, "[s]he said that I was talented...but also a toiletmouth." Id. For a recent and amusing interview with Finley, see Joel Stein, The Arts/Q + A, TIME, July 20, 1998, at 13-14.
64. ZEIGLER, supra note 11, at 110.
and shortly after the decency clause was enacted, they amended their complaint to challenge the clause's constitutionality.\textsuperscript{66}

\textbf{D. First Amendment Infringement and Traditional Constitutional Doctrines}

The plaintiffs' constitutional challenge to the decency clause, the adjudication of the clause by the district court, appellate court, and Supreme Court, and the ramifications of the \textit{Finley}\textsuperscript{67} decision, are based upon traditional constitutional doctrines used to analyze government's regulation of and participation in expressive activities. Additionally, other approaches to First Amendment issues that were not explicitly adopted in the decision will be discussed in order to explain the Supreme Court's various approaches to First Amendment problems. This part of the Note will briefly summarize these First Amendment doctrines to provide a framework for Part III,\textsuperscript{68} which focuses on the constitutional infirmities of the \textit{Finley} decision.

1. Viewpoint Discrimination

In \textit{Finley}, the plaintiffs' constitutional challenge revolved around the concept of viewpoint neutrality.\textsuperscript{69} Viewpoint neutrality\textsuperscript{70} requires

\begin{itemize}
\item 65. \textit{Id.} at 17, 136. Frohnmayer would later be fired in February of 1992. \textit{Id.} at 135. Anne-Imelda Radice became acting Chair of the NEA. \textit{Id.} at 136. Radice had been the director of the National Museum of Women in the Arts and had 15 years of experience in government. \textit{Id.}
\item 66. \textit{Finley v. National Endowment for the Arts}, 795 F. Supp. 1457, 1463 (1992), aff'd 100 F.3d 1015 (9th Cir. 1997) ("After Congress amended 20 U.S.C. § 954(d) to require that 'general standards of decency' be taken into account in evaluating funding applications, the NAAO joined individual plaintiffs in filing an amended complaint challenging this new provision ... "). There were also prior challenges against NEA grant-making procedures in the 1970s. In Advocates for the Arts v. Thompson, an organization concerned with promoting the arts claimed that the Governor and Council of New Hampshire's refusal to fund a literary magazine violated the First Amendment. 532 F.2d 792, 793 (1st Cir. 1976). The refusal was prompted by a poem appearing in an issue of the magazine which the Governor and Council referred to as an "item of filth." \textit{Id.}
\item 67. \textit{Id.} at 136.
\item 68. \textit{See infra} notes 247-333 and accompanying text.
\item 69. \textit{Finley}, 118 S. Ct. at 2175-79.
\item 70. Even within unprotected categories of speech, the government cannot target specific views. For example, in \textit{R.A.V. v. City of St. Paul}, the Court struck down an anti-hate speech law. 505 U.S. 377, 396 (1992). The court found that although the Minnesota ordinance banned an
\end{itemize}
that the government not prefer some messages above others when regulating or contributing to expressive activities. As Professor Rodney Smolla captured it, "[t]he First Amendment goes beyond the Fourteenth Amendment's prohibition against discrimination based on the identity of speakers by also prohibiting discrimination based upon the message of the speaker. This is the essence of the rule barring 'viewpoint discrimination.'" The Court requires restrictions on speech to be viewpoint neutral to prevent the government from suppressing disfavored ideas. The requirement of viewpoint neutrality applies when the government seeks to directly restrict certain expressive activities or when the government is doling out money to fund expressive activities.

The most important aspect of viewpoint discrimination is pinpointing when the government may constitutionally discriminate against particular views. The key to understanding viewpoint discrimination, and to understanding the root of the problem in the Finley decision, is grasping a particular dichotomy: the state as a speaker as opposed to the state as patron of independent participation in public discourse.

This dichotomy was highlighted in *Rosenberger v. Rector and Visitors of University of Virginia*, which is the main case relied upon by the plaintiffs in *Finley*. In *Rosenberger*, the University of Virginia authorized the funding of the printing cost for publications that consisted of student news, information, opinion, entertainment, or academic media groups. However, religious organizations were not eligible for funding, and "religious activity" was defined as any activity that primarily promoted or manifested a particular belief in or about a deity or ultimate reality. One organization applied for funding for its newspaper and was denied on account of its "religious activity."

unprotected form of speech, fighting words, it was underinclusive in that it singled out only those fighting words that communicated messages of racial, gender, or religious intolerance. *Id.* at 391.

71. SMOLLA, supra note 53, at 184.

72. *Id.* at 183-84.

73. *Id.*

74. *Id.*


76. *Id.* at 824.

77. *Id.* at 825.

78. *Id.* at 823. Another important case concerning religion and viewpoint discrimination is *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). In *Lamb's Chapel*, a school district offered school facilities for after-hour school use, including social, civic, and recreational use. *Id.* at 386. However, the district enacted a specific policy against opening the facilities to groups for religious purposes. *Id.* In enforcing its policy, the district would not allow a group seeking to display a film about child-rearing questions from a "Christian perspective" to use the facilities. *Id.* at 387-88. The Court concluded, "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family
The Supreme Court held that the provision excluding religious organizations from eligibility for grants from the student activities fund constituted viewpoint discrimination which violated the First Amendment. Specifically, it found the University's provision was viewpoint-based rather than content-based, stating that "[t]he University does not exclude religion as a subject matter but selects for disfavored treatment those journalistic efforts with religious editorial viewpoints." The Court further explained that the state is allowed to discriminate based on viewpoint in certain circumstances, and noted:

[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . [and the government] may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers . . . . The distinction between the University's own favored message and the private speech of students is evident in the case before us.

---

79. Rosenberger, 515 U.S. at 830.
80. Another facet of First Amendment analysis is the concept of content-based discrimination. Content-based discrimination is distinct from viewpoint discrimination. Erwin Chemerinsky, Constitutional Law: Principles and Policies 759-60 (1997). In general, a content-based restriction prohibits an entire subject of discourse, while a viewpoint-based restriction prohibits discussion about a subject from a particular perspective. Id. For example, a law prohibiting all discussion about abortion would be content-based, whereas a law prohibiting all discussion from pro-abortion activists would be viewpoint-based.
81. Rosenberger, 515 U.S. at 830.
82. Id. at 832-34. See Robert C. Post, Subsidized Speech, 106 Yale L.J. 151, 155 (1996). The author explained:

The Court's point is that when the state itself speaks, it may adopt a determinate content and viewpoint even 'when it enlists private entities to convey its own message.' But when the state attempts to restrict the independent contributions of citizens to public discourse, even if those contributions are subsidized, First Amendment rules prohibiting content and viewpoint discrimination will apply. The reasoning of Rosenberger thus rests on two premises. First, speech may be subsidized and yet remain within public discourse; the mere fact of subsidization is not sufficient to justify classifying speech as within or outside public discourse. Second, substantive First Amendment analysis will depend on whether the citizen who speaks is characterized as a public functionary or as an independent participant in public discourse.
This dichotomy of state as the speaker/state as patron of independent and diverse ideas ("Rosenberger dichotomy") is important in analyzing the majority and concurring opinions in Finley. The majority and concurring opinions disagreed as to the veracity of this long-recognized dichotomy, and reached different conclusions on the state's ability to viewpoint discriminate. Part III of this Note argues that this significant conflict in Finley has an unfortunate effect on constitutional doctrine and the adjudication of future viewpoint discrimination cases.

2. Government Subsidies for Expressive Activities and the Unconstitutional Conditions Doctrine

The doctrine of viewpoint neutrality applies both when the government is directly regulating speech in a particular forum and when the government is subsidizing speech. The government's granting of subsidies for expressive activities is subject to the unconstitutional conditions doctrine. This doctrine states that the government cannot...
participate in political expression by subsidizing persons on the condition that they take part in, or refrain from taking part in, a particular type of speech or association.\textsuperscript{88} Scholars formerly used a doctrine called the right/privilege distinction to examine conditions on the receipt of a benefit.\textsuperscript{89} Under this doctrine, rights were the equivalent of individual interests which citizens enjoyed without regard to the state and were created prior to the establishment of government.\textsuperscript{90} In contrast, the state created privileges and citizens depended on the permission of the state to enjoy them.\textsuperscript{91} In sum, the right/privilege doctrine signified that the government could not infringe upon rights (unless it could show a compelling reason for infringement) but was allowed to place conditions on privileges because they were merely public charity.\textsuperscript{92}

The right/privilege distinction became obsolete in 1972 with the decision of \textit{Perry v. Sinderman},\textsuperscript{93} in which the Supreme Court stated:

\begin{quote}
\textit{E}ven though a person has no `right’ to a valuable government benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .
\end{quote}

However, the \textit{Perry} decision did not prohibit all conditions on the granting of government benefits. Government may still mold speech through the use of government funds, but with some essential restrictions. For example, it is constitutionally impermissible for the government to attempt to “coerce” people into refraining from exercising

\begin{itemize}
\item create a separate affiliate for non-lobbying activities using tax-deductible contributions. \textit{Id.} at 400-01. Here, “a non-commercial educational station that receives [even] 1% of its overall income from . . . grants is barred absolutely from editorializing.” \textit{Id.} at 400.
\item \textit{Id.} supra note 53, at 182-83.
\item \textit{Id.} at 178-79.
\item \textit{Id.} at 179. An example of a privilege is an economic benefit such as a public job or admission to a state university, or a non-economic benefit such as early release from prison on parole.
\item \textit{Id.} at 179.
\item \textit{Id.} One of the principle architects of the right/privilege distinction was Oliver Wendell Holmes. According to Smolla:
\begin{quote}
If Holmes’ right-privilege distinction were accepted as sound, then the solutions to all free speech issues involving governmental affiliation would be relatively effortless. For in contemporary times, free speech disputes constantly arise in the context of conditions attached to public benefits. Conscientious and consistent application of the right-privilege distinction would make these disputes easy to resolve: The government would always win.
\end{quote}
\item \textit{Id.} at 181.
\item 408 U.S. 593 (1972).
\item \textit{Id.} at 597.
\end{itemize}
their First Amendment rights through fines or imprisonment.\textsuperscript{95} Additionally, the government cannot award benefits in return for a citizen's promise to refrain from certain First Amendment expression.\textsuperscript{96} For example, the government cannot ask someone to agree not to criticize the President in exchange for a driver's license.\textsuperscript{97} Similarly, the government cannot require that someone speak out against racism before it will award that person Social Security.\textsuperscript{98}

A seminal case concerning expressive activities within the spectrum of a federally-funded program\textsuperscript{99} is \textit{Rust v. Sullivan},\textsuperscript{100} the so-called "gag-rule" decision.\textsuperscript{101} As explained in Part II, \textit{Rust} was the case that Justice Scalia relied on to find that the decency clause was constitutional.\textsuperscript{102} \textit{Rust} involved a federal support program under Title X of the Public Health Service Act of 1970 for family planning services.\textsuperscript{103} The Act stated that federal funds could not be used "where abortion is a method of family planning."\textsuperscript{104}

\begin{footnotes}
\footnote{95. Smolla, \textit{supra} note 53, at 114-15.}
\footnote{96. Id.}
\footnote{97. Id.}
\footnote{98. Id. See also Thomas P. Leff, \textit{The Arts: a Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan}, \textit{45} \textit{AM. U. L. REV.} 353, 382 (1995) (arguing that there is no real distinction between a penalty and a nonsubsidy, and that cases using the penalty and nonsubsidy analysis often confuse the application of constitutional doctrine to government funding programs).}
\footnote{99. Other precedent involving government subsidies have focused on tax exemptions as the government's way of indirectly funding certain groups. For example, \textit{Arkansas Writers' Project, Inc. v. Ragland} concerned Arkansas' tax system. 481 U.S. 221 (1987). The system imposed a tax on receipts from sales of personal property but exempted from tax newspapers and religious, professional, trade and sports journals and/or publications printed and published within Arkansas. \textit{Id.} at 224. The publisher of a general interest magazine challenged the tax as violative of the First and Fourteenth Amendments. \textit{Id.} at 225. The Court held the statute burdened First Amendment rights by requiring examination of the publications' content as the basis for imposing the tax and by discriminating against a small group of magazines that were the only publications forced to pay the tax. \textit{Id.} at 230. The Court concluded that Arkansas' general interest in raising revenue did not justify imposing the tax on some magazines and not on others. \textit{Id.} at 234.}
\footnote{100. 500 U.S. 173 (1991).}
\footnote{101. Sunstein, \textit{supra} note 86, at 116.}
\footnote{102. See infra notes 227-237 and accompanying text.}
\footnote{104. Rust, 500 U.S. at 178.}
\end{footnotes}
“not provide counseling concerning the use of abortion as a method of family planning,” and prohibiting employees from referring a pregnant woman to an abortion provider even if she specifically asked about abortion. Additionally, the regulations prohibited a Title X project from engaging in activities that “encourage[d], promote[d], or advocate[d] abortion as a method of family planning.” Lastly, the regulations mandated that Title X projects be organized to ensure that they were “physically and financially separate” from any abortion related activities. These guidelines were applicable to all private, non-profit organizations that used Title X funds, regardless of what percentage of the funds actually supported the organization’s operation.

The plaintiffs in Rust, Title X grantees and doctors, challenged the regulations as a violation of the unconstitutional conditions doctrine. The plaintiffs contended that the regulations conditioned the receipt of a benefit, Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. The Court ultimately decided that the guidelines for the use of Title X funds were constitutional. The Court reasoned that “[the] ‘unconstitutional conditions’ cases involve situations in which the government has placed a condition on the receipt of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally-funded program.” The Court cited Federal Communications Commission v. League of Women Voters of California and

105. Id. at 179-80.
106. Id. at 180.
107. Id.
108. Id.
109. Id. at 196.
110. Rust, 500 U.S. at 196.
111. Id. at 198-200.
112. Id. See Gay Men’s Health Crisis v. Sullivan, 733 F. Supp. 619 (S.D.N.Y. 1989) (offering an example of the federal subsidy issue). The Gay Men’s Health Crisis (“GMHC”) brought suit against the Centers for Disease Control (“CDC”) challenging the Helms Amendment passed in 1987. Id. at 623-24. That restricted what AIDS materials could be produced with CDC funding. Id. The Amendment specifically prohibited federal money from being used to promote homosexuality activity. Id. at 626. It required that when referring to any situation other than a heterosexual monogamous marriage, CDC funds could only advocate sexual abstinence as a way to avoid contracting AIDS. Id. at 623-24. Those who did not comply with the requirements had to repay CDC the funds and were further disqualified for future funding. Id. at 625. The GMHC claimed that the amendment prevented them from providing medically accurate education about AIDS. Id. The court rejected the plaintiff’s First Amendment challenge. Id. The court distinguished between rights and privileges and held “that a legislative decision not to subsidize the exercise of a fundamental right does not infringe the right/privilege distinction.” Id. at 636.
Regan v. Taxation with Representation of Washington\textsuperscript{114} as cases proving this proposition.\textsuperscript{115} The Court added that “[Title X] employees remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations . . . do not in any way restrict the activities of those persons acting as private individuals.”\textsuperscript{116}

The Rust decision has been widely criticized by scholars for seemingly resurrecting the rights/privilege distinction, for interfering in the private sphere of the doctor-patient relationship, and for seemingly holding that only the most overt and concrete evidence of the government’s intent to discriminate would satisfy evidentiary requirements of viewpoint discrimination.\textsuperscript{117} Part III of this Note argues that when considering the Finley decision, it is necessary to ask whether the artists in the case are more like the students who sought publication funding in Rosenberger, or more like the Rust employees who sought to engage in abortion related speech—a question the Court ultimately refrained from answering.\textsuperscript{118}

3. The Forum Analysis

Occasionally, the government will attempt to directly regulate expressive activities on government property by placing a “time, place, manner” restriction on the ability of citizens to engage in expressive activities.\textsuperscript{119} The Court will use the forum analysis to determine whether a state-imposed restriction on access to public property is

\begin{itemize}
  \item \textsuperscript{114} 461 U.S. 540 (1983).
  \item \textsuperscript{115} Rust, 500 U.S. at 198. The Court stated:
    \begin{quote}
      Congress has, consistent with our teachings in League of Women Voter’s and Regan, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.
    \end{quote}
  \item \textsuperscript{116} Id. at 198-99.
  \item \textsuperscript{117} For a critique of the Rust decision, see Smolla, supra note 53, at 218. Smolla believes the Rust decision was a result of Justice Brennan’s replacement by Justice Souter. Id. at 217. He states, “Souter’s vote gave Chief Justice Rehnquist the majority he needed to effectuate the theory he had always advanced: that the government may pretty well attach whatever conditions it wants to the receipt of its funds, even when those conditions quite brazenly prefer one set of ideas over another.” Id. Justice Rehnquist’s approach is similar to Justice Scalia’s view of the government’s role in funding. See Finley, 118 S. Ct. at 2184 (“The government, I think, may allocate both competitive and noncompetitive funding ad libitum, insofar as the First Amendment is concerned.”) (Scalia, J., concurring).
  \item \textsuperscript{118} Michael J. Elston, Artist and Unconstitutional Conditions: The Big Bad Wolf Won’t Subsidize Little Red Riding Hood’s Indecent Art, 56 LAW & CONTEMP. PROBS. 327, 339 (1993).
  \item \textsuperscript{119} John E. Nowak & Ronald D. Rotunda, Constitutional Law 1148 (1995).
\end{itemize}
constitutionally permissible. The forum analysis involves a classification of the particular arena in which the expressive activity occurs.

The Supreme Court, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, set out three classifications of forums in which speech can take place. The potential forums in which expressive activities can take place include public forums, limited public forums, and non-public forums. The power of the state to regulate speech on government property will depend on the determination of which type of forum the speech occurs. In a traditional public forum, the government's ability to restrict expression is extremely limited. The government may exclude speakers only if: (1) the expressive activity falls within a category of speech that the Supreme Court has held to be unprotected by the First Amendment; or (2) there is a compelling

120. *Id.* at 1144.
121. *Id.*
123. In *Perry Educ. Ass'n*, a teachers union was elected exclusive bargaining representative for a specific school district. *Id.* at 40. As a result of a collective bargaining agreement, only this union had the right to use the interschool mail system. *Id.* The rival union protested, seeking similar access to the mailboxes. *Id.* at 41. The Court found that the restriction of the interschool mail system to the elected union was not a violation of the First Amendment. *Id.* at 55. The Court ascertained that the interschool mail system fell into the third type of forum, public property, which is not by tradition a forum for public communication. *Id.* at 46. In these types of forums, the Court stated, "the state may reserve the forum for its intended purpose, communicative or otherwise, as long as the regulation on speech is reasonable and not an effect to suppress expression merely because public officials oppose the speaker's view." *Id.* In this situation, the Court concluded that the access policy was "based on the status of the respective parties rather than their views." *Id.* at 49. See United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 126-31 (1981) (holding that a U.S. mailbox was not a public forum and hence it was constitutional to prohibit the deposit of unstamped mail in a U.S. Postal Service approved mailbox).

125. A limited public forum "consists primarily of government property which the government has opened for use as a place for expressive activity for a limited amount of time." *Corinellius*, 473 U.S. at 817. Examples of limited public forums are schools (Grayned v. Rockford, 408 U.S. 104 (1972)) and libraries (Brown v. Louisiana, 383 U.S. 131 (1966)).
128. *Id.*
129. Unprotected categories of speech include obscenity (Roth v. United States, 354 U.S. 476, 485 (1957)), fighting words (Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)), and libel
interest for the government to restrict the speech and the content-based restriction is narrowly tailored to further this interest. However, the government may impose content-neutral time, place, manner restrictions as long as they are narrowly tailored to serve a government interest and leave open alternative channels of communication. Most importantly, a public forum is not limited to real estate, but may also be created by money. The recognition of "money-as-a-public-forum" is based on the reality that speech is often disseminated by print and electronics, rather than by speaking to a group in person.

In the second category, the limited public forum, the government is subject to the same restriction as would be applicable in a public forum. The government may use reasonable time, place, manner restrictions, but any content based restrictions in the limited public forum must further a compelling government interest. In the third category of forums, the nonpublic forum, the government may restrict property to the promotion of a specific purpose and may reserve this property for that intended purpose. The government may restrict expressive activity in this forum, provided that the regulation is not based on the speaker's view.

4. The Position of Political Speech in the Hierarchy of Protected Speech

As discussed earlier in this part of the Note, the Court often assigns expressive activity to a category of speech in order to determine the

---

(Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)). The categorical approach is explained infra Part I.D.4.

130. Cornelius, 473 U.S. at 800.


132. Finley v. National Endowment for the Arts, 100 F.3d 671, 686 (9th Cir. 1996), rev'd 118 S. Ct. 2168 (1998) (Kleinfeld, J., dissenting). Judge Kleinfeld cited Rosenberger, where a public university's student activities funds could not be disbursed on viewpoint based terms, and Lamb's Chapel, where after-hours access to public school property could not be withheld on the basis of viewpoint, as examples of "money-as-a-public-forum" cases. Id.

133. Id. Judge Kleinfeld found that NEA funding does not present the "money-as-a-public-forum" situation that Rosenberger did. Id. Justice Scalia adopted this viewpoint in Finley. 118 S. Ct. 2168, 2184 (1998) ("Rosenberger . . . found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum—to which the NEA's granting of highly selective . . . awards bears no resemblance.").

134. NOWAK & ROTUNDA, supra note 119, at 1148.

135. Id.


137. Perry, 460 U.S. at 46.
state's ability to restrict that expressive activity.\textsuperscript{138} Hence, if speech is assigned to an unprotected category, such as obscenity, it may be banned in any particular forum.\textsuperscript{139} In contrast to unprotected categories of speech, there is a segment of expressive activity that has historically appeared at the zenith of the speech hierarchy: political speech.\textsuperscript{140}

Cass Sunstein has defined "political speech" as speech which "is both intended and received as a contribution to public deliberation about some issue."\textsuperscript{141} In \textit{McIntyre v. Ohio Elections Comm'n}, the concept of "political speech" is discussed.\textsuperscript{142} The Court confronted the issue of whether an Ohio statute requiring that election campaign leaflets be signed violated the First Amendment.\textsuperscript{143} The case arose out of McIntyre's attempts to distribute leaflets opposing a referendum for a school tax levy.\textsuperscript{144} A school official viewed McIntyre distributing the leaflets, asked her to stop, and she refused.\textsuperscript{145} The school official lodged a complaint with the Ohio Elections Commission against McIntyre for distributing the unsigned leaflets in violation of the Ohio statute.\textsuperscript{146}

\textsuperscript{138} See \textit{supra} notes 129-131 and accompanying text.
\textsuperscript{139} See \textit{supra} notes 129-131 and accompanying text.
\textsuperscript{140} See Cass R. Sunstein, \textit{Free Speech Now}, 59 U. CHI. L. REV. 255, 304-06 (1992). Professor Sunstein argues that the First Amendment is principally about political deliberation:

\begin{quote}
\textit{We should] treat speech as political when it is both intended and received as a contribution to public deliberation about some issue.\ldots }
\end{quote}

\begin{quote}
\textit{[A]n approach that affords special protection to political speech, thus defined, is justified on numerous grounds. [It] receives firm support from history – not only from the Framers' theory of free expression, but also from the development of that principal through the history of American law.\ldots }
\end{quote}

\begin{quote}
\textit{[A]n insistence that government's burden is greatest when political speech is at issue responds well to the fact that here government is most likely to be biased.\ldots }
\end{quote}

\begin{quote}
Finally, this approach protects speech when regulation is most likely to be harmful. Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change.\ldots If there are controls on commercial advertising, it always remains possible to argue that such controls should be lifted.\ldots But if the government forecloses political argument the democratic correlative is unavailable.\ldots
\end{quote}

\begin{quote}
Taken in concert, these considerations suggest that government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation.
\end{quote}

\begin{quote}
\textit{Id.}
\end{quote}

\begin{quote}
\textsuperscript{141} SUNSTEIN, \textit{supra} note 86, at 130.
\textsuperscript{142} 514 U.S. 334 (1995).
\textsuperscript{143} \textit{Id.} at 340-41.
\textsuperscript{144} \textit{Id.} at 337.
\textsuperscript{145} \textit{Id.} at 338.
\textsuperscript{146} \textit{Id.}
The Court, in a 7-2 decision, struck down the Ohio statute as unconstitutional because it hit the very heart of political speech. Justice Stevens, writing for the majority, conveyed that "core political speech" is not defined simply as a discussion on a candidate for office, but as any issue-based advocacy. For Justice Stevens, anonymous distribution of pamphlets is an "honorable tradition of advocacy and dissent" in American political history.

Provided that artwork is created in order to convey a message or address an issue or a number of issues, it falls under the umbrella of political speech. Political speech is not immune from regulation, but has been acknowledged for its contribution to the marketplace of ideas. Part III of this Note discusses the proposition that federally-funded artwork should be free from restrictions simply because artwork is political in nature.

Although the First Amendment doctrines described above seem clear-cut, the Court does not always apply them consistently. Some scholars argue that the doctrines are merely a tool that the Court manipulates according to whether they consider the expressive activity to be controversial enough to be stifled. Other scholars argue that the doctrines' utility is waning in the face of modern challenges. As discussed in Section IV of this Note, if the doctrines are

147. Id. at 356.
148. McIntyre, 514 U.S. at 347.
149. Id. at 357. Justice Stevens continued, "political speech by its very nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." Id.
150. See infra notes 247-333 and accompanying text.

Defining viewpoint discrimination, . . . is not simple. Some courts that have wrestled with the problem have ignored the forest for the trees, refining the relevant inquiry so narrowly that the essentially ideological and repressive function of the restriction in question is ignored. Other courts have looked beyond government officials' asserted reasons for suppression, discerning viewpoint bias where it may not appear on the surface of an articulated policy.

Id. See also Smolla, supra note 53, at 183 (arguing "[u]nfortunately, the ‘doctrine of unconstitutional conditions’ is not really a doctrine, if by doctrine we mean an organized body of principles applied in a reasonably consistent fashion . . . . What actually exists is a ‘sometimes doctrine’ of unconstitutional conditions").

152. See Frederick Schauer, Principles, Institutions, and the First Amendment, 112 Harv. L. Rev. 84, 106-07 (1998). The author argued:

Although all of these doctrines have their functions, none appears to fit well with very many, if any, of the modern government enterprise controversies, and the fit with those government enterprises that are themselves in the content and viewpoint business is
indeed merely a pretext for the Justices' decisions about the controversy of the speech, then the Finley decision may not hold great weight as precedent for future adjudication of art related issues.\textsuperscript{153}

II. Subject Opinion

As discussed in Part I of this Note, the NEA had originally agreed to fund four artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, who came to be known as the "NEA Four."\textsuperscript{154} Subsequent to the enactment of the decency clause, the NEA rescinded the funding to these controversial artists.\textsuperscript{155} Originally, the four artists filed suit to object to the recession of their funding, but after the decency clause was enacted by Congress, they amended their complaint to include the allegation that the decency clause was unconstitutional under the First Amendment.\textsuperscript{156} The National Association of Artists' Organizations also became a plaintiff in the action to object to the decency clause's effect on federal funding to the arts.\textsuperscript{157} This part of the Note will canvas the progression of the plaintiffs' case from its success in the lower federal court to its ultimate demise in the Supreme Court.

A. The Lower Court's Findings

In June of 1992, the plaintiffs argued before the United States District Court for the Central District of California that the decency clause was an unconstitutional condition on the receipt of a government benefit.\textsuperscript{158} The plaintiffs contended that the clause "require[d] those who seek NEA funding to refrain from creating or presenting especially poor. In most of the modern government enterprises cases, these devices appear to be little more than conclusions masquerading as analytical tools. Yet it is in the nature of law to look to the past, and try to take from its storehouse of precedents, analogies, rules, doctrines, and principles, all of them designed for yesterday's controversies, the instruments that will deal with today's cases and tomorrow's problems. That the fit is frequently a bad one should come as no surprise.

\textit{Id.}

153. \textit{See infra} notes 334-364 and accompanying text.
154. For a discussion of "The NEA Four," \textit{see supra} notes 60-66 and accompanying text.
155. \textit{Zeigler, supra} note 11, at 110.
157. \textit{Id.}
158. \textit{Id.} at 1472. The artists moved for summary judgment on their facial challenge to the decency clause and the defendants moved to dismiss the complaint based on improper venue and lack of standing. \textit{Id.} at 1460. At the onset, Judge Tashima found that the plaintiffs had standing, accepting their argument that they were injured because they were denied funding for political rather than artistic reasons. \textit{Id.} at 1460, 1468-70. Scholar and filmmaker Laurence Jarvik commented that the district court opinion was "politically naïve" and that it is "absurd to think that a political institution staffed by political appointees . . . would be free from political influence." Don J. DeBenedictis, \textit{Arts Grant Restrictions Struck Down}, A.B.A. J., Sept. 1992, at 22.
any art that conflicts with 'general standards of decency and respect for diverse beliefs and values of the American people,' even if that art is created entirely with non-federal funds.' 

Alternatively, the plaintiffs argued that the decency clause discriminated on the basis of the artists' viewpoint in the artwork. 

The district court rejected the plaintiffs' argument that the clause was an unconstitutional condition, but agreed that the decency clause was viewpoint discriminatory. The court ultimately found that the decency clause was unconstitutionally vague and overbroad. In its analysis, the district court avoided using an unconstitutional conditions analysis by finding that the decency clause was a direct regulation on expressive activity because it suppressed expression that some persons in society found offensive. The court considered Keyishian v. Board of Regents controlling and found that just as the government should not be able to place a restriction on public university speech through its funding, the government should not be able to stifle artistic expression through art funding. The court was also influenced by the history and purpose of the NEA as a

159. Finley, 795 F. Supp. at 1469.
160. Id. at 1472.
161. Id. The court stated:
The unconstitutional condition theory is easily disposed of for two reasons. First, this theory rests on allegations that NEA appraisal of funding applications included an evaluation of each applicant's entire body of work—whether NEA-funded or otherwise. However, this is a facial challenge to the statute. On such a challenge, it is inappropriate to consider the manner in which the agency has interpreted and applied the statute.

Id.

162. Id. at 1471-72. A law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). The rational for the vagueness doctrine is that citizens need notice as to which activities are illegal. Nowak & Rotunda, supra note 119, at 1001-02. Additionally, the doctrine ensures that clear guidelines limit the discretion of law enforcement officers and their ability to enforce laws on a selective basis. Id.

163. Id. at 1475.

164. Finley, 795 F. Supp. at 1476. The overbreadth doctrine prohibits statutes that attempt to punish unconstitutional activities but are phrased so broadly that they also include protected First Amendment activities. Nowak & Rotunda, supra note 119, at 996.

165. See Elston, supra note 118, at 333-34 (arguing that the district court missed the real issue: "whether the 'government could achieve indirectly' through conditioning funding on a showing of decency 'what it could not achieve directly' by a law prohibiting indecent artwork, the classic unconstitutional conditions problem").

166. 385 U.S. 589 (1967).

167. Finley, 795 F. Supp. at 1473. In Keyishian, the Court held that a statute requiring a university professor to certify that he was not a member of the Communist Party, or affirmatively certify that if he had ever been a member, he had so stated to the university, was unconstitutional. Keyishian, 385 U.S. at 603. The Finley court analogized artistic freedom with NEA grants to the academic freedom in American colleges and universities recognized in Keyishian. Finley, 795 F. Supp. at 1473.
means of providing "the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression." After the motion to dismiss was denied by the district court, the government settled with the artists on other issues, agreeing to pay a total of $50,000 in damages. The artists also received $202,000 in attorneys fees. Finally, the artists received the sum of their 1990 recommended grants that were rescinded by Frohnmayer.

On appeal in 1996, the Ninth Circuit affirmed the district court's decision. The court noted that plausibly vague laws are subject to a more stringent review in a First Amendment setting, and agreed with the district court that the decency clause was unconstitutionally vague by a 2-1 majority. Most importantly, the appellate court

168. *Finley*, 795 F. Supp. at 1473-74 (quoting *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991)). The court stated that "the significance of the arts as a traditional sphere of free expression... fundamental to the functioning of our society," is confirmed by the legislative 'Declaration of findings and purposes that is a part of the NEA's authorizing statute.' *Id.* at 1473. Ironically, the Supreme Court would later use *Rust* as a basis for upholding the decency clause. *Finley*, 118 S. Ct. at 2179. See infra notes 210-12, 231-232 and accompanying text.


170. *Id.*

171. *Finley*, 118 S. Ct. at 2174. The Clinton administration, however, appealed the district court decision. *Id.* At the beginning of his first term, President Clinton was criticized for lacking a substantive "arts policy." See Editorial, *Mr. Clinton's arts policy is to art as military music is to music*, WASH. TIMES, Mar. 26, 1994, at D (responding to the Times' earlier report that "the President's main accomplishment in the arts [has been] in creating an aura of support, a sense that after the culturally bleak Reagan and Bush years, the arts are viewed with sympathy by the White House"). The editorial contended that:

[W]e still don't have an arts policy and until the NEA gets its mitts on more money than the Pentagon has for its marching music, we probably won't have one. We really don't know what to say to the Times revelations of truth about the president, except to advise the "arts community" to just hang in there. At some point Mr. Clinton is sure to tire of Big Macs and Clint Eastwood movies right?

*Id.* See also Paul Goldberger, *Mood is Mixed, cautious among art devotees dealing with Clinton*, ORANGE COUNTY REG., Apr. 3, 1994, at F39, available in 1994 WL 4329418 (reporting that "the mood among people in the arts is mixed and strangely cautious, and there is a feeling among many that the high expectations for the Clinton administration in the arts have yet to be realized... notwithstanding, movie stars and Hollywood executives have been more conspicuous at the White House than practitioners of high culture").

172. *Finley v. National Endowment for the Arts*, 100 F.3d 671, 684 (9th Cir. 1996). A petition for rehearing was denied by the Ninth Circuit in May of 1997. 112 F.3d 1015 (1997). Three judges dissented from the denial of rehearing, stating that the decision gave the statute an "implausible construction" and extended "First Amendment principles to a situation that the First Amendment doesn't cover." *Id.* at 1016-17.

173. *Finley*, 100 F.3d at 675 (citing N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963)). Judge Browning stated that "courts apply a heightened vagueness standard to a law that could deter protected speech because of its uncertain meaning." *Id.*

174. *Id.* at 680-81. The court focused on the effect of the vagueness and noted that [the clause] grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's deci-
agreed with the district court that the decency clause was a direct restriction, characterizing the clause's language as "mandatory." The court stated, "[t]his language does not grant the Chairperson broad discretion in establishing criteria for judging grant applications, as NEA contends; it actually restricts the Chairperson's discretion by requiring him or her to judge applications according to standards of 'decency and respect.'" The court agreed with the artists' contentions that the decency clause authorized viewpoint-discrimination, stating:

"It is the treatment of a subject, not the subject itself, that is disfavored. Two depictions of the same subject matter—an American flag, for example—could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public...""

Judge Kleinfeld of the Ninth Circuit filed a dissenting opinion that would later be cited by the majority in Finley. Judge Kleinfeld began by acknowledging the historical protection of indecent and offensive speech. However, Judge Kleinfeld maintained that while an artist is "constitutionally entitled to express [himself] indecently and disrespectfully... [and the] offensive or indecent expression cannot be censored does not mean that the government has to pay for it." The dissent also found that Rosenberger was not applicable, and that it only would be controlling "if the NEA gave out grants to virtually all artists except for those whose work violated 'general standards of decency and respect for the diverse beliefs and values of the American public.'" In order to reach this opinion, Judge Kleinfeld used a forum analysis. Consequently, since NEA funding did not constitute a

---

175. Id. at 676.

176. Id. Note that this court's view that the clause was a direct regulation is the antithesis of the Supreme Court's view that the language was merely "advisory." See infra notes 184-216 and accompanying text.

177. Id. at 683. The court referred to viewpoint discrimination as "an 'egregious form of content discrimination.'" Id. (quoting Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 832 (1995)).

178. Id. at 684 (Kleinfeld, J., dissenting).

179. Finley, 110 F.3d at 684.

180. Id.

181. Id. at 686.

182. Id. at 687. For an explanation of a forum doctrine, see supra notes 119-137 and accompanying text.
“money-created-public-forum,” *Rosenberger* did not require a finding that the decency clause was unconstitutional.\(^{183}\)

**B. The “NEA Four” Reach the Supreme Court**

On August 29, 1997, the United States Department of Justice filed an appeal asking the Supreme Court to reverse the Ninth Circuit’s decision.\(^{184}\) The Supreme Court announced that it would hear the case on November 26, 1997, and oral arguments were held on March 31, 1998.\(^{185}\) Controversy continued to surround the four artists, as well as the case itself, and various ideological groups submitted memoranda to the Supreme Court supporting either the artists or the government.\(^{186}\)

In *Finley*,\(^{187}\) the Supreme Court reviewed the appellate court’s determination that the decency clause was impermissibly viewpoint-based and void for vagueness under the First and Fifth Amendments.\(^{188}\) The Supreme Court reversed the appellate court’s decision by an 8-1 vote, although the majority and concurring opinions made

---

\(^{183}\) *Id.* Judge Kleinfeld explained:

Had the NEA grant program been structured to award grants to virtually all artists, then the plaintiffs in the case at bar would be entitled to prevail under *Rosenberger*. The majority uses principles for entitlement and regulation in a prize case . . . . When the government gives a prize rather than an entitlement, it necessarily discriminates by content and viewpoint.

*Id.*


\(^{185}\) *Id.* After oral arguments Tim Miller commented:

It had taken an hour. After eight years of drama and hate mail and blabbing and death threats and demonstrations it all ended up with the Supreme Court spending an hour on this subject . . . . Walking back down the marble stairs, . . . [I] felt . . . like I was leaving Principal Lambas’ office.


After the hearing everyone wanted to know—the assembled press—whether we thought we had won or not. I tried to imagine what a victory in this case would look like. Even if the court had managed to uphold the lower courts’ decisions, a reassertion that decency language was unconstitutional would do nothing to repair the damage done in the past ten years by right wing forces aided by dems in need of some political viagra.


\(^{186}\) For example, the American Association of University Professors filed an amicus brief on behalf of the artists. *Finley* Amicus Brief, 118 S. Ct. 2168 (No. 97-371) (1998). The National Family Legal Foundation and Morality in Media, Inc. filed amicus briefs on behalf of the United States. *Id.*


\(^{188}\) *Id.* at 2175.
their determinations of constitutionality on vastly different grounds. Justice O’Connor delivered the majority opinion, Justice Scalia filed a concurring opinion joined by Justice Thomas, and Justice Souter was the lone dissenter.

Justice O’Connor began the majority opinion by answering the plaintiffs’ challenge that the decency clause was viewpoint discriminatory. In finding that the clause was viewpoint-neutral, the majority characterized the decency clause as “advisory.” This characterization was the antithesis of the district court and appellate courts’ determination that the clause effected a mandate. Unconvinced that the decency clause was the pernicious result of a bad faith political agenda, the majority found that the clause was “aimed at reforming procedures rather than precluding speech,” adding that the wording was no more restrictive or subjective than a determination based on “artistic excellence.”

The majority proceeded to examine the decency clause using a “government as educator” theory. Noting that the NEA listed “education” as one of its goals, Justice O’Connor cited precedent involving the government’s regulation of speech in school. After

189. Id. at 2180.
190. Id. at 2175-96.
191. Id. at 2175.
192. Id. at 2176. Justice O’Connor further stated that the decency clause was in “sharp contrast to congressional efforts to prohibit the funding of certain classes of speech.” Id.
193. Finley, 118 S. Ct. at 2176.
194. Id.
195. Id. at 2177.
196. Id.
197. Id.
198. Id. (quoting Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982)). In Pico, several members of the Board of Education attended a conference sponsored by a politically conservative organization that presented a list of books that it found “objectionable” and “improper fare for school students.” 457 U.S. at 856. Subsequently, the board removed eleven of the listed books from the district’s school libraries, characterizing them as “Anti-American . . . and just plain filthy.” Id. at 857. After committee meetings involving students and teachers, the board decided to remove nine of the books. Id. at 857-58. Students in the Island Trees school system claimed that the board’s decision violated the First Amendment and the Supreme Court found for the students. Id. at 859, 872. The Court stated:

[W]hether petitioners’ removal of the books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners’ actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution . . . . On the other hand, [an] unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar.

Id. at 871 (footnote omitted). Justice Rehnquist also stated in his dissent:
listing the projects of the NEA involving education, Justice O'Connor
determined that decency played a proper role in grant allocation. Justice O'Connor stated “it is well established that ‘decency’ is a per-
missible factor where ‘educational suitability’ motivates its consideration.”

Unlike the lower courts, the majority concluded that Rosenber-
ger, the main case relied upon by the plaintiffs, was inapplicable to
the decency clause. The majority determined that the nature of the
grant-making process included making value judgments about the po-
tential grantee’s artwork, such as assessments of “technical profi-
ciency” and “creativity.” Most significantly, the majority stressed
that Rosenberger was distinguishable from the instant situation be-
cause the nature of NEA funding made for a “highly selective grant
program.”

The majority maintained that the funding of art is unlike
the funding for student newspapers in Rosenberger, because “[i]n the
context of arts funding, . . . the Government does not indiscriminately
‘encourage a diversity of views from private speakers.”

Noting again the competitive and aesthetic nature of the NEA, the Court
stated that “the inherently content-based ‘excellence’ threshold for
NEA support sets it apart from the subsidy at issue in Rosenberger —
which was available to all student organizations that were ‘related to
the educational purpose of the University.’” This position refers to
the Rosenberger dichotomy of the government as speaker/government
as patron of private and independent ideas, discussed in Part I of this
Note. In finding that the situation was not one where the govern-
ment was “encourag[ing] a diversity of views from private speak-


---

It is “permissible and appropriate for local boards to make educational decisions based
upon their personal social, political and moral views.” . . . When the school district
decides to remove a book from the school library, [they] are not proscribing it as to the
citizenry in general, but are simply determining that it will not be included in the . . .
library . . . . [A]ctions by the government as educator do not raise the same First
Amendment concerns as actions by the government as sovereign.

Id. at 909-10 (quoting Zykan v. Warsaw Comm. School Corp., 631 F.2d 1300, 1305 (7th Cir.
1980)).

199. Finley, 118 S. Ct. at 2177.
200. Id. (quoting Pico, 457 U.S. at 871).
202. Finley, 118 S. Ct. at 2178.
203. Id.
204. Id.
205. Id. (quoting Rosenberger, 515 U.S. at 834).
206. Id. (quoting Rosenberger, 515 U.S. at 824).
207. For an explanation of the government as speaker/government as patron of private, in-
dependent views dichotomy, see supra notes 70-85 and accompanying text.
ers," the majority implied that art funding creates a situation where the government is speaking on behalf of itself and, therefore, is entitled to keep its message from being garbled.

The majority also highlighted the difference between a government subsidy of expressive activities and a government restriction on expressive activities. Justice O'Connor explained that the government may allocate competitive funding according to criteria that would be impermissible if a direct regulation of speech or a criminal penalty were at stake. The ubiquitous federal-funding case, Rust v. Sullivan, was cited for the proposition that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."

The majority next addressed the Ninth Circuit's finding that the decency clause was unconstitutionally vague. The majority found that the appellate court erred in invalidating the clause as impermissibly vague for three reasons. First, Justice O'Connor stated the decency clause was "undeniably opaque" but that "[i]t is unlikely . . . that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature." Secondly, she stated that the Court was cognizant that artists may adapt their projects to the decision-making criteria of the NEA to acquire funding, however, the constitutional consequences were not significant because "the government is acting as patron rather than as sovereign." Lastly, Justice O'Connor stated that if this subsidy was declared unconstitutionally vague, then "all government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence' must also be invalidated."

The concurring opinion, authored by Justice Scalia, and joined by Justice Thomas, noted its distaste for the views of the majority from

---

208. Finley, 118 S. Ct. at 2178 (quoting Rosenberger, 515 U.S. at 834).
210. Finley, 118 S. Ct. at 2179.
211. Id. There is no denying that the "decency clause" is not a direct restriction on indecent artwork. However, Part III of this Note will argue that the "decency clause" has the same effect as a direct regulation due to the influence of federal funding in the art milieu.
212. Finley, 118 S. Ct. at 2179 (citing Rust, 500 U.S. at 193).
213. Id. at 2179.
214. Id.
215. Id. Justice O'Connor cites no precedent for this proposition, making it unclear whether she is attempting to distinguish between the state as a speaker and the state as a subsidizer (the Rosenberger dichotomy), or whether this is a new proposition of law.
216. Id. at 2179-80.
the onset.\textsuperscript{217} Justice Scalia admonished the majority that "the operation was a success, but the patient died" because, in his opinion, the majority had "gutt[ed] the [decency clause]."\textsuperscript{218} Justice Scalia agreed with the majority that the decency clause was constitutional, but found so on a vastly different theory.\textsuperscript{219}

Justice Scalia's concurring opinion differed the most in that he viewed the decency clause as requiring rather than advising the NEA to consider "decency" and "respect" when handing out funds.\textsuperscript{220} Justice Scalia found that the statute was viewpoint discriminatory because it authorized and mandated the Chairman of the NEA to execute grant decisions based on these two values.\textsuperscript{221} The concurrence also argued that the inclusion of these two criteria had a definite and salient effect on the outcome of grant distribution: conservative artwork would be favored.\textsuperscript{222} Justice Scalia stated that "the applicant who displays 'respect,' that is, 'deferential regard,' for the diverse beliefs and values of the American people . . . will always have an edge over an applicant who displays the opposite."\textsuperscript{223}

The second task that Scalia embarked upon in the first part of his concurrence was to address the majority's appraisal of the legislative history behind the enactment of the decency clause and how it affected the constitutionality of the clause.\textsuperscript{224} Unlike the majority, Justice Scalia found that the clause was not "aimed at reforming procedures" but rather that it was "evident" that the decency clause "was prompted by, and directed at, the public funding of such offensive productions as Serrano's 'Piss Christ' . . . ."\textsuperscript{225} Justice Scalia also found that the legislative intent, whether hostile or friendly to art, was irrelevant to the constitutionality of the clause.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{217} Id. at 2180.
\item \textsuperscript{218} Finley, 118 S. Ct. at 2180.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. at 2180-82.
\item \textsuperscript{221} Id. at 2181. In determining that the statute required viewpoint discrimination, Justice Scalia stated:
\begin{quote}
I agree with the Court that [the decency clause] 'imposes no categorical requirement' in the sense that it does not require the denial of all applications that violate general standards of decency or exhibit disrespect for the diverse beliefs and values of Americans . . . . But the factors need not be conclusive to be discriminatory.
\end{quote}
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. (emphasis in original).
\item \textsuperscript{224} Finley, 118 S. Ct. at 2182.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. Justice Scalia explained, "[w]e do not judge statutes as if we are surveying the scene of an accident; each one is reviewed, not on the basis of how much worse it could have been, but on the basis of what it says."\textsuperscript{Id.}
In the second half of his concurring opinion, Justice Scalia discussed case law to support the proposition that the decency clause was constitutional even though it was viewpoint discriminatory.227 Imposing that the majority had done an inadequate job of explaining the case law,228 Justice Scalia cited the line of abortion cases discussed in Part I of this Note,229 and declared that it was “preposterous” to compare the denial of a federal art subsidy with “measures ‘aimed at the suppression of dangerous ideas.’”230 Quoting Rust,231 Justice Scalia wrote, “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program.”232 Justice Scalia explained that Rosenberger “found the viewpoint discrimination unconstitutional, not because funding of ‘private’ speech was involved, but because the government had established a limited public forum233—to which the NEA’s granting of highly selective (if

227. See id. The analysis that Justice Scalia applied to the decency clause is not surprising in light of his opinions in former decisions. See McCormack, supra note 151, at 328 (arguing that “[a] number of cases, involving not only religion but also symbolic speech and hate speech, make it apparent that Justice Scalia is out to rewrite First Amendment law . . . . The emerging nature of his First Amendment analysis is that the Amendment creates no individual rights but instead erects limits on how government may conduct its business”).

228. Finley, 118 S. Ct. at 2182. (“The Court devotes so much of its opinion to explaining why this statute means something other than what it says that it neglects to cite the constitutional text governing our analysis.”).

229. See supra notes 217-237 and accompanying text.

230. Finley, 118 S. Ct. at 2183 (quoting Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983)). Justice Scalia prefaced his view by saying, “[a]vant-garde artistes such as respondents remain entirely free to epater les bourgeois; they are merely deprived of the additional satisfaction of having the bourgeoisies taxed to pay for it.” Id. at 2183-84. Justice Scalia’s idea that “we can’t censor your work but that doesn’t mean we have to pay for it” echoes Judge Kleinfeld’s dissenting opinion in Finley. 100 F.3d at 684. Justice Scalia’s comment that the denial of the subsidy was not motivated by a desire to censor is surprising in light of the fact that he criticizes the majority for their assessment of the circumstances precipitating the enactment of the decency clause. Finley, 118 S. Ct. at 2182. For example, Justice Scalia’s statement about the legislative history of the decency clause suggests that he thinks the decency clause was directed at the suppression of disfavored ideas. Id. Justice Scalia stated:

It is evident in the legislative history that § 954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as Serrano’s “Piss Christ,” . . . and Mapplethorpe’s show of lurid homoerotic photographs. Thus, even if one strays beyond the plain text it is perfectly clear that the statute was meant to disfavor—that is, to discriminate against—such productions.

Id.


232. Finley, 118 S. Ct. at 2183 (quoting Rust, 500 U.S. at 193).

233. For a discussion of the forum analysis, see supra notes 119-137 and accompanying text. Justice Scalia’s position mirrors Judge Kleinfeld’s dissent in Finley. Judge Kleinfeld found that Rosenberger was inapplicable because it was a “money as a public forum” case and applicants for the NEA grants, in contrast to the applicants for the subsidy as issue in Rosenberger, were not
not highly discriminating) awards bears no resemblance.”234 Accordingly to the concurrence, the government can allocate funds in any way it wishes without violating the First Amendment.235 Indeed, Justice Scalia seems to suggest that the government may always constitutionally viewpoint discriminate.236 In closing, Justice Scalia dismissed the notion that the vagueness doctrine was applicable to this particular First Amendment problem.237

In Finley,238 Justice Souter was the only Justice who found that the decency clause was viewpoint-based and unconstitutional.239 In the first part of his dissent Justice Souter found that the clause was viewpoint-based and unconstitutional.234

entitled to the grant. Finley, 100 F.3d at 683-87. For a discussion of Rosenberger, see supra notes 69-85 and accompanying text.

234. Finley, 118 S. Ct. at 2184.

235. Id. The fact that Justice Scalia finds the decency clause constitutional implies that he did not apply strict scrutiny to the art subsidy, reminiscent of his dissenting opinion in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 235-38 (1987). There, Justice Scalia stated, “[t]here is no need, however, and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy that one might think appropriate for opposing shades of political expression.” Id. at 237. Foreshadowing his statement was a year and a half before the arts crisis he questioned whether

the Kennedy Center, which is subsidized by the Federal Government the amount of up to $23 million per year . . . is authorized by statute to “present classical and contemporary music, opera, drama, dance, and poetry.” . . . Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded? Are government research grant programs or the funding activities of the Corporation for Public Broadcasting . . . subject to strict scrutiny because they provide money for the study or exposition for some subjects but not others?

Id. at 238. Lionel S. Sobel, First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist, 41 VAND. L. REV. 517, 531-32 (1988) (arguing that Justices Scalia and Rehnquist should not be hesitant to subject subsidies to strict scrutiny). The author stated:

[S]ubject matter-based selections can and do serve compelling governmental interests and thus may satisfy strict scrutiny. The compelling interests in question are those that induce governments to provide subsidies for art and culture in the first place—for example, those identified by Congress in the National Foundation on the Arts and Humanities Act . . . . If proper criteria are used, selections based on subject matter can produce a net gain in . . . resources to subsidize forms of expression that are not readily available without subsidies (such as Shakespeare, opera, ballet, fine art, and documentaries), rather than forms of expression that are readily available even without subsidies (such as contemporary drama, rock concerts and dance shows, popular graphic arts, and situation comedies), the amount of speech gained through selective subsidization exceeds the amount lost. On balance, the purpose of the first amendment—the encouragement of expression—is achieved, and this type of government subsidy decision withstands strict scrutiny.

Id. (footnotes omitted).

236. See Finley, 118 S. Ct. at 2183-84.

237. Id. at 2184 (“Insofar as it bears upon First Amendment concerns, the vagueness doctrine addresses the problems that arise from government regulation of expressive conduct . . . not government grant programs.”).

238. Id. at 2168.

239. Id. at 2185.
point-based, based on his belief that the purpose of its enactment was to suppress artwork which it found controversial and offensive.\textsuperscript{240} He conceded that Congress has no obligation to support offensive art, but stated:

The First Amendment speaks up only when Congress decides to participate in the Nation's artistic life by legal regulation, as it does through a subsidy scheme like the NEA. If Congress does choose to spend public funds in this manner, it may not discriminate by viewpoint in deciding who gets the money.\textsuperscript{241}

In the second part of his dissent, Justice Souter rejected the majority's argument that the diverse application review panel serves as a prophylactic against discrimination of artwork that is indecent or disrespectful.\textsuperscript{242} Justice Souter concluded that the statute in effect prohibited the review panelists from tolerating indecency and disrespect, and therefore could not be viewed as merely adding "considerations" to the grant-making process.\textsuperscript{243} Justice Souter cited case law holding that decency is protected speech and that Congress may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of . . . ideas."\textsuperscript{244} Justice Souter explained that this proposition was spelled out in \textit{Rosenberger}.\textsuperscript{245} In contrast to Justice Scalia's view of the \textit{Rosenberger} holding, Justice Souter found that \textit{Rosenberger} held that:

\begin{quote}[G]overnment may act on the basis of viewpoint "when the State is the speaker" or when the state "disburses public funds to private entities to convey a governmental message". . . [but] that the government may not act on viewpoint when it "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."\textsuperscript{246}
\end{quote}

\begin{itemize}
\item \textsuperscript{240} \textit{Id.} at 2186.
\item \textsuperscript{241} \textit{Id.} at 2186 n.2.
\item \textsuperscript{242} \textit{Finley}, 118 S. Ct. at 2189.
\item \textsuperscript{243} \textit{Id.} ("Just as the statute cannot be read as anything but viewpoint based, or as requiring nothing more than diverse review panels, it cannot be read as tolerating awards to spread indecency or disrespect.").
\item \textsuperscript{244} \textit{Id.} at 2191 (citing \textit{Regan v. Taxation with Representation of Wash.}, 461 U.S. 540, 548 (1983)).
\item \textsuperscript{245} 515 U.S. 819 (1995).
\item \textsuperscript{246} \textit{Finley}, 118 S. Ct. at 2191 (quoting \textit{Rosenberger v. Rector and Visitors of University of Virginia}, 515 U.S. 819, 834 (1995)). Justice Souter dissented from the result in \textit{Rosenberger} because he felt that the majority was approving direct funding of religious activities by the arm of the state, and that there was no viewpoint discrimination in the application of the university's guidelines to deny funding to the newspaper. \textit{Rosenberger}, 515 U.S. at 835 (Souter, J., dissenting). Justice Souter and Justice O'Connor's view that the State may only viewpoint discriminate when speaking or enlisting someone to speak on that person's behalf is the view most supported by case law. \textit{See}, e.g., \textit{Rust v. Sullivan}, 500 U.S. 173, 192-95 (1991) (explaining that the prohibition on expression which advocates abortion as a method of family planning in federally funded
III. **Analysis of National Endowment for the Arts\ v. Finley**

A. **Problems with the Decision on a Substantive Level**

The majority and concurring opinions in *Finley* present a pastiche of conflicting interpretations of constitutional doctrines. This part of the Note argues that the decision is flawed for four reasons. First, the majority and concurring opinions have inapposite views as to the rules on viewpoint discrimination and the government’s role in funding. This conflict leaves the law uncertain and confusing for future courts. Second, the Court considers cases on the subject of abortion such as *Rust*, discussed in Part I of this Note, in order to come to the conclusion that the government can make viewpoint discriminatory decisions when handing out subsidies for artwork. However, the majority does not address or account for the fundamental difference between artwork and abortion and artists and abortion clinic employees. Third, the majority’s reasoning behind upholding the decency clause, the “advisory language” concept, is a constitutional law loophole unsupported by precedent. Lastly, the Court fails to address the proposition that art falls into the most protected category of speech because of its ability to convey political and controversial ideas.

1. **The Court’s Version of the Viewpoint Discrimination Doctrine and the Rosenberger Dichotomy**

When the Supreme Court handed down *Rosenberger*, the rules of viewpoint discrimination appeared to be settled, clear, and formulaic. However, the *Finley* decision alters this former clarity. In *Rosenberger*, discussed in Part I of this Note, the Supreme Court set out the health care clinics is a determination by the government as a speaker, about what it chooses to say and not say.

In *Hurley* v. Irish American Gay, Lesbian and Bisexual Group of Boston, Justice Souter proclaimed on behalf of the majority that “the fundamental rule of protection under the First Amendment, [is] that a speaker has the autonomy to choose the content of his own message.” 515 U.S. 557, 573 (1995). In this case, a group known as GLIB, composed of Irish gays, lesbians, and bisexuals, applied to a veterans group for permission to march in a St. Patrick’s Day Parade in Boston. *Id.* at 561. The veterans group rejected the application, and the state’s highest court required the veterans to admit GLIB to the parade under the public accommodation statute. *Id.* The Supreme Court reversed. *Id.* at 565. In his majority opinion, Justice Souter repeatedly referred to the autonomy of the speaker and stated that the case “boil[ed] down to the [veterans’] choice . . . not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.” *Id.* at 575. In accordance with that proposition, Justice Souter would have undoubtedly found that the decency clause was constitutional if he concluded that the government was acting as a speaker when distributing art funding. See Brian C. Murchison, *Speech and the Self-Realization Value*, 33 *Harv. C.R.-C.L. L. Rev.* 443 (1998) (discussing Justice Souter’s focus on speaker autonomy).
The dichotomy of the government as speaker/government as patron of private, diverse viewpoints dichotomy. As Justice Souter pointed out in his Finley dissent, in Rosenberger the Court informed us that the state may viewpoint discriminate "when the State is the speaker" or when the state "disburses public funds to private entities to convey a governmental message." The state may not, however, viewpoint discriminate when it "does not itself speak . . . but instead expends funds to encourage a diversity of views from private speakers." Justice O'Connor, writing for the majority, and Justice Souter in dissent, maintained that the government may discriminate only when the government is acting as speaker. They also stated that the government is prohibited from engaging in viewpoint discrimination when subsidizing private expressive activities. Therefore, they embraced the Rosenberger dichotomy. Accordingly, the majority found that "[i]n the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers.'" Justice Scalia's summation of the rules governing viewpoint discrimination, however, are vastly different from the majority. The plaintiffs argued the Rosenberger dichotomy in their particular situation, to which Justice Scalia replied:

It is the very business of government to favor and disfavor points of view on . . . innumerable subjects . . . [a]nd it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example), . . . or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood). None of this has anything to do with abridging anyone's speech. Rosenberger, as the Court explains, found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum—to which the NEA's

247. See supra notes 69-85 and accompanying text.
249. Id. at 834.
250. Finley, 118 S. Ct. at 2178-79, 2190-91.
251. Id.
252. Id.
253. Id. at 2178.
254. Id. at 2184.
granting of highly selective (if not highly discriminating) awards bears no resemblance.\textsuperscript{255}

The effect of the concurrence, the majority, and the dissent's two separate camps of thought on the \textit{Rosenberger} dichotomy is an unfortunate one for constitutional precedent. The split of the Court on the rules governing viewpoint discrimination allows future courts to utilize Justice Scalia's summation of the law, which is, in a nutshell, that the government may do whatever it wants in the arena of subsidies.\textsuperscript{256} Justices Scalia and Thomas' rejection of the idea that \textit{Rosenberger} held that the government may viewpoint discriminate when it is a speaker, but not when it is "disburs[ing] public funds to private entities to convey a governmental message," makes the rules surrounding when the government may permissibly viewpoint discriminate uncertain. Justice Scalia's position on the government as speaker/government as subsidizer is important because \textit{Finley} stands as the most recent Supreme Court precedent on viewpoint discrimination. Future courts may reach different conclusions on issues depending on whether they adopt Justice Scalia or Justice O'Connor's summation of the law. Future courts confronted with the issue of what is viewpoint discrimination in the handing out of government subsidies may utilize Justice Scalia's version of the law and as a consequence, all government control or interference with expressive activity may be upheld.

Although the majority followed the \textit{Rosenberger} dichotomy and recognized that the government is constrained in its ability to viewpoint discriminate, the majority characterized the decency clause as viewpoint neutral.\textsuperscript{257} The majority's views of the NEA, the nature of government subsidies, and the demand for government subsidies are unrealistic. The majority based their view that the decency clause was constitutional in part on their perception of the grant-making process as one inherently filled with value judgments about "artistic excellence."\textsuperscript{258} The majority then used this to distinguish the funding of newspapers on the ground that the newspaper funding was available to all students and encouraged a "diversity of views from private speakers."\textsuperscript{259} Just as the majority thought that it was ridiculous to expect "absolute neutrality" in the decision-making process, based on the fact that judgments about excellence must be made, it is inaccurate to state that the offering of artistic grants does not encourage a

\textsuperscript{255} Id.
\textsuperscript{256} For a criticism of Justice Scalia's First Amendment ideology as applied in various Supreme Court cases see McCormack, \textit{supra} note 151, at 328-33.
\textsuperscript{257} See \textit{Finley}, 118 S. Ct. at 2175-79.
\textsuperscript{258} Id. at 2177.
\textsuperscript{259} Id. at 2178 (quoting \textit{Rosenberger}, 515 U.S. at 834).
"diversity of views from private speakers." The decision-making process is a subjective event, much like the creation of the art itself. Just as the decision-maker allows elements of his or her own life, such as prejudices, experiences, and mores, to enter the decision-making process, the artist enters aspects of his or her human experience onto the canvas he or she paints. The human experience is diverse, and artists strive to tell us something about these experiences. The fact that the funding is available encourages these artists, these private citizens, from diverse areas of the nation, to apply for the funding in order to have their experiences supported.

2. Faulty Analogies

The majority's analogy between subsidizing artwork and subsidizing abortions and abortion-related speech is too attenuated and provides a suitable basis for finding the decency clause constitutional. First, the legislation at issue in Rust limited the ability of family planning clinics to refer, counsel, or advocate abortion. This legislation was likely based on the government's reluctance to mobilize funding behind an activity that incites moral and religious polarization, and that, under some circumstances, can be dangerous and emotionally damaging. The public outcry and violence that results from the polarization on abortion occurs because it is a life-ending procedure that may affect the emotional well-being of all those involved. While artwork may incite emotion, controversy, dismay or delight, it does not have the serious and direct effect that abortion does. When the government funds controversial art, it perhaps associates itself with a disturbing or morally questionable viewpoint, but unlike abortion, it does not directly involve itself in the morally questionable termination of a human life.

Additionally, when the government enacted the regulations at issue in Rust, it was likely concerned about the nature of the relationship between a doctor and a pregnant woman. Since physicians have special knowledge and capabilities, typically pregnant women trust their advice. Therefore, a pregnant woman may potentially act based on what the physician tells her and may follow a course of action based on his or her instructions. However, an artist and his or her audience

260. Id.
262. See Kim M. Shipley, The Politicization of Art: The National Endowment for the Arts, The First Amendment, and Senator Helms, 40 Emory L.J. 241, 299-300 (arguing that "[w]hile Congress is empowered to refuse funding to activities that are contrary or harmful to the public interest involved, there is no such accusation in the present controversy. Those who viewed the Mapplethorpe exhibit . . . suffered no irreparable harm").
are not in a similar relationship as a doctor and a pregnant woman. An artist's relationship with his or her audience is more akin to the newspapers and the college campus, a fact scenario present in Rosenberger. An artist seeks to produce artwork to elicit an emotive response from his or her audience. An audience member and a piece of art are not in a discrete physiological position that makes that person susceptible to act upon the artist's message the way a pregnant woman would in a family planning clinic.

Another analogy that demonstrates a willingness to strain constitutional *stare decisis* is the majority's comparison between artwork and elementary school books.263 The majority applied precedent involving the suitability of books in an elementary school library to the statute regulating the type of art that a government agency will fund.264 On a general level, it is inappropriate to compare art funding to elementary school education because, in the latter, the government is acting *in loco parentis* and has a responsibility to shield children, who are unable to discern for themselves what is educationally unsuitable. In the realm of artwork, NEA funded art only appears in exhibitions, and those who view NEA art make an affirmative effort to view it. Viewers of art are not a captive audience, such as riders on a bus or students in a school. Furthermore, unlike elementary age students who are required to be at school, those who view NEA funded art are present at exhibitions by choice.

The majority in *Finley* also cited the *Pico* case for the proposition that "'decency' is a permissible factor where 'educational suitability' motivates its consideration."265 However, *Pico* supports Justice O'Connor's position only if one completely ignores the plurality's emphasis that the holding was extremely narrow. Justice Brennan, who delivered the opinion, stressed that the holding was limited only to the removal of books from the school library, and not to the classroom or the acquisition of books.266 Most notably, Justice Brennan stated, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.'"267

263. *Finley*, 118 S. Ct. at 2177.
264. Id.
266. *Pico*, 457 U.S. at 862.
267. Id. at 868 (quoting *Tinker* v. Des Moines School Dist., 393 U.S. 503, 511 (1969)).
3. Advisory Language Loophole

The majority opinion in Finley also reveals a readiness to edit First Amendment precedent. As discussed in Part I of this Note, the Supreme Court has traditionally adjudicated the constitutionality of legislation subject to First Amendment challenges by applying the public forum or unconstitutional conditions doctrine. In the instant case, the majority characterized the decency clause as advisory rather than as a direct restriction. If the clause were characterized as a restriction, the majority would have needed to determine whether there was a "compelling interest" for the regulation. As a consequence, in avoiding this characterization, the Court did not need to hypothesize a compelling reason for regulating artwork. Arguably, artwork is entitled to extra protection because speech with a "political message" is at the top of the hierarchy of protected First Amendment speech. Even Justice Scalia noted the hesitancy of the majority to

268. See supra notes 86-137 and accompanying text.
269. But see Schauer, supra note 152, at 103-04. The author argued:
   If Karen Finley's eligibility for an NEA grant had been contingent on agreeing to speak, or not to speak, outside of the context of the very art for which she sought support, we would have seen a classic unconstitutional condition. If, for example, she had been told not only that she could not get funding for her own form of performance art, but also that she could not get funding for anything, unless she refrained from performing in chocolate anywhere, the unconstitutional conditions doctrine would compel invalidation. But that was not the case here. Instead she was told that her eligibility for this grant was contingent upon some characteristic of this art, and thus her freedom to produce whatever kind of art she wished—including bad art—was curtailed only by her desire to obtain the grant . . . . That the principle of unconstitutional conditions is not so much as mentioned in [Finley] . . . is less an oversight than an epitaph.

Id.

270. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (holding that theaters are public forums designed for expressive activities); see also Miller v. California, 413 U.S. 15, 36-37 (1973) (holding that all artistic expression is protected unless it is legally obscene).
271. See George Vetter, The First Amendment and the Artist-Part I, 44 RHODE ISLAND B.J. 7, 9 (1996) (arguing that Barnes v. Glen Theater Inc. "raises a question as to whether expressive, but non-political artwork would, like nude dancing, be subject to lesser protection under the First Amendment"); but see Daniel Mach, Note, The Bold and the Beautiful: Art, Public Spaces, and the First Amendment, 72 N.Y.U. L. REV. 383, 388 (1997) (rejecting the contention that art's protection under the First Amendment is contingent on its subject-matter or character). The author argued:
   Art need not . . . express identifiable ideas in order to receive First Amendment protection. If the Constitution required such clarity, courts would be forced to engage in the difficult (if not impossible) task of determining where "entertainment stops" and "ideas" begin. Furthermore, the creative, imprecise nature of artistic expression affects audiences in ways mere words cannot. If a picture is indeed "worth a thousand words," then art speech deserves the utmost First Amendment protection for its ability to inspire a host of intellectual, interpersonal, and spiritual responses.

Id. (footnotes omitted).
admit that the decency clause actively required the Chairman of the NEA to consider "decency" and "respect."^272

Another problem with the majority's view that the decency clause suggests that "decency" and "respect" serve as factors in an overall determination rather than requires the denial of indecent or disrespectful art, is that this distinction does not retroactively change any of the major constitutional law decisions.^[273] If we went back and analyzed those decisions on "factor/element" versus "mandate/rule basis," the outcome of the decisions would likely remain the same.^[274] For example, in *International Society for Krishna Consciousness v. Lee,*^275 the Supreme Court struck down a ban on the sale or distribution of literature in a public airport. Even if the statute in that case had directed the airport to "take into consideration" the religious viewpoints of the applicants rather than directly discriminate against religious viewpoints, the statute still would not have passed constitutional muster.^276

4. *Failure to Address the Notion of Artwork as Political Speech*

In addition to utilizing flawed theories, the Court declined to address certain relevant theories. The Court failed to look at artwork from a categorical perspective, and did not address the argument that artwork is political speech,^[277] which consequently falls into the highest slot in the hierarchy of protected speech.^[278]

Although all artwork is arguably political speech, the artwork that precipitated the enactment of the decency clause had a uniquely polit-
ical element in that these works were criticized for the homosexual overtones they conveyed. At the time of the controversy surrounding the Mapplethorpe artwork and works by other gay artists, the NEA was reluctant to support openly gay works due to the public’s negative reaction. The fact that homosexuality has historically been a taboo subject makes artwork that expresses gay themes even more crucial and deserving of enhanced First Amendment protection. Gay art expresses fears about being gay, about contracting AIDS, about being a minority in a white heterosexual majority, and generally helps educate society about the gay experience in America. The Finley decision failed to consider whether the messages contained by artwork were validly political since flag burning, pornography, and hate speech have been considered as viable political messages.

The view that the majority adopted toward the creation of the decency clause, the failure to note the controversy and the struggle between the art world and Congress that precipitated its enactment,

279. For a comprehensive discussion of First Amendment issues with a panel of constitutional law scholars, see Symposium, Choosing the Right Paradigm: Does Free Speech Interfere with Efforts at Equality or Vice-Versa?, DRAKE L. REV. 1, 39 (1995). In this symposium Cass Sunstein stated:

I think that the Mapplethorpe material probably was political in the relevant sense. There were political statements that Mapplethorpe was making that bore directly and self consciously, and everyone understood this, on issues of what the state does. So the Mapplethorpe stuff was political in the relevant sense. To put it more clearly, what Mapplethorpe is for is not what pornography is for; Mapplethorpe’s work had components of a political statement.

280. A discussion of the controversial art that encouraged Congress to enact the decency clause is discussed in supra notes 20-35 and accompanying text.

281. Under the chairmanship of Jane Alexander, the NEA has proceeded with caution when funding gay art. Chris Bull, See Jane Run the NEA, THE ADVOCATE, Feb. 22, 1994, at 38. Alexander told the homosexual magazine The Advocate that she intended to use the NEA to “introduce people gently to gay themes all across the country. And I mean gently, because if you start with a kind of very overt thing, people get scared... You gently bring in gay people and introduce them to the world through art.”

282. See Standards for Federal Funding of the Arts: Free Expression and Political Control, 103 HARV. L. REV. 1969, 1986 (1990) (arguing that “[h]omoeroticism’s status as potentially political speech makes it an especially poor choice of target, because political speech has traditionally been the most protected category of expression”).

283. SMOLLA, supra note 53, at 80-85; cf. SUNSTEIN, supra note 86, at 135 (arguing that regulation of speech is no different than government regulation of other activities and hence provides no justification for enhanced review of government regulation of speech).

284. See Heins, supra note 151, at 122. The author argued:

The Court has repeatedly recognized that controversial political viewpoints are “the essence of First Amendment expression.” The viewpoint neutrality rule is designed precisely to protect this essence by preventing government suppression of controversial or otherwise disfavored ideas. That purpose is ill-served... if government may accomplish its goal by suppressing an entire category of viewpoints—be they religious, “political,” “controversial,” or “offensive.” Speech that is controversial, that “induces a
ignores the possibility that the legislators and NEA officials will make judgments based on their own personal mores. The speech that was attempting to be prohibited was “controversial speech” and the debate was incited by distaste for artwork with homosexual themes. The majority seemed to be looking at legislative intent through rose-colored glasses. The majority found that the decency clause was not viewpoint discriminatory because it served as a compromise to eliminating funding altogether. This conclusion was based on the statement of one of the bill’s architects who stated that “[i]f we have done one important thing in this amendment it is this. We have maintained the integrity of freedom of expression in the United States.” The legislator’s intent appears honorable, and the majority assumed that the legislators stated their true intent. Indeed, the background surrounding the enactment of the decency clause demonstrates that the clause was intended to inhibit that speech which is political, because it is directly inapposite to the views and platforms of the legislators who created it. The majority’s view of legislative intent suggests that the condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger,” is precisely the speech most in need of constitutional protection.

Id. 285. See STYCHIN, supra note 3, at 18 (describing the targeting of homosexual art by the legislature). Clearly, the political process has been a tenuous area in which to advance claims in response to the anti-funding critics. Arguments that taxpayers have the right not to have their money spent promoting lesbian and gay male sexuality through cultural funding generally get a receptive hearing at the legislative level. This is reinforced by arguments that lesbian and gay cultural representation promotes the destruction of the moral fibre and values of American society.

Id. 286. Id. at 36.

Attempts to restrict NEA funds for the creation of gay representational works are objectionable not only because of the unpredictability of their effect, but also because an attempt to restrict the terms under which a political identity is formed is deeply violative of a dialogic right of the subject. The forging of a politically charged subjectivity depends on the production and consumption of cultural representations. Restricting access to and deployment of our cultural resources is an attempt to inhibit the formation of an individual and collective identity and thus is violative of a positive right of self-definition.

Id. For further discussion of funding practices and their effect on gay discourse, see Carl F. Stychin, Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts, 12 CARDOZO ARTS & ENT. L. J. 79 (1994).

287. FINLEY, 118 S. Ct. at 2176.

288. Id. at 2168, 2176 (quoting 136 Cong. Rec. 28624, 28674 (1990)).

289. See City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) (“Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends.”).

290. See supra notes 11-59 and accompanying text.
Court will only find viewpoint discrimination when the legislation is overtly phrased to viewpoint discriminate.291

Justice Scalia also confused the issue of legislative intent in Finley by seemingly contradicting himself when he admonished the majority for its naïveté concerning the decency clause’s enactment. He found it “preposterous to equate the denial of taxpayer subsidy with measures ‘aimed at the suppression of dangerous ideas,’” after he had earlier contended that the decency clause was clearly enacted to eradicate federally-funded offensive art.292

B. The Effects of the Decency Clause Justify Its Removal as a Matter of Public Policy

Perhaps it is melodramatic to view the decency clause as a complete ban on indecent or disrespectful art, or to view the decency clause as an unconstitutional condition that forces the artist to choose between an NEA grant and unfettered expression. However, the decency clause should nonetheless be held unconstitutional because its effects are the same as if the government had effectively prohibited indecent or controversial art.293

1. Chilling Effect, Blacklisting, and History

An artist who seeks to have his or her work subsidized and advertised will now decline from creating works with strong political messages, religious undertones, or sexual innuendoes. After the de-

---

291. See, e.g., American Council of the Blind v. Boorstin, 644 F. Supp. 811 (1986). This is an example of overt viewpoint discrimination. In Boorstin, the Court found that the Library of Congress’ decision to discontinue the production and distribution of braille editions of Playboy, based on the sexual nature of the periodical, was viewpoint based in violation of the First Amendment. Id. at 816. See Smolla, supra note 53, at 184-85. The author argued:

Unfortunately, despite examples such as Boorstin, such a smoking gun rarely exists. When the government uses condition attached to largess as a disguise for deliberate invidious discrimination, the difficulty is how to unmask this abuse. More subtle principles must be employed to ferret out hidden discrimination. The better understanding of viewpoint discrimination thus treats that term as broader than its “purposeful discrimination” counterpart under the Fourteenth Amendment.

Id.

292. Finley, 118 S. Ct. at 2183 (quoting Regan, 461 U.S. at 550). For example, his statement about the legislative history of the decency clause seems to suggest that it was directed at the “suppression of dangerous ideas.” Id. at 2182 (“It is evident in the legislative history that S.954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as Serrano’s ‘Piss Christ’ . . . .”).

293. See Donald W. Hawthorne, Subversive Subsidization: How NEA Art Funding Abridges Private Speech, 40 U. Kan. L. Rev. 437, 453 (1992) (arguing that “[t]he ‘fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. . . . Rather, freedom of speech may be abridged by ‘inhibition as well as prohibition’ and ‘indirect “discouragements” undoubtedly have the same coercive effect . . . ’”).
cency clause is in place and operating for a considerable amount of
time, the artwork that is prevalent in galleries will become neutral and
mundane. The reality is that if a Chairperson does not take into con-
sideration "standards of decency and respect for American values," his or her job will be on the line. This may motivate the Chairperson
to ensure that any artwork that is feasibly offensive will never make it
to the galleries.

Additionally, although the decency clause was characterized by the
majority as "advisory," the clause nonetheless has the same coercive
impact as a direct restriction. Arguably, the coercive impact may only
extend to cause the prospective recipient artist to forgo the right to
the benefit and instead fund his or her project without content-based
restrictions by appealing to private entities. However, the success of
most artists' careers is directly related to their ability to receive NEA
funding. Not only does an NEA grant improve an artist's chance of
success by enabling the artist to create more artwork and with better
materials, canvases, paint, and film, but NEA funding increases the
amount of social recognition, press, and respect that the artist re-
ceives. Moreover, NEA grants are often matched by private enti-
ties who revere the opinion of the "panel of experts" that appraises
the artist's talent. An artist who is looking for an NEA grant is
looking for more than just a subsidy, the artist is looking for a market-
ning vehicle to boost his or her career. NEA funding provides the
"stamp of approval" that encourages private investors and art critics
to view the artist as talented and established. In sum, an artist is
undoubtedly coerced by the effects of NEA funding on his or her ca-

294. See The National Endowment for the Arts: Learn about the NEA, supra note 15 (report-
ing that "[e]ach NEA dollar is matched at least 1:1 and is a funding catalyst attracting many
more dollars from local and state agencies, corporations, foundation, and individuals").

295. For a contrasting opinion, see Shipley, supra note 262, at 295-96 (arguing that recipients
of federal subsidies should relinquish more constitutionally protected rights because "the grant
recipient is comparable to a private contractor . . . [and] the artist's career is not necessarily tied
to the receipt of federal funding . . . [i]n fact most artists in this country do not receive federal
funding, and most never will").

296. See The National Endowment for the Arts: Learn about the NEA, supra note 15.


More than $9 billion in private giving sustains arts in communities all over America.
The NEA's $175 million is important more for its symbolism than for the actual dollars
involved. An NEA grant validates an artist, and the government should not be in the business of determining what is art. That process smacks of "official" art, such as is
imposed on the artistic communities in totalitarian societies.

Id.; see also J. Sarah Kim, Defending the 'Decency Clause' in Finley v. National Endowment for
the Arts, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 627, 649-50 (1993) (arguing that the
because an artist must make the choice of applying for the grant and receiving the benefits, or continuing to create artwork without censorship. The old adage of “starving artists” is not far off because artists do need the support of the NEA to pursue a career and make ends meet.298

The argument that the NEA produces “official art”299 due in part because of its influence on an artist’s career, assumes that viewers of artwork do not pause to think about where the art originates or what message it seeks to convey. Members of the public who pay admission to view art are probably those who also take the time to think about the art and are able to discern between the message and messenger.

The oft quoted statement that “those who don’t know history are the most likely to repeat it” also has application in the arts funding controversy. The politicians who refer to Serrano’s work as “disgusting,”300 and the performance of the “NEA Four” as “tasteless,”301 should recall that most of the great artists of the Nineteenth century were similarly misunderstood, and that artistic pieces rejected at the time of their inception are now worth millions of dollars.302 It is often
denial of an NEA grant is not the equivalent of a professional excommunication). The author stated:

The NEA, when refusing to fund thousands of applicants, is not blacklisting the denied applicants as artists with indecent work or without artistic excellence. The art community should realize that the NEA is promoting one work instead of another with its limited budget, instead of thinking that all art that is denied funding does not have artistic merit.

Id.

298. See Creative America: A Report to the President by the President’s Committee on the Arts and Humanities 13 (1997). The Committee reported that:

An extensive survey of 12,000 craft artists, actors, and painters found that the vast majority earned less than $20,000 a year from their work. Only 28% of Actors Equity members sampled in the survey made more than $20,000 per year from their work. Only 28% of Actors Equity members sampled in the survey made more than $20,000 per year. Over 90% of the painters earned less than $20,000, and nearly 3/4 made only $7,000 or less a year from sales of their work.

Id.

299. See The National Endowment: It's Time to Free the Arts, supra note 297.

The NEA’s $175 million is important more for its symbolism than for the actual dollars involved. A NEA grant validates an artist, and the government should not be in the business of determining what is art. That process smacks of ‘official’ art, such as is imposed on the artistic communities in totalitarian societies.

Id.

302. For example, some critics labored to interpret Georgia O’Keeffe’s work as overtly sexual. See Jo Ann Lewis, Phillips exhibit turns a new leaf (and a few petals) in exploring the artist’s aesthetic, WASH. POST, Apr. 18, 1999, at GO1, available in 1999 WL 16998055 (reporting that “[t]he critics in the '20's New York . . . had a field day excavating sexual metaphors from these flower paintings, which one described as ‘painful ecstatic climaxes’”).
the case that all great artists are misunderstood by the generation in which they live because their messages look too far ahead, such that they will only be understood by the wiser generation that follows them.

2. The Government's Role in Artwork—the Proverbial and Literal Cost

The controversy surrounding the arts has occurred at a literal cost, and perhaps a proverbial one as well. As the arts and the government are becoming discussed in tandem, the question becomes whether we want these two words to become synonymous. During the last ten years of the arts debate, scholars, critics, artists, and the public have considered the notion that the government should not be involved in artwork at all because the government’s involvement decreases the quality of arts awareness in America. Some argue that the federal arts are too expensive and that the poor end up subsidizing the


We dwellers in the empire do not seem to want art with visionary power now—art that looks to the future. We want art made in the present to speak only to the present. That means it must not offend; it should flatter us, deliver the goods . . . . Our time is more hostile to the imagination than any period since that of the Hollywood blacklisting. And yet in our stolidity, our cringing pride, our sense of entitlement, what we need most is the shock of art, its power to tell us that this world is not all there is. Rather than leave it to the politicians, the social scientists and the now-beloved market forces to shape the future, we need the visions of our artists to give form to hopes and terrors.

Id.


It is the obligation of a democratic society . . . to protect the magical idea from those who would politicize it into a program or a slogan. And that means, of course, giving support to legitimate visionary artists, no matter how offensive their works may seem to certain organized coalitions . . . . American civilization, like all societies, exists not only in the present but in the future as well. We remember Athens less for the Peloponnesian Wars than for Aeschylus, Sophocles, Euripides . . . . and Aristotle. We value the Elizabethans not so much for overcoming the Spanish Armada as for producing the works of Spenser, Marlowe, Shakespeare, and Jonson . . . . Do Americans wish to be remembered primarily for gangsta rap, Seinfeld, Rent, and Titanic? All those attempting to help mold the American future through creative expression . . . . can only be dismayed and appalled by this Supreme Court decision.

Id.

305. See, e.g., Laurence Jarvick, Ten Good Reasons to Eliminate Funding for the National Endowment for the Arts (last visited Jan. 7, 1999) <http://www.heritage.org/library/categories/budgettax/bg1110.html> (arguing that the government subsidization of art produces no new masterpieces, but rather dreary and political artwork).

306. See The National Endowment for the Arts: Learn about the NEA, supra note 15 (reporting that the NEA cost each American about 36 cents per year, the equivalent of 1% of the federal budget).
Indeed, the controversy surrounding the arts has involved expensive litigation, public furor, and increased judicial activism. However, this argument fails when considering the amount of money that these so called “highbrow pork barrel” and the “pleasures of the affluent” pump into the American economy. Cultural tourists spend more money than the average traveler ($615 vs. $425), take longer trips, shop more, and are more likely to stay in hotels and motels. Additionally, “[n]onprofit arts return $3.4 billion in federal income taxes to the U. S. Treasury each year, and spur $1.2 billion in state government revenue and $790 million in local government revenue.”

It has been argued that if government becomes more involved in the arena of artwork, then the government will sponsor art and no one else will. However, the reality is that government involvement in the arts has more positive effects that outweigh the inconvenience of censorship and conflict. For example, the NEA brings performances to small towns in rural areas in all fifty states and helps keep ticket and admission prices affordable. On an educational level, the NEA invested $8.2 million of its annual grant dollars in kindergarten through twelfth grade arts programs, and thousands of artists work in schools “through NEA supported programs including artist residen-

307. See Cato Handbook for Congress: Cultural Agencies (last visited June 6, 1999) <http://www.cato.org/pubs/handbook/hb105-14.html> (arguing that “[s]ince art museums, symphony orchestras, humanities scholarship, and public television and radio are enjoyed predominately by people of greater-than-average income and education, the federal cultural agencies oversee a fundamentally unfair transfer of wealth from the lower classes up”).

308. Id.


310. Id.

311. State and local governments have recently also become more involved in art, granting permits to developers on the condition that they fund “public art” for the community. See Ehrlich v. Culver City, 911 P.2d 429, 450 (1996) (providing an example where a municipality will retain content authorization where a developer applied for a permit to build townhouses and the city agreed that artwork would be installed). See also Gideon Kanner, Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal, 25 REAL Est. L. J. 214 (1997) (describing the Ehrlich case and its implication on content discrimination and governmental exactions).


The NEA’s arrogance is breathtaking. Provincial artists do not need eleemosynary or elevated advice from Big Brother. Every state and section of this country has its own indigenous and particular cultural tradition . . . . Those traditions evolved without any ‘help’ from Washington; the last thing our vibrant sectional cultures need is the cookie-cutter uniformity and political correctness that are bureaucracy’s signet.

313. See National Endowment for the Arts, Learn about the NEA, supra note 15.
cies, outreach programs, teacher training special performances, and master classes."^{314}

A frequent argument in the arts debate is that the American taxpayers should not have to pay for controversial art.^{315} The *Finley* decision, due in part to its treatment of First Amendment doctrine and its polar views amongst majority and concurring opinions as to what is historically unconstitutional, appears to be judicial activism. In part, the Court was likely seeking to protect what it perceived to be the majority view on controversial art: that taxpayers would prefer not to facilitate it. However, the taxpayer argument fails because Americans do not have a choice when it comes to paying taxes. We cannot agree to fund education, yet we refuse to fund nuclear weapons and the national defense.\(^{316}\) Similarly we cannot agree to fund white artists but not black artists.\(^{317}\) On a constitutional level, taxpayers do not have standing to object to the manner in which taxes are spent.\(^{318}\) On a political level, taxpayer disgust may induce legislation, but it should never provide a basis to uphold viewpoint discriminatory funding procedures.\(^{319}\)

---

314. *Id.*
315. See Jarvick, *supra* note 305 (arguing that "[e]ndowment funding is just a drop in the bucket compared to giving to the arts by private citizens").
316. See Renee Linton, *The Artistic Voice: Is It in Danger of Being Silenced?*, 32 CAL. W. L. REV. 195, 216-18 (1995) (arguing that "[t]axpayers fund many things that individuals may not like[, ] [including] foreign military adventures, or $600 toilet seats for advanced bombers. Usually, the tab for these governmental expenditures is much higher than the NEA's . . . ."); see also Editorial, *Congress Goes to War Against Public Art*, S. F. CHRON., July 14, 1997, at A20, *available in* 1997 WL 6701394 (responding to Republicans' proposal to eradicate the NEA, "these are specious arguments. . . . Arts grants cost the average taxpayer $1 per year compared to $149 for education or $1,618 for defense").
317. See Sünstein, *supra* note 86, at 228. The scholar argued:
If we allowed taxpayers to fund as they wished, we would permit funding decisions to skew artistic creations in accordance with prevailing political convictions, especially those of the government or of current majorities. This would allow government to give money only to people whose point of view it shared. At least in a world in which the government engages in a wide range of funding, this skewing effect on expression could not possibly be tolerated. It would run afool of the core of the free speech guarantee.

*Id.*

318. *Id.* See Frothingham v. Mellon, 262 U.S. 447 (1923) (denying a taxpayer requested injunction against Tenth Amendment expenditures made to reduce maternal and infant mortality under federal statute); see also Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) (refusing to permit a taxpayer challenge under the Establishment Clause to the transfer of property formerly used as a military hospital to the Valley Forge Christian College); but see Flast v. Cohen, 392 U.S. 83 (1968) (permitting taxpayer standing to challenge aid to religious school because there was "a logical nexus between the status asserted and the claim thought to be adjudicated").

[It] may be that whenever government supports a field of speech so pervasively as to effectively displace the private sphere, it no longer may require that subsidized speech
C. New Standards Needed for Resolving First Amendment and Artwork Issues

Because artwork is so distinguishable from other expression and speech analyzed under the unconstitutional conditions doctrine, a new approach should be created for distribution of artistic subsidies or adjudicating content-based legislation that has either a direct or indirect effect on artwork. Many scholars who have examined the crisis surrounding federally-funded art have recognized the inability of existing constitutional doctrine to adequately protect the competing interests of federal funds, traditional values, and iconoclastic artwork.\footnote{Id. 320. See, e.g., Mach, supra note 271, at 383 (suggesting “neutral display” approach would avoid the “general pitfalls of the public forum doctrine”); Schauer, supra note 152, at 85-86 (arguing that the judiciary’s “refusal to draw doctrinal distinctions among culturally distinct institutions is simply unworkable in the context of the vast and increasing domain of free speech claims . . . ”).}

Scholar Andrew Mach advocates the use of the neutral display test for regulating artistic displays.\footnote{Id. 321. See Mach, supra note 271, at 421-422.} According to a neutral display analysis, “[o]nce a government agent decides to solicit submissions for general display on public property, she may select, reject, or remove a work of art from display only on the basis of its artistic merit. Any regulation she imposes for a reason other than aesthetic quality violates the First Amendment.”\footnote{Id. 322.}

Another scholar suggests that the government subsidize the arts through tax exemptions.\footnote{Id. 323. Leff, supra note 98, at 407-08.} According to this plan, the government would create a system where tax exemptions for donors would be substituted for direct federal subsidies.\footnote{Id. 324. Id.}

First, it should be noted that the neutral display only applies when the government decides to open its property to artistic display; absent such a decision, putative public artists cannot claim any access to government fora. Moreover, the government retains the power to decide when, where, and in what form to show the requested art. Second, since government administrators may reject any art they consider aesthetically unappealing, much “grotesque,” “shocking,” or even “offensive” art can lawfully be restricted as artistically deficient. Third, the neutral display analysis does not apply to government speech, where strict neutrality is not and cannot be required.\footnote{Id. 325. Leff, supra note 98, at 407-08.}
that results from these decisions.\textsuperscript{325} Other benefits are that private citizens with diverse viewpoints are encouraged to fund art that they find particularly appealing.\textsuperscript{326} Arguably, if there is a correlation between poverty and the particularized preference for a distinct type of artwork, then these types of works will be repressed. However, private citizens may enact fundraising measures to combat such problems.\textsuperscript{327} Another benefit of the tax exemption model is that the government will save on the cost of administrative fees necessary to run an agency such as the NEA.\textsuperscript{328}

Another proposed solution to the problem of viewpoint discriminatory practices within the existing NEA procedures for art grants is to shift the grant-making process to the state level.\textsuperscript{329} Under this model, the NEA would receive an annual budget from Congress, but would allocate the sums to state and local municipalities who would then make the decision as to who would receive the grants.\textsuperscript{330} Shifting the grant making process to a local level, rather than in the narrow confines of Washington D.C., where it currently takes place, would give the states the ability to determine the decency of the artwork based on the values of that smaller community.\textsuperscript{331}

Lastly, if a laissez-faire treatment of federally-funded art is unfeasible, the regulation of its content should remain in the hands of the panel of experts and should furthermore operate independently of any specifications from Congress as to how to access “artistic merit.” This idea of “professional deference” is inspired by Professor Rodney Smolla’s view that the decisions concerning the content of speech should be made only by professionals in the field who “judge the merits of speech from perspectives limited to the professional criteria that have evolved within their areas of expertise.”\textsuperscript{332} The professional deference model is sensible because the panel of experts is chosen based

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item See Leff supra note 98, at 410-12.
\item Disputes over First Amendment rights of artistic expression are best exercised and defended in places where they have an actual public impact. A decentralized decision-making process, especially with respect to projects that tend to create controversy, would properly place the issue of artistic freedom into the sphere of local public debate where the effect of expression is most immediately felt, rather than in the removed and artificial atmosphere of Washington, D.C.
\item Id. at 411.
\item Id.
\item SMOLLA, supra note 53, at 195.
\end{enumerate}
\end{footnotesize}
on their knowledge and notoriety in their field and accordingly appointed as judges of artistic excellence. Congress is lacking in the type of expertise necessary to instruct a group of individuals who are already well versed by nature of their position in the artistic field.

IV. IMPACT

A. The Decision as Stare Decisis for Future Cases on Art and the First Amendment

On a substantive level, the effect of the Finley decision depends on whether future courts choose to adopt the majority or concurring opinion. The majority opinion, as discussed in Part II of this Note, took the stance that the decency clause was constitutional because it was advisory and not a direct restriction on the content or viewpoint of the artistic expression. There are arguably two effects on First Amendment doctrine because of the new “advisory language” category for government regulation of expression. First, the Court's conclusion that the clause is constitutional because it is “advisory” encourages the deceptive drafting of future legislation. The Court sends the message to future legislators that the constitutionality of any legislation will depend not on what type of expression they seek to prohibit, but rather whether they include enough prepositions. If by including certain jargon, the legislation can be read to consider factors rather than require the presence of certain factors, the legislation will be constitutional. As Part III of this Note argued, whether legislation is phrased to consider or require the consideration of certain values is inconsequential because the decisionmaker will regard the factors as a mandate from Congress rather than merely a helpful hint.

333. Id. at 196.
335. See supra notes 191-195, 268-276 and accompanying text.
336. Cf. Stuart Taylor, Jr., Savoring Judicial Fudge, N.Y. L.J., July 6, 1998, at 2 (characterizing the majority's view of the decency clause as “advisory” as judicial fudge because it placated both sides).

It resolved an essentially symbolic skirmish in the culture wars by giving both sides something to crow about, while letting the NEA get back to its usually benign if boring business of financing the works of orchestras and the like. . . . A judicial fudge that placates partisans on both sides is not a good thing, of course, if it sacrifices important constitutional principles to expediency. But it is a good thing when the court avoids a collision between two vital principles that can co-exist only if neither is carried to the limits of its logic.

Id.

337. See supra notes 247-333 and accompanying text.
However, some judicial phenomena limit the impact of Finley decision on First Amendment precedent. First, if the use of constitutional doctrines are merely a pretext for courts' value judgments about the expression at issue, then the decision may not have an effect on future decisions. The outcome of any First Amendment challenge to funding practices will depend more on the controversial or the political nature of the art.

Additionally, constitutional doctrine is apparently not set in stone. Recent decisions involving commercial speech have strikingly different outcomes than prior cases. For example, the Third United States Circuit Court of Appeals, in Christ's Bride Ministries v. Southeastern Pennsylvania Transportation Authority, held that in the designated forum at issue, content-based restrictions on speech would be strictly scrutinized. In this case, Christ's Bride Ministries ("CBM") sued the Southeastern Pennsylvania Transportation Authority ("SEPTA") alleging breach of contract and violations of its rights under the First and Fourteenth Amendments. CBM contracted with SEPTA to display in train and subway stations posters that stated: "Women Who Choose Abortion Suffer More and Deadlier Breast Cancer." SEPTA removed the ads after receiving a letter from the Assistant Secretary of Health, which asserted that the ad was inaccurate. CBM's ad was removed, although the group had already paid for the advertising. Judge Jane R. Roth quoted Supreme Court precedent: "'above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" Thus, the government "'may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or controversial views. And it may not select which issues are worth discussing or debating in public facilities.'" This decision, the antithesis of a decision handed down by the Supreme Court regarding commercial speech on buses,

---

338. 148 F.3d 242 (3rd Cir. 1998).
339. Id. at 255. The court must have concluded that the subways were a public forum because they used strict scrutiny.
340. Id. at 243.
341. Id. at 245.
342. Id. at 248.
343. Id. at 246 ("CBM had paid a total of $6,086 for two months of advertising.").
344. Christ's Bride Ministries, 148 F.3d at 255 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).
345. Id. (quoting Mosley, 408 U.S. 92, 95 (1972)).
346. See Lehman v. Shaker Heights, 418 U.S. 298 (1974) (upholding Shaker Heights' right to accept commercial advertising on city owned buses but reject political advertising because the Court found that city owned buses were not a public forum).
demonstrates that judges may adapt First Amendment precedent. In light of Christ’s Bride Ministries, the Finley decision may not cause a disastrous blow for the adjudication of artwork related issues because judges are not totally bound by First Amendment precedent.

Additionally, the Second Circuit recently handed down a decision that explains and interprets the Finley decision. At issue in Velazquez v. Legal Services Corporation were regulations setting forth restrictions on the situations in which funding from the Legal Services Corporation (“LSC”) could be used. Created by Congress in 1974, LSC is a nonprofit corporation that distributes federal funds to nationwide recipient organizations which in turn provide legal assistance to low income individuals. Controversy has surrounded LSC since its inception and Congress had repeatedly placed restrictions on the permissible use of funds by recipient organizations. In 1996, Congress substantially expanded the restrictions on the permissible activities of LSC grantees, prompting a constitutional challenge and a motion for an injunction. Subsequently, LSC issued new regulations to cure the feasibly unconstitutional aspects of the regulations. In Velazquez, the plaintiffs challenged the final regulations. The plaintiffs argued that the final regulations unreasonably burdened a grantee’s ability to use nonfederal funds to engage in restricted activity and which constituted an unconstitutional condition on the receipt of LSC subsidies.

The court found that one segment of the final regulations, the “suit for benefits exception,” was unconstitutional. In reaching its conclusion that the exception was viewpoint-based, the court used three cases as a framework: Rust, Rosenberger, and Finley. Most importantly, the majority discussed the dissent’s opinion at length. Judge Jacobs, in dissent, contended that Rust and Finley established

347. 164 F.3d 757 (2d Cir. 1999).
348. Id. at 759.
349. Id.
351. Velazquez, 164 F.3d at 760-61.
353. Velazquez, 164 F.3d at 761-62.
354. Id. at 763-64.
355. Id. at 772. The “suit-for-benefits” exception would “make an entity ineligible for an LSC grant if, in the course of a representation of an individual client seeking specific relief from a welfare agency, that entity sought ‘to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.’” Id. at 773.
356. Id. The court found that “[i]n all other respects, the statute will continue to function as written. Grantees will be barred (on penalty of losing their entitlement to grantee status) from engaging in any of the activities prohibited by § 504(a)(16).” Id.
357. Id. at 765-73.
the government's broad entitlement to discriminate on the basis of viewpoint in making financial grants.\footnote{358} Furthermore, Judge Jacobs argued that viewpoint discrimination was suspect only where the government seeks to promote a diversity of private speech.\footnote{359} The court responded that while the words from the decisions might support Judge Jacob's view, they doubt that [the] words can reliably be taken at face value. In seeking to understand how a judicial precedent in a relatively unexplored area of law bears on other undecided questions, it is often more instructive to look at what the Court has done, rather than at what the Court has said in explanation.\footnote{360}

The court found it implausible that the Supreme Court, although having approved the regulations in \textit{Rust}, "would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy."\footnote{361} The court finally came to its "resolution" concerning \textit{Rust} and \textit{Finley}. The court found that the determinative test in the situation was to look at the value of the speech, or apply a categorical approach.\footnote{362} The court reasoned that a lawyer's argument concerning a governmental practice was a more valuable and protected form of speech than "abortion counseling" or "indecent art."\footnote{363}

The \textit{Velazquez} decision demonstrates that judges will not read the rules set out by the Supreme Court in a vacuum. The court sensed that an unjust result would follow if the opinions of \textit{Rust} and \textit{Finley} were applied in a black and white fashion and adapted its approach accordingly. The \textit{Velazquez} decision also demonstrates that courts will be innovative in applying constitutional doctrines that have been dormant. For example, the \textit{Velazquez} court looked to where the speech at issue fell on the spectrum of protected speech to reach its conclusion that the regulations were viewpoint discriminatory. A future court taking this approach may find that "indecent art" is a more valuable form of expression. Based on the flexibility of the \textit{Velazquez}}
court, it is possible that the *Finley* decision did not sound the death knell for uncensored federally-funded art.

However, regardless of these technicalities, the *Finley* decision impacts constitutional law because it affects the attitude of the judiciary. The decision furthered the current judicial activism of patriarchal control over our pocketbooks and content of entertainment mediums. The American public's preference for the use of their tax dollars is a question for the Gallup polls. Nonetheless, the legislature, with the aid of the judiciary, has taken on the role of protecting taxpayers. The *Finley* decision enables the content of federally-funded art to be actively determined by government bodies.\(^{364}\)

### B. The Decision's Effect on Artists and the Types of Art They Create

The effect of the *Finley* decision is more salient within the realm of the artistic community than on the books of First Amendment precedent. Because the decision can be extended by future courts, the decision threatens the media, television, and books. Recent challenges to films such as "*Lolita"\(^{365}\) also demonstrate the inadequacies of existing First Amendment doctrine to deal with problems involving art and other media. Legislation is being used in far-reaching ways to prohibit expressive activity that is beyond the scope of the law's purpose. Currently, the constitutionality of the Child Pornography Prevention Act is being questioned for this reason.\(^{366}\) Two districts are currently split\(^{367}\) and it will be interesting to see if *Finley* will be precedent that

---

364. For an example of content determination on a municipal level, see Ehrlich v. Culver City, 911 P.2d 429 (1996).

365. *See Nightline: Lolita May Be Most Controversial Movie You'll Ever See* (ABC television broadcast, Mar. 23, 1998), available in 1998 WL 5373010 (interviewing actor Jeremy Irons and eliciting his response to criticism concerning the sexually explicit nature of the film *Lolita* in which he appears). The actor stated:

> I think one of the objects of drama or of stories, film, novels, whatever, is to show people what can happen if you go wrong. A great play the Greeks wrote called Oedipus, where a man makes love to his mother unknowingly . . . . Titus Andronicus of Shakespeare, a man eats his mother. Now we aren't saying that this is how we should behave, we're saying this is what can happen in life. And Nabokov is writing a tragic love affair, a story where those people who go wrong, who go over the limits of what is acceptable in society, get their comeuppance. And if we are to understand each other as human beings, we surely must be able to see behavior or read about behavior where people take the wrong steps . . . and see what the outcome is.

*Id.*


367. In United States v. Hilton, the court held that the Child Pornography Prevention Act ("CPPA") prohibiting "any visual depiction" that appeared to be of a minor engaging in sexually explicit conduct was unconstitutional because it was vague in that it failed to clarify with sufficient definiteness the conduct which is prohibited, and was overbroad because it prohibited protected expression such as adult pornography featuring adults who appear youthful. 999 F. Supp
influences the Court to be more stringent on constitutional attacks based on First Amendment infringement.

Additionally, if legislation can be used to prohibit movies and films that some groups find objectionable, the overall quality of political debate will suffer. The government may characterize its content-based restrictions as actions involving education and take a loco parentis responsibility to “protect” us. Media, artwork, and political debate may involve a homogenous collection of senator-approved subject matter.

**Conclusion**

The *National Endowment for the Arts v. Finley* decision allows the government to make content and viewpoint-based distinctions when handing out federal funding for artists. In this manner, the government may limit the expression of Americans and the artists who serve as proxies for the expression of our political and social views and facets of our human experiences. The decision, as First Amendment precedent, teaches legislators that they have the freedom to draft legislation in a discretionary fashion, and their motivation to eradicate objectionable and controversial material will not invalidate such legislation. The decision is unpalatable not solely because it fails to solve the tension between politics and federal funding or controversial artwork and diplomacy, but also because it fails to set out distinct parameters for government control in funding expressive activities. The *Finley* decision sounds of censorship and discards the importance of artistic freedom.

Karen M. Kowalski

131, 135-36 (D.C. Maine 1998). See *The Free Speech Coalition v. Reno*, 1997 WL 487758 (N.D. Cal. 1997). In *The Free Speech Coalition*, the court held that the CPPA was not unconstitutionally vague because it gave sufficient guidance to a person of reasonable intelligence as to what it prohibits and was not overbroad because it “prohibits only those works necessary to prevent the secondary pernicious effects of child pornography from reaching minors.” *Id.* at *6. Finally, the court found it was not an unconstitutional prior restraint because it does not require advance approval for production or distribution of adult pornography that does not use minors and does not affect a complete ban on constitutionally protected material. *Id.* at *7. For a detailed analysis of this case and its effect on First Amendment precedent, see Geating, *supra* note 366 at 389.

368. See Horn & Plattner, *supra* note 37, at 2224 (stating “[t]he threat of government censorship is not limited to disturbing sexual and religious art... Controversial recent programming on public television... has renewed the debate over whether the Public Broadcasting System ought to air documentaries with such strong partisan viewpoints, especially ones hostile to the U.S. government”); but see Murphy, *supra* note 278, at 560 (arguing that “a failure to fund is an issue totally different from censorship... [e]ven if one believes... that the state must never censor art, one may consistently believe also that the state should never spend a dime in support of art”).