NEA v. Finley: Explicating the Rocky Relationship Between the Government and the Arts

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NEA v. Finley: Explicating the Rocky Relationship Between the Government and the Arts

I. INTRODUCTION/HISTORY

The National Endowment for the Arts (NEA) has been the principal source of governmental support for artistic expression since 1965, awarding over three billion dollars to artists over that period of time.1 As an integral part of President Lyndon Johnson's Great Society, the NEA's principle goal was to ultimately make the arts more accessible to all Americans through funding private expression.2 Additionally, the NEA strived to preserve American culture and encourage widespread artistic expression.3

Aside from the funding, the NEA originally desired to keep government out of the entire process altogether.4 The original authors of the enabling legislation feared that government involvement at any depth or stage beyond funding, would promote the perception that government-supported art, funded by the NEA, was merely government approved, conformist art; truly not works of uninhibited exploration and communication.5 Thus, the original framers stressed that "funding is to foster free inquiry and expression. Conformity for its own sake is not to be encouraged, nor shall undue preference be given to any particular style or school of thought or expression. The sole standard should be artistic excellence."6

However, despite the framers' fear of conformist art, the NEA's enabling statute has afforded the agency with an expansive range of discretion in awarding the grants. The statute broadly states that the agency should construe "artistic and cultural significance, giving emphasis to American creativity and cultural diversity,

2. See Rene'e E. Linton, Comment, The Artistic Voice: Is it in Danger of Being Silenced?, 32 CAL. W. L. REV 195, 196-99 (1995) (discussing the United States' history of governmental arts funding, both before and after the establishment of the NEA); see also Mach, supra note 1, at 416 (recognizing the NEA's endeavor to realize independent artistic excellence).
4. See id.
5. See id. (citing Marjorie Heins, Sex, Sins, and Blasphemy: A Guide to America's Censorship Wars 5, 117-19 (1993)).
6. Id. at 199 (quoting S. REP. NO. 89-300, at 3,4 (1965)).
professional excellence,” and the encouragement of “public knowledge, education”, “understanding, and appreciation of the arts”.7

A. How the NEA Works

The NEA awards grants at two distinct levels.8 At the first level, the NEA defines its priorities, establishes categories or types of art it seeks to support, and establishes criteria for funding within each incorporated category.9 At the second level, the relative merits of each application are weighed within each category.10

At the second level the merit judging is handled respectively: “by three distinct governing bodies: (1) the Advisory Peer Panels, (2) a National Council on the Arts, and (3) the Endowment Chairperson.”11 The Advisory Peer Panels are the first hurdle for a grant application to overcome.12 The Advisory Peer Panels consist of rotating experts in their representative fields, for “no member may serve longer than three consecutive years.”13 In accordance with the 1990 Amendments to the enabling statute, the panels must “reflect ‘diverse artistic and cultural points of view’ and include ‘wide geographic, ethnic, and minority representation,’ as well as lay individuals who are knowledgeable about the arts.”14

The Advisory Peer Panels then report to the 26 member National Council on the Arts (Council).15 The 26 member Council is comprised of citizens who have broad experience in a wide range of artistic provinces.16 The President, whose decisions require the advice and consent of the Senate, appoints the 26 individual members.17 Each Council member serves an alternating six-year term whereby approximately one-third of the members rotates every two years.18 Upon rejection of an application, the Council’s decision is final and will not make it to the third stage within the level—the Chairperson of the NEA.19

The Chairperson carries the decisive responsibility and power to approve an application.20 However, the Chairperson cannot approve an application for which

7. See Finley, 118 S. Ct. at 2171 (paraphrasing 20 U.S.C. §§ 954(c)(1)-(10) (1990)).
9. See id.
10. See id.
11. See Linton, supra note 2, at 200 (quoting Heins, supra note 5, at 119).
12. See id.
14. See Finley, 118 S. Ct. at 2172 (quoting 20 U.S.C. §§ 959(c)(1)-(2)).
15. See id.; see also Linton, supra note 2, at 200 (discussing the governing bodies that make up the NEA).
16. See Linton, supra note 2, at 200.
17. See id.
18. See id.
19. See id.
20. See Finley, 118 S. Ct. at 2172.
the Council has provided a negative recommendation.21 As with the Council, the President appoints the Chairperson, with the advice and consent of the Senate.22 At the birth of the initial controversy underlying the case at bar, John Frohnmayer was the appointed Chairperson, selected by President Bush.23

At each stage of the three-tiered process, the balancing of the merits of each application traditionally involves content-based considerations, because there has always been more applications and need for grant money than allocated to the NEA.

B. A Fly in the Ointment

Of the NEA’s estimated 100,000 awards, only a few have resulted in formal public complaints, some of which involved misapplication of funds or a lack of accountability toward the public.24 The elaborate peer panel/stage structure was effective in shielding the NEA from political pressure and intense public scrutiny for 24 years.25

In 1989, however, two particular NEA funded projects drew the ire of the public and Congress alike; Robert Mapplethorpe’s exhibit “The Perfect Moment,”26 which depicted homoerotic scenes, and Andres C. Serrano’s photograph, “Piss Christ,”27 depicting a crucifix immersed in urine, prompted Congress to amend the NEA’s enabling statute.28 The movement for reform was intense. Amidst charges of pornography and anti-religious sentiments, Republican critics, such as Senators Jesse Helms and Orrin Hatch, led the initial charges.29 Later, when the “NEA

21. See id.
22. See Linton, supra note 2, at 200.
23. See Finley, 118 S. Ct. at 2173.
24. See id. at 2172.
25. See Linton, supra note 2, at 201.
26. The Institute of Contemporary Art at the University of Pennsylvania had used $30,000 of its NEA grant to fund Mapplethorpe’s 1989 exhibit. See Finley, 118 S. Ct. at 2172; Linton, supra note 2, at 204.
27. The Southeast Center for Contemporary Art, disseminating a portion of its NEA grant, gave Serrano $15,000 to produce photographs which included the controversial “Piss Christ” photograph. See Finley, 118 S. Ct. at 2172; Linton, supra note 2, at 203-04.
28. See Joan Biskupic, ‘Decency’ Can Be Weighed In Arts Agency’s Funding, WASH. POST, June 26, 1998, at A1, A18 (describing the Supreme Court’s Decision); see also Finley, 118 S. Ct. at 2172 (discussing the factual history of the case at bar); Mach, supra note 1, at 417-21; Linton, supra note 2, at 201-10.
29. See Patrick Pacheco, The Karen Finley Act Reacts Theatre: The Supreme Court Decision Against the NEA 4 Gives the Performance Artist a New Outrage, L.A. TIMES, June 27, 1998, at F1 (Senators Hatch and Helms found the work offensive and took on substantial roles in getting the amendment enacted). When considering the NEA’s fiscal allotment for 1990, Congress angrily reacted to the Mapplethorpe/Serrano controversy by cutting the NEA budget by $45,000, the exact amount
Four" (Karen Finley and her three co-appellants) won at the appellate level, the Clinton administration, signaling a bi-partisan attack, appealed the decision to the Supreme Court on behalf of the government.

C. Evolution of the Amendment

The first round was fired by Senator Jesse Helms, who described the two artists' works as "unspeakable" and "filth." Helms initiated the task of ensuring that the government would immediately cease to fund such art. The Senate passed the Helms Amendment, designed to last until September 30, 1990, the date of the NEA's scheduled reauthorization by Congress. Later, when the House rejected the Helms' Amendment, a joint conference committee agreed to a compromise that President Bush signed into law on October 23, 1989. The compromise, still known as the Helms Amendment, prohibited the use of government funds to promote or disseminate art that the NEA considered obscene. Included as obscene were works that depicted homoeroticism, sadomasochism, individuals engaged in sex acts with children, and any other art that had "no serious literary, artistic, political, or scientific value when viewed as a whole." The NEA implemented these concerns by requiring all grant recipients to affirm in writing that they would not use their grants to produce the aforementioned types of projects. A Federal District Court subsequently invalidated this requirement as unconstitutionally vague.

In response to the Helms Amendment's immediate impact and constitutional resonance, Congress, through the 1990 appropriations bill, employed an Independent Commission (Commission) of constitutional law scholars to determine whether the NEA was qualified to legally determine obscenity. The Commission was also asked to make further recommendations before the NEA's then existing authoriza-

30. See Pacheco, supra note 29, at 2172.
33. See Herbert, supra note 31, at 417.
34. See id.
35. See id.
36. See id.; see also Finley, 118 S. Ct. at 2172-73 (discussing the Congressional amendment that precluded funds for “obscene” works).
37. See Finley, 118 S. Ct. at 2173 (citing Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774, 782 (C.D. Cal. 1991)).
38. See id.
39. See Finley, 118 S. Ct. at 2173; Herbert, supra note 31, at 417.
tion period and expiration of the temporary Helms Amendment.\(^{40}\)

The Commission determined that the NEA, largely as a result of their structure, was not an appropriate tribunal for legal determination of obscenity.\(^{41}\) Furthermore, the Commission determined that there is no constitutional obligation to provide arts funding, and they recommended that the certification requirement be eliminated, cautioning against setting forth any kind of content restrictions.\(^{42}\) Furthermore, the Commission suggested strengthening the "role of the advisory panels and a statutory reaffirmation" of the importance of "mutual respect for the disparate beliefs and values among us."\(^{43}\)

Meanwhile, as the Independent Commission was busy at work on their recommendations, each Congressional chamber was busy at the task of formulating their own suggestions.\(^{44}\) Overall, Congress sought to establish greater accountability on the part of the NEA toward Congress.\(^{45}\) Congress wanted to ensure that government funds would not be used to fund art that was inconsistent with mainstream "American values."\(^{46}\)

This sparked a firestorm of debate in the House between the summer and fall months of 1990. On June 28, 1990, the Committee on Education and Labor submitted the Arts, Humanities, and Museums Amendments of 1990, which suggested the reauthorization of the NEA with only minor alterations.\(^{47}\) The House declined this proposal.\(^{48}\) In addition, the House debated and shot down several other proposals including the Crane Amendment, which would have effectively done away with the NEA altogether, and the Rohrabacher Amendment, which would have forbidden the use of grants to "promote, distribute, disseminate, or produce matter that has the purposed effect of denigrating the beliefs, tenets, or objects of a particular religion [or] of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin."\(^{49}\)

Ultimately, taking into account the various proposals set forth over the summer and fall months of 1990, the House settled on the compromised Williams/Coleman Amendment on October 11, 1990, as proposed by Representatives Pat Williams and Ronald Coleman.\(^{50}\) The compromise amendment stated that artistic excellence

40. See id.
41. See Herbert, supra note 31, at 418.
42. See Finley, 118 S. Ct. at 2173.
43. See id.
44. See Herbert, supra note 31, at 418.
45. See id.
46. See id.
47. See id. at 418-19.
48. See id. at 419.
49. Finley, 118 S. Ct. at 2173 (quoting 136 Cong. Rec. 28,657-28,664 (1990)).
50. See id.; see also Herbert, supra note 31, at 421 (discussing the statute and its applications).
and merit would still be the criteria upon which funding applications would be judged. In addition to this standard, however, the application must "take[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

Similar to the House, dissension also prevailed in the Senate. "[T]he Senate Subcommittee on Education, Arts, and Humanities recommended that the NEA be reauthorized without any changes." However, the Committee on Labor and Human Resources, led by Senator Hatch, disregarded the Subcommittee suggestion. Instead, this Committee opted for an amendment that forced repayment of federal funds by any grantee who violated federal funding that was later found to have violated federal or state obscenity or child pornography laws, and banned the grantee from receiving federal funds for at least three years subsequent or until he returns the original grant. The Senate approved the Hatch Amendment, setting up a reconciliation to be determined by a joint conference committee regarding the two successfully passed amendments.

The Williams/Coleman amendment eventually prevailed and came to represent the root language for the amendment to the NEA's charter, codified at 20 U.S.C. § 954(d)(1). Congress deleted the Hatch Amendment language altogether.

Thus, the 1990 amendment, § 954(d)(1), which was the subject of the controversy in this case, stated that the Chairperson of the NEA would, in addition to previously established considerations, ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

51. See Finley, 118 S. Ct. at 2173; see also Herbert, supra note 31, at 421 (explaining the statute's mandate that the chairperson must utilize the artistic excellence standard).
52. See Herbert, supra note 31, at 421 (quoting 136 CONG. REC. 9681 (daily ed. Oct 15, 1990)).
53. See id. at 419-20.
54. Id.
55. See id.
56. See id.
57. See id.
58. See Herbert, supra note 31, at 419-20; Finley, 118 S. Ct. 2168, 2173 (1998).
59. See Herbert, supra note 31, at 420. The NEA sought to implement the directives of the new Amendment by altering slightly the Advisory Peer Panel stage of the three tier review system that had already been in place. This was done to ensure satisfaction of the decency standard. According to the NEA, the decency standard was satisfied by ensuring the representation of all cultural and ethnic groups and beliefs. See id. at 419. The decision of whether or not the implementation of the more diverse panels is sufficient to meet the Congressional command with respect to the Amendment was not at issue in the case at bar. See Finley, 118 S. Ct. at 2175.
60. See Finley, 118 S. Ct. at 2173 (describing 20 U.S.C. § 954(d)(1)). The amendment provides in full that:

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


D. Karen Finley's Entrance

Shortly after the amendment's enactment, it's constitutional mettle was taken to task. In 1991, performance artists Karen Finley, John Fleck, Holly Hughes, and Tim Miller (NEA Four), responding to the rejection of their NEA grant applications, jointly filed lawsuits, claiming that the new provision violated their constitutional free speech and due process rights.

Since the inception of this controversy, it has been Finley's work and bold public antics which have commanded the central focus of Congressional attack and media speculation, nudging the artist toward the position of spokesperson for the arts community against the amendment. Finley, who comes from a blue-collar Irish Catholic background (her father was a vacuum cleaner salesman), is also a mother and a recipient of master's degrees and Guggenheim awards. She has relied upon federal funding throughout her educational and professional career as an artist. Finley's act, which the artist describes as a social statement of the oppression against women, features Finley nude, covered only by chocolate and alfalfa sprouts as she recounts a sexual assault. While she smears the chocolate, Finley uses profanity to describe the assault.

Finley has stated, "Who's going to be deciding who's decent and what's 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.

Id. 61. See Biskupic, supra note 28, at A1; see also Finley, 118 S. Ct. at 2174. The NEA Four applied for their grants and gained approval at the advisory panel stage before the passage of the amendment. Subsequently, Chairperson Frohnmayer sent the applications back to advisory panel stage for reconsideration. See id.


63. See Pacheco, supra note 29, at F1.

64. See id.

65. See Hartigan, supra note 62, at A1. Hughes, Miller, and Fleck are gay and express their sexuality as such in solo performances. See id. Specifically, Hughes' monologue features a graphic recollection of her lesbianism and her own mother's sexuality. See Finley, 118 S. Ct. at 2183 n.2 (Scalia, J., concurring). Fleck, who confronts alcoholism and Catholicism in addition to his sexuality, has a segment in his performance in which he appears as a mermaid, urinates on the stage and creates an altar out of a toilet by placing a photograph of Jesus on the toilet bowl's lid. See id. (Scalia, J., concurring). Miller traces his childhood experiences and fears regarding growing up gay. See id. (Scalia, J., concurring). Miller uses vegetables to represent sexual symbols. See id. (Scalia, J., concurring).

66. See Finley, 118 S. Ct. at 2183 n.2 (Scalia, J., concurring).
decent? Is a banana going into a mouth decent? Is chocolate on a body decent?"  
Such exemplars constituted the substance of Finley's public statements throughout the NEA Four's eight-year long attack on the amendment.

E. Appellate History

After the passage of § 954(d)(1), an advisory panel nevertheless recommended approval for each of the NEA Four's applications. However, a majority of the Council opted to pass on the applications in light of the new amendment. The NEA Four alleged that the Chairperson's determination of decency constituted the sole basis for their denials.

The NEA Four thus filed suit, alleging that the NEA breached their First Amendment rights for political reasons. Additionally, the NEA Four alleged that the NEA failed to adhere to statutory procedures because the NEA had made its decision to turn down the grant applications based upon criteria that was not a part of the original NEA enabling statute. Finally, the artists claimed that the NEA dishonored the confidentiality of their applications' content through press releases, which violated the Privacy Act. The NEA Four sought, at the outset to have their grants approved and to recover for the Privacy Act violations. Later, the NEA Four amended their complaint to challenge the constitutionality of the amendment in its entirety as being vague and content biased on its face.

The district court denied the NEA's motion to dismiss, prompting a settlement with regard to the artists' statutory and as-applied constitutional claims. The district court also granted the artists' summary judgment on their facial constitutional challenge to § 954(d)(1), enjoining enforcement of the provision. The District Court held that the NEA could not comply with the decency standard by merely setting up a more diverse advisory panel. The act of setting up a diverse advisory panel did nothing to notify applicants as to what is "decent" or to outline

67. See Pacheco, supra note 29, at F1.
68. See Finley, 118 S. Ct. at 2174.
69. See id. The NEA Four received word of their denials in June 1990. See id. Hughes and Miller later received word, on September 30, 1991, that they would be receiving Solo Performance Theater Artist Fellowships. See id. at 2178.
70. See id. at 2173-74.
71. See id. at 2174.
72. See id.
73. See Finley, 118 S. Ct. at 2174 (referring to The Privacy Act of 1974, 5 U.S.C. § 552(a) (1999)).
74. See id.
75. See id. The joining of the National Association of Artists' Organizations was instrumental in this endeavor.
76. See id. The artists received the amounts of their vetoed grants, damages, and attorney's fees. The total tab for the government was $252,000.
77. See id. The Government did not seek a stay of the district court's injunction. See id. As such, the amendment was not enforced between 1992 and the time of the Supreme Court determination of the Finley matter. See id.
78. See id.
the parameters of NEA discretion. It is impossible, the court reasoned, to set up a nationwide standard for decency due to the nature of our "pluralistic society."\textsuperscript{79}

The Court of Appeals affirmed the district court's decision through a divided panel.\textsuperscript{80} The majority held that the new amendment forced the NEA, particularly the Chairperson, to use impermissible, content-based considerations of decency and respect when awarding grants.\textsuperscript{81} As such, the amendment was labeled vague, overbroad, and a violation of both the First and Fifth Amendments.\textsuperscript{82} In the alternative, the court held that the new amendment intentionally advocated content based discrimination; reasoning that the government should be instrumental in fostering a "diversity of views from private speakers," and not cherry-picking only those views of which it approves.\textsuperscript{83} The United States Supreme Court granted certiorari to consider the constitutional issues raised regarding the NEA Four's facial attack of § 954(d)(1).\textsuperscript{84}

II. ANALYSIS OF THE COURT'S OPINIONS

A. The Majority Opinion

Justice O'Connor delivered the majority opinion of the court.\textsuperscript{85} Beginning with the First Amendment issue, Justice O'Connor broke down the premise of the

\textsuperscript{79} Id.; see also Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (discussing the vagueness doctrine as a basic principle of due process, by which the court reasoned that the amendment at issue in the present case could not be given effect consistent with the Fifth Amendment's due process requirement). The district court also labeled the amendment overbroad because the amendment, in constraining the NEA's grant-making procedure, adversely affected constitutionally protected speech. See Finley, 118 S. Ct. at 2174; see generally Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) (striking down a state obscenity statute because the word lust prohibited the expression of constitutionally protected speech).

\textsuperscript{80} See Finley, 118 S. Ct. at 2174-75.

\textsuperscript{81} See id.

\textsuperscript{82} See id.; see generally Coates v. Cincinnati, 402 U.S. 611, 616 (1970) (striking down a state statute because the word "annoying" subjected the right of assembly to an unascertainable standard).

\textsuperscript{83} See Finley, 118 S. Ct. at 2175 (quoting Rosenburger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)) (ruling that a public university unconstitutionally used content-based decision making when it denied funding to a religious-based newspaper). The dissent written by Judge Kleinfeld and two other judges from the Court of Appeals decision, echoed the sentiments expressed by Justice O'Connor in the Supreme Court's majority opinion. See infra notes 85-115 and accompanying text.

\textsuperscript{84} See id. at 2175.

\textsuperscript{85} See id. at 2171.
artists' claims.\textsuperscript{86} Primarily, the artists argued that the amendment promoted viewpoint discrimination because it rejected any speech that fell outside of mainstream values or definitions of decency.\textsuperscript{87} As such, the artists claimed that the NEA was unable to award grants toward certain forms of expression.\textsuperscript{88}

Justice O'Connor refuted this claim by ruling that the "hortatory" amendment merely added considerations to the grant making process; the amendment, she argued, did not preclude or restrict awards to projects that might be deemed "indecent" or "disrespectful."\textsuperscript{89} The amendment, reasoned Justice O'Connor, did not place conditions upon the receipt of grants, nor did it dictate that standards of decency be given a particular weight at any time throughout the reviewing process.\textsuperscript{90} Indeed, she argued, Congress failed to disallow or punish particular viewpoints when they enacted the amendment.\textsuperscript{91}

As for the artists' assertion that the amendment was the by-product of a political attack upon their artistic expressions, Justice O'Connor reasoned that the amendment was instead a successful bipartisan proposal, aimed at saving the NEA's ability to fund art altogether, which took into account the Independent Commission's neutral recommendations.\textsuperscript{92} Moreover, working the decency "consideration" into the overall scheme of the selection process rather than isolating the factor from "artistic excellence" operated in favor of maintaining "the integrity of freedom of expression."\textsuperscript{93} Finally, the vague directive instructing that the amendment's new criteria be "taken them into consideration," coupled with the varied interpretations of the criteria, made it unlikely that the new guideline would invoke any "greater element of selectivity than the determination of 'artistic excellence'" already part of the enabling statute.\textsuperscript{94}

Most significantly, Justice O'Connor explained that "decency and respect" legislation did not silence the artists' voices; the amendment, at most, only cut off the artists' ability to use the government to facilitate or fund their viewpoints.\textsuperscript{95}

86. See id. at 2175. Indeed, Justice O'Connor leads off the majority opinion by pointing out Finley's "heavy burden" in prevailing on a facial constitutional challenge to the new amendment. See id. In order for Finley to succeed on a facial attack, there must be no viable constitutional use for the amendment. See id.; see also Broadrick v. Oklahoma, 413 U.S. 601, 613 (1972) (holding that in order for a statute to be considered overbroad, the statute must prohibit a substantial amount of constitutionally protected speech).

87. See Finley, 118 S. Ct. at 2175.

88. See id.

89. See id.

90. See id.

91. See id. at 2176.

92. See Finley, 118 S. Ct. at 2176.

93. See id.

94. See id. at 2177. Even more, Justice O'Connor points out that the original enabling statute contemplates several permissible and constitutional applications of the new criteria, such as educational use and projects that reflect cultural diversity. See id.

95. See id. at 2176-77; see also Harris v. McRae, 448 U.S. 297, 313 (1980) (ruling that nothing in the Constitution prevents Congress from denying public funding for certain medically necessary abortions while permitting the funding of childbirth costs).
Unlike "invidious viewpoint discrimination" cases whereby certain speech is forbidden altogether, the artists here were not forbidden from making the speech. Further, legislation aimed at creating governmental preferences has not been deemed unconstitutional in prior Supreme Court decisions. Justice O'Connor wrote:

[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.

Justice O'Connor further reasoned that content-based considerations in the grant-making process of arts funding are an inescapable consequence; with so many worthwhile projects and limited funds to go around, the reality that the majority of meritorious projects will be turned down, whether considered "wholesome" or "indecent", is inevitable. The reality, therefore, that the government will deny money to constitutionally protected speech is an inescapable consequence when the government acts as consumer in the arts market.

1. Artists' Reliance On Rosenburger

Finley relied on *Rosenburger v. Rector and Visitors of University of Virginia* as the foundation for the argument that the NEA impermissibly denied their applications based upon content. In *Rosenburger*, a public university declined to fund a Christian newspaper while it funded similar non-religious newspapers. The University, fearing a violation of the Establishment Clause, denied funding based upon content, a decision triggering the application of a strict scrutiny

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96. *See Finley, 118 S. Ct. at 2176-77; see also Maher v. Roe, 432 U.S. 464, 465 (1976)* (ruling that the states were not compelled by the Equal Protection Clause to pay for nontherapeutic abortions under state programs which simultaneously funded childbirth costs for the medically indigent).

97. *See Finley, 118 S. Ct. at 2179; see also Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1982)* (explicating power of Congress to prioritize in legislation); *Rust v. Sullivan, 500 U.S. 173, 193 (1991)* (holding 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").

98. *See Finley, 118 S. Ct. at 2177-78.*

99. *See id.*


101. *See Finley, 118 S. Ct. at 2178.*

102. *See Rosenburger, 515 U.S. at 827.*
The University lost its case because, by also funding the other papers, the University had therefore established a limited public forum.

In distinguishing *Rosenburger* from the case at bar, Justice O'Connor noted that factually, especially in regard to the element of limited funding, the two cases are quite similar. Justice O'Connor distinguished the two cases, however, by pointing to the competitive nature of arts funding contemplated by the NEA.

Unlike *Rosenburger*, in which the University gave funding to all student newspapers regardless of their content, the NEA does not "indiscriminately encourage a diversity of views from private speakers." Rather, the NEA's selection of applications relies upon the inherently content-based consideration of "artistic excellence." Therefore, Justice O'Connor said the application of *Rosenburger* to the present case was "misplaced."

### 2. Vagueness Argument

Citing the First and Fifth Amendments as justification, the artists also claimed that the NEA Amendment was unconstitutionally vague. Justice O'Connor conceded the fact that one may consider the Amendment unconstitutionally vague and overbroad if the provision were to appear in a criminal statute or regulatory provision. Justice O'Connor nevertheless disputed the artists' argument, first, by stating broadly that it is unlikely that the new provision will steer artists into self-censorship.

Second, and more significantly, Justice O'Connor noted that any possible vagueness in competitive funding criteria, or legislation which sets up spending priorities, does not propose dire constitutional consequences because, in this context, the government is acting as a patron. Indeed Justice O'Connor stated

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103. *See id.* The University could not satisfy the strict scrutiny standard by offering a compelling state interest. *See id.*
104. *See id.*; *see also* Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 396 (1992) (holding that a school district's denial of access to an open forum by a religious group was an unconstitutional content-based decision).
105. *See Finley*, 118 S. Ct. at 2178.
106. *See id.*
107. *See id.*
108. *See id.* at 2177.
109. *See id.*
110. *See id.* The First and Fifth Amendments protect speakers from the "arbitrary and discriminatory enforcement of vague standards." *See generally* NAACP v. Button, 371 U.S. 415, 432-33 (1963) (holding that a state statute which forbids the solicitation of legal services impermissibly collides with the associational rights of the NAACP, an ideologically motivated association).
111. *See supra* notes 77, 81.
112. *See Finley*, 118 S. Ct. at 2179 (comparing the vagueness permitted in the process of exercising Congressional spending power, to the clear lines necessary in legislation determining whether conduct is lawful or unlawful).
113. *See Finley*, 118 S. Ct. at 2179.
114. *See id.* at 2179.
that if the NEA amendment were to be considered unconstitutionally vague, the ruling would create a slippery slope whereby most government programs awarding scholarships and grants based on "academic excellence" would come into jeopardy.\textsuperscript{115}

In summary, the majority stated that so long as the Amendment is not applied in a manner that results in the intentional suppression of disfavored viewpoints, the Court will not deem the Amendment unconstitutional.\textsuperscript{116}

\textbf{B. The Concurrence}

Justice Scalia delivered an opinion concurring in the result but dissenting in the opinion's rationale.\textsuperscript{117} In short, Justice Scalia defended the judgment on the grounds that viewpoint-based discrimination, in this context, is not only good, but is the job of government.\textsuperscript{118} "It was wrong," stated Justice Scalia, for the majority to have "gutted" § 954(d)(1) to achieve its objective.\textsuperscript{119} Further, Justice Scalia noted, one of the least intrusive ways to accomplish the goal established by Congress is by instituting legislation which sets up preferences.\textsuperscript{120} Yet, a complete ban on the types of art implicated within the language of the Amendment would be constitutional.\textsuperscript{121}

\begin{quote}
\textsuperscript{115} See \textit{id.} at 2179-80. To explicate this point, Justice O'Connor references other programs awarding grants on the basis of subjective criteria such as the Congressional Award Program (promoting excellence in youth), the National Endowment for the Humanities (funding progress and scholarship), Secretary of Education (awarding fellowships to students with superior abilities), Fulbright grants (to strengthen international cooperative relations), and the Secretary of Energy awards (awarding teachers for excellence in education). \textit{See id.} at 2180.
\end{quote}

\begin{quote}
\textsuperscript{116} See \textit{id.} at 2178 (noting that because the present case constitutes a facial attack upon the Amendment itself, and not a denial of a specific grant whereby invidious discrimination is alleged, an as-applied analysis is inappropriate). "[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with these problems if and when they arise." \textit{See id.} at 2179 (quoting \textit{Red Lion Broadcasting Co. v. FCC}, 395 U.S. 367, 396 (1969)).
\end{quote}

\begin{quote}
\textsuperscript{117} Justice Scalia, joined by Justice Thomas, wrote the concurring judgment. \textit{See Finley}, 118 S. Ct. at 2180 (Scalia, J., concurring).
\end{quote}

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\textsuperscript{118} \textit{See id.} at 2184 (Scalia, J., concurring); \textit{see also} Eugene Volokh, \textit{Editorial, How Free is Speech when the Government Pays?}, \textit{WALL ST. J.}, June 29, 1998, at A18 (discussing the Court's opinion).
\end{quote}

\begin{quote}
\textsuperscript{119} \textit{See Finley}, 118 S. Ct. at 2180 (Scalia, J., concurring).
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\textsuperscript{120} \textit{See id.} (Scalia, J., concurring).
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\textsuperscript{121} \textit{See id.} at 2182 (Scalia, J., concurring) (noting that Congress could have entirely banned the funding of offensive productions through its use of the spending power. Instead, Congress took a less drastic approach by stating that it will disfavor such works in the evaluation process).
\end{quote}
1. "The Statute Means What It Says"

Justice Scalia began his concurring opinion by presenting verbatim language from the Amendment and declaring that the language was meant to apply only to those who do the judging; the application reviewers are to take under advisement, as bona-fide factors in the overall balancing, "'general standards of decency' and 'respect for the diverse beliefs and values of the American public' when evaluating artistic excellence and merit." This mandate is "100% clear," unambiguous, and applies to all applications regardless of the art's purpose or intended audience. The language is not at all advisory as stated in the majority; to the extent that an artist exhibits disrespect, adverse to the Amendment's criteria, the likelihood that artist will gain a NEA grant diminishes.

Thus, the decision maker will always discriminate in favor of those applications that fall in accordance with the new Amendment's criteria. Technically, the new Amendment does not compel an automatic denial of applications which exhibit disrespect for American values.

Further, Justice Scalia briefly noted that the difficulty in defining just what constitutes "decency" or "the diverse beliefs and values of the American people" had no affect on the constitutionality of the new Amendment. Similarly, the political bipartisan context in which the Amendment was passed was labeled irrelevant; the motivations of the legislators were inappropriately debated.

2. The Plain Meaning Approach Is Constitutional

Justice Scalia began his discussion regarding the constitutionality of the Amendment by reiterating the same priorities legislation argument set forth in the majority. Additionally, Justice Scalia asserted a special overture, arguing against a slippery slope effect the Justice believed would result had Finley prevailed; Justice Scalia felt that the government would have been forced to become "the mandatory patron of all art too indecent, too disrespectful, or even too kitsch to attract private support."
In short, the crux of Justice Scalia's defense regarding the constitutionality of the Amendment was similar to the majority's, stating that, even with the new criteria, the legislation was no more discriminatory or unconstitutional than other funding legislation passed by Congress.\textsuperscript{131} Even when conceding the notion of institutionalized discrimination against particular viewpoints within the NEA, the legislation was still constitutional because the favoritism did not quell any particular artist from making the speech.\textsuperscript{132}

Likewise, in taking on Finley's reliance on\textit{ Rosenburger}, Justice Scalia again aligned this portion of his opinion with the majority.\textsuperscript{133} The Justice took an extra step in this analysis, stating, viewpoint discrimination is "the very business of government."\textsuperscript{134}

Indeed, Justice Scalia asserted that the only difference between himself and the majority, in regard to the constitutionality of the Amendment, was that he did not believe the First Amendment is applicable at all in regard to funding certain types of speech.\textsuperscript{135} Thus, Justice Scalia made a sharp distinction between instances whereby government abridges speech and whereby the government decides to fund a certain form of expression.\textsuperscript{136} Moreover, as far as the First Amendment is concerned, it was of no consequence whether or not there was a competitive nature to the arts funding.\textsuperscript{137}

Similarly, Justice Scalia believed that the constitutional ban against vague legislation was not applicable to government grant programs.\textsuperscript{138} The worst foreseeable consequence of vague language regarding arts funding would be a "waste of money."\textsuperscript{139} Of course, Justice Scalia did not believe the language of the Amendment was at all vague.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{131} See id. (Scalia, J., concurring).
\item \textsuperscript{132} See id. at 2183-84 (Scalia, J., concurring). As with Justice O'Connor's majority opinion, Justice Scalia used\textit{ Rust} as an exemplar for this assertion. See id. at 2183.
\item \textsuperscript{133} See id. at 2184 (Scalia, J., concurring); see also supra notes 96-105 and accompanying text (discussing the artists' reliance on\textit{ Rosenburger} v. University of Virginia, 515 U.S. 819 (1995)).
\item \textsuperscript{134} See\textit{ Finley}, 118 S. Ct. at 2184 (Scalia, J., concurring).
\item \textsuperscript{135} See id. (Scalia, J., concurring).
\item \textsuperscript{136} See id. (Scalia, J., concurring).
\item \textsuperscript{137} See id. (Scalia, J., concurring) ("The Government, I think, may allocate both competitive and noncompetitive,\textit{ ad libitum}, insofar as the 1st Amendment is concerned.").
\item \textsuperscript{138} See id. at 2184 (Scalia, J., concurring).
\item \textsuperscript{139} See id. (Scalia, J., concurring).
\item \textsuperscript{140} See id. (Scalia, J., concurring);\textit{ supra} notes 117-20 and accompanying text.
\end{itemize}
C. The Dissent

Justice Souter was the lone dissenter. Justice Souter's dissent operated under the premise that the Amendment was unconstitutionally overbroad on its face, and that Congress unconstitutionally and intentionally fostered viewpoint-based decisions meant to exclude expressions such as those rendered by the artists in the present case, while favoring those expressions that reinforce mainstream American values.

Justice Souter wrote, "[T]he Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional." The majority's assertion that the new amendment merely provided for considerations did not persuade Justice Souter. Rather, Justice Souter viewed the Amendment as regulatory.

According to Justice Souter, the most troubling element underlying the majority's decision, and the factor that should control the discussion in this matter,
was Congress's poorly veiled purpose in passing the new legislation. Congress passed the new criteria to prevent the funding of projects that exhibit an offensive message, a sentiment confirmed by quotations in the Congressional Record. Justice Souter opined that with such a pervasive legislative purpose in tow, finding constitutionality within the Amendment should be difficult, if not impossible. Indeed, the First Amendment has never before allowed the government to affirmatively impose the general standards of decency promulgated in the Amendment. "The First Amendment does not "validate the ambition to disqualify many disrespectful viewpoints.""

1. Application of the New Criteria Breeds Unconstitutionality

Justice Souter's next argument in favor of finding the Amendment unconstitutional focused on an area the majority mentioned but failed to take in issue: if the NEA can satisfy the new criteria indirectly by merely populating NEA advisory panels with members of diverse backgrounds as the majority suggests, then the enactment of § 954(d)(1) failed to reflect the plain language of the Amendment. Justice Souter's first point in this line of attack was that the very words of the new amendment, in particular the words "[t]aking into consideration," dictated that allowing the new criteria to be heeded only through subconscious inclinations would be inadequate. Second, even if the diverse panels could effectively satisfy the mandate of the new criteria, the selection in favor of decency and respect, albeit through subconscious inclinations, would still be unconstitutional because the

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147. See id. at 2186 (Souter, J., dissenting) (referring to Ward v. Rock Against Racism, 491 U.S. 781, reh'g denied, 492 U.S. 937 (1989)) (calling for an examination of the government's purpose when regulating speech due to its content).
148. See id. (Souter, J., dissenting). Additionally, Justice Souter noted that because there was a bipartisan push to restructure the NEA, the reauthorization could only succeed by compromise. See id. at 2187 n.3 (Souter, J., dissenting). Saving the NEA, therefore, would require the inclusion of at least some viewpoint-based considerations. See id. (Souter, J., dissenting).
149. See id. at 2187 (Souter, J., dissenting).
150. See id. (Souter, J., dissenting); see generally Reno v. American Civil Liberties Union, 521 U.S. 844, 882, 885 (1997) (striking down a statute regulating indecency on the Internet); Cohen v. California, 403 U.S. 15, 26 (1971) (protecting the political expression of a jacket inscribed with "Fuck the Draft," which was worn in a courthouse); United States v. Eichman, 496 U.S. 310, 319 (1990) (striking down an anti-flag burning statute because it necessarily prohibited the expression of political speech).
151. Finley, 118 S. Ct. at 2187 (Souter, J., dissenting) (quoting Rosenberger, 515 U.S. at 831-32).
152. See id. at 2188 (Souter, J., dissenting).
153. The NEA Chairperson took this position and Justice O'Connor, while failing to take this subject in issue, suggested it would be an adequate implementation of the new criteria. See id.
154. See id. (Souter, J., dissenting).
155. See id. (Souter, J., dissenting).
ultimate decision would screen out artwork that does not conform with mainstream values.\textsuperscript{156} Third, if the statute is read as the Chairperson and majority suggest—that the mandate for the new criteria can be satisfied by selecting diverse advisory panels—then the new statute was simply redundant of language already a part of the original enabling statute.\textsuperscript{157} Review panels, under 20 U.S.C. § 959(c) must consist of "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view."\textsuperscript{158} Interpretations of provisions that render redundant other provisions within the same statute are strongly disfavored.\textsuperscript{159}

Justice Souter next took on the majority's reading of the Amendment that the new criteria merely added considerations to the review process.\textsuperscript{160} Justice Souter reasoned that the majority's reading was conveniently short-sighted; there was nothing naive or subconscious about the new Amendment.\textsuperscript{161} The very debate and implementation process clearly revealed that the new amendment was an express attempt to work decency and "respect for the diverse beliefs and values of the American public," as bona fide factors, into the NEA enabling statute with the intended effect of banning government funding toward certain forms of artistic expression.\textsuperscript{162} Through such veiling, Justice Souter believed the majority was trying to avoid constitutional criticism.\textsuperscript{163} However, even when conceding the notion that the new criteria were fairly construed as mere considerations, the language is still unconstitutional because the First Amendment bars the government from using content-based considerations when deciding whether or not to fund speech.\textsuperscript{164}

Justice Souter also distinguished the present case from the spending power argument as set forth in both the majority opinion and Justice Scalia's concurrence.\textsuperscript{165} The government may make content-based discriminatory decisions regarding art when it is acting as a consumer or speaking through art.\textsuperscript{166} However, Justice Souter distinguished the present case by remarking that, unlike the scenario in which the government purchases a portrait to decorate a government building, the art produced as a result of funding through the NEA does not speak for the

\begin{itemize}
\item \textsuperscript{156} See id. (Souter, J., dissenting).
\item \textsuperscript{157} See id. (Souter, J., dissenting).
\item \textsuperscript{158} See id. (Souter, J., dissenting) (quoting language from the original enabling statute, 20 U.S.C. § 959(c)).
\item \textsuperscript{159} See id. (Souter, J., dissenting) (citing Freytag v. Commissioner, 501 U.S. 868, 877 (1991)).
\item \textsuperscript{160} See supra notes 88-98 and accompanying text.
\item \textsuperscript{161} See Finley, 118 S. Ct. at 2189 (Souter, J., dissenting).
\item \textsuperscript{162} See id. at 2188-89 (Souter, J., dissenting).
\item \textsuperscript{163} See id. at 2188-90 (Souter, J., dissenting).
\item \textsuperscript{164} See id. at 2190 (Souter, J., dissenting).
\item \textsuperscript{165} See id. at 2190 (Souter, J., dissenting); supra notes 94-98, 119-20 and accompanying text.
\item \textsuperscript{166} See Finley, 118 S. Ct. at 2190 (Souter, J., dissenting); Rust v. Sullivan, 500 U.S. 173, 198-99 (1991) (holding that when the government hires private individuals to transmit specific information pertaining to its programs, it can control the speech of the persons within this scope of employ).
\end{itemize}

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government. As promulgated in the original enabling statute, the NEA art is intended for private, non-government consumption. That the government is only financially underwriting the production of art, and not purchasing the piece of artwork itself or speaking through the art, places the NEA under the full strictures of the First Amendment. Thus, with the present decision the majority effectively established a new category by which the government is immune to the restraints of the First Amendment- “government-as-regulator-of-private speech.”

2. Rosenburger Controls

Justice Souter explained that the recent case of Rosenburger v. Rector thoroughly explicated the principles required to decide the case at bar. In Rosenberger, a publicly funded University which provided funds to student administered newspapers denied funding to a religious-based newspaper. Funding of student newspapers was meant to foster a diversity of views amongst the students.

The Rosenberger Court held that the University’s decision failed the strict scrutiny standard because the decision was content-based and the First Amendment forbids decisions based upon the popularity of the views expressed.

Applying Rosenberger to the case at bar, the NEA, like the public University in Rosenburger, provides funds for private artists. The NEA’s funding scheme, like the subsidy scheme in Rosenberger, was originally created to encourage a diversity of views from private speakers.

Justice Souter argued that the reasoning of the majority failed because the new criteria promoted content-based decisions, and the First Amendment forbids

167. See Finley, 118 S. Ct. at 2190 (Souter, J., dissenting).
168. See id.
169. See id. (Souter, J., dissenting); Rosenberger v. Rector, 515 U.S. at 892-93 n.11 (1995) (Souter, J., dissenting) (“The communicative element inherent in the very act of funding itself is an endorsement of the importance of the arts collectively, not an endorsement of the individual message espoused in a given work of art.”).
170. See Finley, 118 S. Ct. at 2190 (Souter, J., dissenting) (arguing that the government has the burden of establishing a new exception to the fundamental rules of the First Amendment). Justice Souter asserted that the government failed to meet this burden. See id. at 2193 (Souter, J., dissenting).
171. See supra notes 100-04 and accompanying text.
172. See Finley, 118 S. Ct. at 2191 (Souter, J., dissenting).
173. See Finley, 118 S. Ct. at 2191 (Souter, J., dissenting) (citing Rosenberger, 515 U.S. at 833).
174. See id. (Souter, J., dissenting) (citing Rosenberger, 515 U.S. at 833).
175. See id. (Souter, J., dissenting) (citing Rosenberger, 515 U.S. at 833).
176. See id. (Souter, J., dissenting).
177. See id. (Souter, J., dissenting).
decisions based upon the popularity of the views expressed. Even more, by pointing to the competitive nature of securing grants through the NEA, Justice Souter reasoned that Justice O'Connor erred by distinguishing Rosenburger in the majority opinion.

Justice Souter, however, refuted the majority's attempt at characterization, summarily stating that economic scarcity cannot be the basis for the justification of viewpoint discrimination. While Justice Souter recognized that the scarcity of money will necessarily involve weighing the merits of different applications, he asserted that more neutral principles such as "artistic excellence," already a part of the original enabling legislation, should control the evaluation.

3. The Finley Facial Attack Is Appropriate

Although facial challenges are generally disfavored by the courts, Justice Souter believed that the flagrant overbreadth involved in the new Amendment to the NEA charter made the new criteria amenable to just such an attack. First, Justice Souter reasoned that the NEA does not offer a list of reasons following their refusal of an application. Thus, the artist does not know whether the decency and respect criteria played a part in the NEA denial. As such, waiting for an as-applied challenge was both questionable and counterproductive. An as-applied attack would constitute essentially the same suit as that raised in the

178. See id. (Souter, J., dissenting).
179. See id. at 2192 (Souter, J., dissenting).
180. See id. (Souter, J., dissenting).
181. See id. (Souter, J., dissenting). But see Volokh, supra note 118, at A18 (arguing that basing the decision on artistic excellence is every bit as viewpoint-based as the judgement of decency or respectfulness).
182. See Finley, 118 S. Ct. at 2193 (Souter, J., dissenting) (citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990)). In order for a facial attack to succeed, there must not be any constitutional application or circumstance in which the statute would be valid. See id. at 2191 (Souter, J., dissenting) (citing United States v. Salerno, 481 U.S. 739, 745 (1987); see also Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973) (holding that in order for a statute to be considered overbroad, the amount of constitutionally protected speech that is prohibited must be substantial).
183. See Finley, 118 S. Ct. at 2193 (Souter, J., dissenting); see also Julie Ann Alagna, 1991 Legislation, Reports and Debates over Federally Funded Art: Arts Community Left with an "Indecent" Compromise, 48 WASH. & LEE L. REV. 1545, 1552-53 (1991) (analogizing constitutional principles such as vagueness, overbreadth, and prior restraint in light of the NEA controversy).
184. See Finley, 118 S. Ct. at 2193 (Souter, J., dissenting).
185. See id. (Souter, J., dissenting). Indeed, Justice Souter only sees two limited situations in which an as-applied challenge could possibly arise under the current machinations of the new legislation. One such situation would be a scenario whereby the artist produced a work that he or she knew raised a risk of offense but was not meant to be exhibited "in a forum in which decency and respect might serve as permissible selection criteria." Id. (Souter, J., dissenting). The second situation delineated by Justice Souter was a situation in which the artist, who sought funding from the NEA, sanitized his artwork in the hope of gaining the government funds. See id. (Souter, J., dissenting).
186. See id. (Souter, J., dissenting).
present case. Second, despite the admittedly tough burden that facial challenges generally face, the overbreadth doctrine operates as an exception to this rule. The overbreadth doctrine, applicable to all First Amendment cases, renders a statute wholly invalid whenever the statute restricts constitutionally protected, as well as unprotected, expression. Yet, the overbreadth must be "substantial" in that the overbreadth reaches a substantial number of erroneous situations.

Justice Souter argued that the overbreadth doctrine applied to the case at bar because the statute reached a substantial amount of protected speech. Even the majority opinion itself failed to report a substantial amount of permissible applications; indicating or proving that the permissible applications of the statute would greatly outweigh the impermissible uses.

4. The Chilling Effect

Justice Souter finished the dissent with the most popular argument echoed by the bulk of the country's artistic community: that the mere threat of a denial of government funding necessarily carries with it the potential to "chill" artistic expression. In other words, those seeking NEA grants compromise or self censor

187. See id. (Souter, J., dissenting).
188. See supra note 183.
189. See Finley, 118 S. Ct. at 2194 (Souter, J., dissenting).
190. See id. (Souter, J., dissenting); see, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (ruling that the term "lust" did not prohibit an inordinate amount of constitutionally protected speech); Reno v. ACLU, 521 U.S. 844, 868 (1997) (invalidating the decency provision of the Communications Decency Act as facially overbroad).
191. See Finley, 118 S. Ct. at 2194 (Souter, J., dissenting); see also Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (holding that in order for a statute to be considered overbroad, the amount of constitutionally protected speech that is prohibited must be substantial).
192. See Finley, 118 S. Ct. at 2194 (Souter, J., dissenting).
193. See id. at 2194-95 (Souter, J., dissenting). The majority speculated that the new amendment's decency criteria could be permissibly applied to situations in which art was going to be displayed in schools or children's museums. Likewise, permissible application of the respect criteria would follow when the creation of art seeks to honor a minority, tribal, rural, or inner-city culture. However, nothing in the NEA's governing statute indicates that the majority of NEA funds will go toward the aforementioned endeavors so as to make the permissible applications greatly outweigh the impermissible applications, says Justice Souter. See id. (Souter, J., dissenting). Additionally, the majority seems to neglect section 954(a) of the NEA charter, which affords a special mission in regard to funding for arts education. Thus, funding of the arts for elementary and secondary schools is carried out through section 954(a), not the new Amendment. As such, Justice Souter reasoned that the first example given by Justice O'Connor in the majority was misplaced. See id. at 2194 n.14 (Souter, J., dissenting).
194. See id. at 2195 (Souter, J., dissenting).
their work in the attempt to secure desperately needed federal funding. Others will not even attempt to gain NEA grants.

At any rate, reasoned Justice Souter, the result of the new criteria is a more timid and mainstream class of NEA grant recipients. Even more, given the practical reality that receiving the NEA’s stamp of approval (that is, receiving a grant) is tantamount to gaining concurrent support from the private sector, the effect of the new Amendment is even more magnified than the majority recognized.

III. IMPACT OF THE COURT’S DECISION

A. Judicial Impact

The foundational issue as to whether arts funding is a constitutional area amenable to government involvement is a question left largely untouched by all nine justices of the Supreme Court. The admittedly necessary discriminatory process of selecting which arts projects to fund may, absent the exceptions to the First Amendment established by prior case law, render an institution such as the NEA unconstitutional per se. In contexts outside the area of arts funding, the Supreme Court has consistently ruled against government programs which operate in just the same manner as the NEA—programs which require content-based decisions when allocating government funds. The NEA was originally granted a reprieve from the general ban against content-influenced decision-making because the program was designed to promote the private expression of a broad range of speech.

Because all three opinions in Finley operated under the premise that government arts funding as an institution was constitutional, the remainder of this case note will proceed under the same assumption. As such, accepting the constitutionality of the NEA as an entity, the focus inexorably turns toward the new criteria and whether the NEA may use decency and respect when weighing the...

195. See id. (Souter, J., dissenting); see also Hartigan, supra note 62, at A1 (exploring the reaction to the Court’s decision).
196. See Finley, 118 S. Ct. at 2195 (Souter, J., dissenting).
197. See id. (Souter, J., dissenting).
198. See id. (Souter, J., dissenting); infra notes 271-72 and accompanying text.
200. See Sabrin, supra note 8, at 1211-13; see also Lee C. Bollinger, Public Institutions of Culture and the First Amendment: The New Frontier, 63 U. CIN. L. REV. 1103, 1112-14 (1995) (attacking the Court’s handling of First Amendment jurisprudence); see also George Vetter and Christopher C. Roche, The First Amendment and the Artist-Part I, 44 R.I. B.J., Mar. 1996, at 7 (explicating foundational First Amendment principles and cases, and applying them to the NEA controversy).
201. See Sabrin, supra note 8, at 1212.
202. See id.
203. See generally Finley, 118 S. Ct. 2168.
The limitations of the First and Fifth Amendments were in issue throughout the present case. The NEA argued, and the Supreme Court agreed, that the Constitution does not bar Congress from employing, as guideposts, aesthetic criteria such as decency and respect because the new criteria address basically the mode or form, rather than the content, of the artists' speech. Even more, Justice O'Connor determined that Congress, through the NEA, was engaged within priorities legislation, an area controlled by a rational basis analytical approach. Overall, because the fundamental right to engage in the speech was not abridged, only the use of government funds to facilitate that speech was denied, and Congress has power to promote certain forms of speech over others, the Court employed an overall rational basis analysis in holding that the new considerations were reasonable as applied by the NEA.

It appears likely that the argument calling for strict scrutiny presented by Justice Souter would have prevailed but for the priorities legislation rationale, recognized by prior case law and explicated by both Justices O'Connor and Scalia in Finley. This is because an exception from the confines of the First Amendment would not have been recognized for the unique context under which the NEA now operates with its new criteria.

Putting the priorities legislation argument and the present scenario aside, the majority recognized that the First Amendment applied to arts funding. Because the present case represented a facial attack or broad challenge to the new amendment, the majority acknowledged that the targeting of specific views might be unconstitutional. Therefore, an as applied decision based on the new criteria

204. See Sabrin, supra note 8, at 1212; Finley, 118 S. Ct. 2168, 2168 (1998).
206. See id.
207. See Finley, 118 S. Ct. at 2179; supra notes 94-98 and accompanying text; see also Harris v. McRae, 448 U.S. 297, 324-25 (1980) (ruling that it is permissible for Congress to deny funding toward medically necessary abortions while permitting funding for childbirth costs); Maher v. Roe, 432 U.S. 464, 478-79 (1977) (ruling that the states are not compelled to pay for nontherapeutic abortions under state programs which fund childbirth costs for the medically indigent).
208. See Finley, 118 S. Ct. at 2177-79; supra notes 94-98 and accompanying text; see also Biskupic, supra note 28, at A1 (describing the Supreme Court's decision).
209. See Finley, 118 S. Ct. at 2185-95 (Souter, J., dissenting); see supra notes 139-96 and accompanying text (summarizing Justice Souter's dissent).
210. See Finley, 118 S. Ct. at 2179; see also Biskupic, supra note 28, at A18 (describing the Supreme Court's decision).
211. See Finley, 118 S. Ct. at 2178; see also Biskupic, supra note 28, at A18 (describing the Supreme Court's decision).
could be considered unconstitutional.\textsuperscript{212} Indeed, an invidious or targeted individual content-based decision would trigger strict scrutiny, which the government would likely be unable to justify.\textsuperscript{213} Of course, getting inside the head or to the heart of the motivations of the Chairperson, Council, or Advisory panel members would be a difficult mountain for an as-applied plaintiff to climb, especially because the NEA can now cite to the new considerations as justification for any effect their decisions now produce.\textsuperscript{214}

B. Legislative Impact

Although the majority applied long-standing principles in deciding \textit{Finley}, the outcome is nonetheless unsettling to some because “the congressional spending power is not well-understood” by most and the ruling raises controversial questions regarding the spending power’s application to free speech.\textsuperscript{215}

As indicated in the majority and concurring opinions, as well as here in the Judicial Impact section, the unique power afforded by Congress’ spending power allows Congress to support and encourage certain projects while not concurrently supporting projects it deems obstinate.\textsuperscript{216} Congressional spending power allows the government to place conditions on the activities and speech the government funds.\textsuperscript{217}

However, general restrictions upon the use of Congressional spending power exist.\textsuperscript{218} Congress must grant the funds in pursuance of the public’s general welfare, the recipients must be fully aware of the federal conditions upon which the funds were granted, and the conditions must relate to a government interest in national projects or programs.\textsuperscript{219}

The funds allotted for the refurbished NEA in the present case appear to satisfy these general restrictions.\textsuperscript{220} The NEA still serves the general welfare by funding creative talent, Congress established qualifications in a set of guidelines

\textsuperscript{212} See id.
\textsuperscript{213} See id.; see also supra notes 80, 104. See generally Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (holding that the decision which forbade the KKK use of an open forum was content-based and unconstitutional).
\textsuperscript{214} See generally Finley, 118 S. Ct. at 2185-95 (Souter, J., dissenting) (discussing the view that the Court’s decision is inconsistent with previous First Amendment cases dealing with viewpoint discrimination).
\textsuperscript{216} See id.; see also supra notes 95-99, 120-21, 208-09 and accompanying text.
\textsuperscript{217} See James, supra note 215, at B15.
\textsuperscript{219} See id.
\textsuperscript{220} See id.
which explains their funding determinations, and the conditions on the grants relate to the national program of promoting the arts.

Priorities legislation as applied through the NEA will most likely continue to be considered constitutional so long as a pattern of discrimination is not established and an entire subject matter is not altogether banned from receiving government support. Individual as-applied claims, a door left open by the majority, does not present a case much different than that brought by the artists in Finley, and the as-applied plaintiff faces a virtually insurmountable task of proving the underlying intentions of those who denied the application.

Of course, in the event an as-applied plaintiff is able to prevail, the government may then simply opt not to continue the NEA in any form whatsoever because arts funding is not, by law, required of the government. Thus, a successful suit by the as-applied plaintiff may result in the demise of the program for everyone.

Additionally, the Finley decision effectively bolstered a vital underlying principle regarding priorities legislation in general. Unlike a criminal statute or regulation, when the government is acting as a patron, the legislation is permitted to be vague because the consequences of such vagueness are not severe. Indeed, when the government is acting as a consumer, content-based weighing of applications for government funds is an inevitable consequence, the by-product of a necessary line drawing exercise.

221. The verbatim language and the NEA Chairperson response, establishing diverse advisory panels in an effort of working in the new criteria, arguably places this second requirement in dispute. Taking into consideration, however, the overt intentions of Congress when promulgating the new Amendment, allows applicants to adequately ascertain what the government expects from the project. See Finley, 118 S. Ct. at 2179.

222. See Kim, supra note 218, at 646; see also Sabrin, supra note 8, at 1227-28 (explaining priorities legislation and advocating the viewpoint that public financing of the arts is constitutional because it furthers, not abridges, First Amendment values).

223. See Sabrin, supra note 8, at 1227-28.

224. See Finley, 118 S. Ct. at 2193 (Souter, J., dissenting).

225. See James, supra note 215, at B15-16; see also supra note 213 and accompanying text.

226. See James, supra note 215, at B16.

227. See id.

228. See Finley, 118 S. Ct. at 2168.

229. See Finley, 118 S. Ct. at 2179; see Biskupic, supra note 28, at A1 (reporting that Justices O'Connor, Scalia, and Souter did not have any problem with any possible vagueness within the statute); see also Kim, supra note 218, at 650-61 (supporting the ideal that vagueness is permitted when the government is acting as a consumer). But see Sabrin, supra note 8, at 1231-33 (accepting priorities legislation so long as a pattern of discrimination is not established, but not accepting vagueness). Sabrin proposes that decision makers should "speak in terms of subject matter, mode of expression, and viewpoint, rather than 'content.'" Sabrin, supra note 8, at 1233. Sabrin further suggests that the courts should defer to the funding agency's finding regarding artistic merit. See id.

230. See Finley, 118 S. Ct. at 2179.
C. What Should Be the Limit on the Government’s Discretion Regarding the Kind of Speech It Can Subsidize?

Despite the ruling in Finley, it is important to note that the government does not have absolute discretion in choosing what kind of speech it can fund.\(^{231}\) For example, the government cannot deny second-class mailing subsidies for newspapers and magazines it finds indecent.\(^{232}\) Likewise, the government cannot deny tuition subsidies for students who express disfavored views.\(^{233}\) Furthermore, the government cannot deny the use of public streets, parks, or sidewalks for those who wish to express views that fall outside of the mainstream ideology of most Americans.\(^{234}\) In fact, the government must do everything within its power to protect these speakers.\(^{235}\)

The examples above constitute only a small number of the several ways in which the government is restricted when subsidizing speech.\(^{236}\) The question that remains is, “what should be the limit on the government’s discretion in what kind of speech gets subsidized?”\(^{237}\) When does the government cross the line, transforming the tool of priorities legislation into an instrument for advancing impermissible censorship?\(^{238}\) Justice O’Connor left this question unanswered in Finley.\(^{239}\)

D. Social Impact

1. Those Against the Decision

The most prevalent sentiment espoused by Finley supporters, in the wake of the Court’s decision, is that the ruling would promote a chilling effect upon cultural expression throughout the artistic community.\(^{240}\) Matching the sentiments expressed by Justice Souter in his dissent, most of those in the artistic community did not accept Justice O’Connor’s notion that the new criteria merely added

\(^{231}\) See Eugene Volokh, supra note 118, at A18 (editorializing the opinion).
\(^{232}\) See id.
\(^{233}\) See id.; see also Rosenberger, 515 U.S. at 819 (holding that a public university unconstitutionally denied a student organization funding based upon the content and viewpoint expressed in their newspaper).
\(^{234}\) See Volokh, supra note 118, at A18. Note that by way of exception to the First Amendment, the government is not restricted when it seeks to fund programs that speak for the government. See Finley, 118 S. Ct. at 2190-91.
\(^{235}\) See Volokh, supra note 118, at A18.
\(^{236}\) See id.
\(^{237}\) See id.
\(^{238}\) See id.
\(^{239}\) See id.; see also Finley, 118 S. Ct. at 2168.
\(^{240}\) See Biskupic, supra note 28, at A1.
advisory language to the grant making process.\textsuperscript{241} “It is a dark day. It [the decision] is a complete refutation of the founding principles of the NEA, which were to support excellence and to insulate the process from the winds of politics,” said David Ross, executive director of San Francisco’s Museum of Modern Art.\textsuperscript{242}

Karen Finley, while concurring with the chilling effect, commented:

I don’t agree that the law is ‘meaningless.’ Who’s going to be deciding who’s decent and what’s decent? Is a banana going into a mouth decent? Is chocolate on a body decent? Will having a career in the arts now mean that you have to come from money or create propaganda to support the state, or be a white straight man?\textsuperscript{243}

Finley supporters argue that the practical consequence of the new amendment will be a coercive effect whereby artists will alter their projects to conform to the new criteria, all in the effort of gaining NEA funding.\textsuperscript{244} Such conformity is antithetical to the First Amendment, which encourages the free flow of ideas\textsuperscript{245} and the original NEA charter, which sought to keep government away from the program altogether outside of its funding.\textsuperscript{246} Furthermore, artists who resist conformity will not only risk not receiving an NEA grant, but will also risk not gaining support from private donors, who rely on the NEA’s “stamp of approval” when deciding whether to provide their private support for a particular project.\textsuperscript{247}

Indeed, even while the artists in Finley were finding support in the lower federal courts and enforcement of § 954(d)(1) was suspended, a chilling effect and trend of self-censorship was already beginning to swell within the artistic community.\textsuperscript{248} Ross noted that even before Finley was decided, “the NEA was increasingly becoming irrelevant to many non-profit arts organizations; the NEA has since limited grants to four broad categories and no longer provides general operating support for nonprofits.”\textsuperscript{249} Robert Brustein, artistic director of the American Repertory Theatre, added that his theater received approximately $800,000 a year from the NEA before the controversy began, but only $62,500 in

\textsuperscript{241} See Hartigan, supra note 62, at A1.
\textsuperscript{242} See id.
\textsuperscript{243} See Pacheco, supra note 29, at F1.
\textsuperscript{244} See James, supra note 215, at B15.
\textsuperscript{246} See Linton, supra note 2, at 199.
\textsuperscript{247} See Finley, 118 S. Ct. at 2195 (Souter, J., dissenting); see also supra note 199 and accompanying text.
\textsuperscript{248} See Hartigan, supra note 62, at A1.
\textsuperscript{249} Id.
1998. Even more, reported Brustein, the chilling effect can already be felt, evidenced by the safe and conservative choices that theaters are making in the effort of securing not only the receipt of their NEA grants altogether, but also the amount of their grants from year to year.

2. Those In Favor Of The Decision

Naturally, most of those in favor of the decision aligned their comments around the decisions of Justice O'Connor, Justice Scalia and the comments of those in Congress directly responsible for the new Amendment. Additionally, others took the opportunity to applaud the decision as one directly opposed to poor artistic expression.

An anonymous Wall Street Journal article labeled Finley a "second-tier artist" who used her art as a political vehicle for leftists who dubbed themselves marginalized in the American landscape. The article asserts that throughout the entire history of the NEA, the organization has yet to fund a single piece of genuinely significant art. The article endeavors irony stating, "[s]ince when did people purporting to be working on the cutting-edge start expecting government funding for their work?"

With certainty, the Wall Street Journal writer was not alone in his assessments as a number of editorial writers across the country took the occasion of the new Amendment's approval to applaud Congress' lack of tolerance for allowing public funds to be squandered "on talentless artists."

Others believed that the arts community only had itself to blame for the outcome. The arts community focused themselves inward, with far too many individuals believing that their art must only impress the art world and not the public at large. As such, the action taken by the Court in the attempt to establish a middle ground was appropriate. Government supported art, which relies upon public funds, ought to be accessible and enjoyable by all segments of the population, not just the high cultured few.

250. See id.
251. See id.
253. See id.
254. See id.
255. See id.
257. See Weinstock, supra note 245, at 823.
258. See id.
259. See id.
260. See id.
IV. CONCLUSION

A. Thesis

In light of the majority’s successful constitutional meanderings and the effective and permanent alteration of the original NEA enabling statute, the best solution in the interests of judicial economy and the arts market as a whole is to completely disband the NEA.261

The absence of funding is better for the arts community because the new criteria allow for unattached state actors to interject biases which are, in the eyes of the arts market and the public at large, politically and constitutionally suspect.262 Furthermore, the new biases threaten to fix art within a certain period, sanitizing the views of artists in the eyes of the public at large, a public which may not realize that the art they are examining was altered in the effort of gaining federal funding through the NEA.263 More fundamentally, the artistic community is one which has historically defied categorization; for example, during the modern period there was a general consensus which believed that good art was incapable of categorization.264

B. The Decency Clause Defies the Original NEA Charter

The new criteria leans toward and promotes the creation of safe conformist art in direct contrast to the spirit of the First Amendment and the black letter of the original charter of the NEA.265 The original charter explicitly stated that the more neutral considerations of “artistic excellence and merit” were the sole criteria, a balancing exercise determined by actors not accountable to governmental interference or influences of bias interjected by Congress.266


262. See Cherian, supra note 261, at 146-47.

263. See id. at 147; see also Byron V. Olsen, Rust in the Laboratory: When Science is Censored, 58 Alb. L. Rev. 299, 303-14 (1994) (explicating the effects of government financial support as it relates to conduct and selection of scientific exploration and pronouncement of results).

264. See Cherian, supra note 261, at 134-35. Note that today’s post-modern art does indeed express a point of view, a quality elusive of most modern artwork. See Cherian, supra note 261, at 134-35.

265. See Herbert, supra note 31, at 426-27; see also Fitzpatrick, supra note 143, at 185-86 (quoting U.S. v. Eichman, 496 U.S. 310, 319 (1990)).

266. See Herbert, supra note 31, at 427.
The new NEA is a different sort of animal altogether, recognizing artistic excellence and merit only so long as a state actor, accountable to a Congressional mandate referring to an abstract nod toward “American values,” determines the creation decent and respectful.\textsuperscript{267} Even the majority admits that the amendment is vague, but the importance of this observation is waived in light of the priorities legislation argument.\textsuperscript{268}

C. Unsolicited Politicalization

Even more, the decency clause addition turns the NEA and its federally-funded art into political lightning rods because it is the very nature of art to express a poignant point of view not shared by all.\textsuperscript{269} Positively, much of what makes art worthwhile is that it provokes individualized emotions connected to controversial political or social alignments, or perhaps even sexual orientation. An individual piece of art does not intend to lend itself to analysis by a particular person. Rather, a piece of art is most likely to affect an unsuspecting individual; an individual not looking to measure a piece of art by its governmentally imposed standards of decency.

In light of the aforementioned, art of the nature traditionally funded by the NEA constitutes inappropriate fodder upon which to base a politically charged cultural war.\textsuperscript{270} In a world where it is a common occurrence for art critics to applaud a particular piece of art while, simultaneously, certain politicians ridicule it as obscene, this strange new marriage between Congress and the NEA is untenable.\textsuperscript{271} In fact, post-modern artists purposely attack notions of decency and firmly rooted political positions.\textsuperscript{272} Such is the core of their art.\textsuperscript{273}

D. NEA Connection To The Private Sector

In light of the fact that securing private funding has traditionally been dependant upon whether the artist at issue has been able to secure an NEA grant,\textsuperscript{274} the decency clause bias works an additional hardship upon those artists who do not conform their art to fit the new criteria.\textsuperscript{275} Even more, this practical effect works

\textsuperscript{267} See id. at 418, 426-27
\textsuperscript{268} See Finley, 118 S. Ct. at 2179-80.
\textsuperscript{269} See generally Weinstock, supra note 245, at 817-20 (describing the controversy surrounding the NEA and how it played out in the Republican primary of 1992).
\textsuperscript{270} See Cherian, supra note 261, at 134 (explaining that the NEA was founded with the idea that good art was politically neutral).
\textsuperscript{271} See id. at 147.
\textsuperscript{272} See Courtney Randolph Nea, Content Restrictions and the National Endowment for the Arts Funding: An Analysis from the Artist’s Perspective, 2 WM. & MARY BILL RTS. J. 165, 177, 184 (1993) (addressing the funding controversy from the artist’s perspective).
\textsuperscript{273} See id.
\textsuperscript{274} See Finley, 118 S. Ct. at 2195 (Souter, J., dissenting).
\textsuperscript{275} See id.
a further distortion upon the arts market by not only dissuading the artists from producing works consistent with their original vision, but also by indirectly dissuading private contributors from funding works that fall outside of mainstream American values. This specific bias could be eliminated if the government were to stop funding the arts through the NEA altogether and restrict their funding to art that directly speaks for the government as an entity.

E. Economically Inefficient

Even more, given the political nature of arts funding under the new criteria, the questions left open by the Finley majority and the door left open regarding applied challenges, it is economically inefficient to continue to fund art through the NEA because of the high cost of litigation that the controversy has and will continue to spur.

If the public really wanted their money to go toward certain art projects, they would make their own private contributions. The entire Mapplethorpe/Serrano/Finley controversy indicates that people actually care where their art monies are spent. The government already provides a tax deduction for contributions made to museums, an increasingly more effective alternative in funding art which the people, not select personally biased politicians, want to see.

The present state of the arts market boils down to a picking of the better of two evils: given the failure of the government to refrain from interjecting its own biases in violation of the NEA charter, reliance upon wealthy contributors suddenly has become the preferred alternative for funding art and influencing the kinds of art that are most likely to be seen.

276. See Cherian, supra note 261, at 144-46; see also Mary Ellen Kresse, Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?, 39 BUFF. L. REV. 231, 271-73 (1991) (discussing the reality of arts funding through the NEA and the resulting effects).

277. See Cherian, supra note 261, at 144-46. The NEA previously attempted to remedy this situation by awarding money toward arts organizations instead of directly toward the artists themselves. See id. at 145. This resulted in a more circuitous way of effecting the same result, inciting a further waste of public money. See id. Instead of the artist himself getting the all important stamp of approval, arts organizations had to begin scrambling for the approval. See id. With the new criteria, the flow of money would go toward safe organizations. See id.

278. See supra notes 231-38 and accompanying text.


280. See Cherian, supra note 261, at 146.

281. See id. at 147 (asserting that "if citizens wanted to give money to museums, they could do so themselves.").

282. See id. at 146.

283. See id.
Without the NEA, individual artists would be more inclined to personally solicit and advertise for contributions, a movement that has already begun to grow among non-profit art organizations as grants from the NEA have dwindled.\textsuperscript{284} Without the NEA, perhaps the common man would be more sympathetic and apt to make contributions to the arts.

Given the failures of the government and the absence of a workable reformation of the NEA, dissolution of the NEA is the best alternative.

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\textsuperscript{284} See Hartigan, \textit{supra} note 62, at A1.