NOTE

THE POLITICS OF ART AND THE IRONY OF POLITICS: HOW THE SUPREME COURT, CONGRESS, THE NEA, AND KAREN FINLEY MISUNDERSTAND ART AND LAW IN *NATIONAL ENDOWMENT FOR THE ARTS V. FINLEY*[*]

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"[A]ll Art is immoral . . . ."[1]

"Art is the only thing that can go on mattering once it has stopped hurting."[2]

I. INTRODUCTION

Political and artistic expressions are both ancient and symbolic endeavors.[3] In fact, it is not entirely clear, at a fundamental level, that there is any distinction between the terms "politics" and "art."[4] In a more general sense, politics is normative

1. OSCAR WILDE, INTENTIONS 195 (Thomas B. Mosher 1904).

2. FREDERICK HARTT, ART: A HISTORY OF PAINTING SCULPTURE ARCHITECTURE 11 (2d ed. 1985) (quoting Elizabeth Bowen).

3. *See* THE COLUMBIA HISTORY OF THE WORLD 58-59 (John A. Garraty & Peter Gay eds., 1972) (recounting the political history of Sumer, where monarchs ruled cities and acted for the common weal as representatives of the gods); *see also* HARTT, *supra* note 2, at 34-41 (noting that cave paintings in France are believed to be the oldest examples of representational artistic expression, dating from about 15,000 years B.C.).

4. At the outset, the terms, as used in this Note, should be defined. Politics is meant to refer to both the power relations in a society, and in a more mainstream sense, the expressive attempt of society to govern itself. Webster's defines politics as "the art or science of government: a science dealing with the regulation and control of men living in society." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1755 (1993) [hereinafter WEBSTER'S DICTIONARY].

If ever there was a word that defied exegesis it is "art." Webster's defines art alternatively as an "application of skill and taste to production according to aesthetic principles: the conscious use of skill, taste, and creative imagination in the practical definition or production of beauty." *Id*. at 122. The association of artistic expression with beauty is obvious, and to an extent helpful in understanding art. Much that is considered art, however, is not considered beautiful or skillful by society; this is a pervasive theme in the history of art, as well as a definitional aspect of art. Consider, for example, the less than stellar initial reception of the Impressionists or Gothic architecture, two styles of art that today are established as

and stabilizing—an attempt to place order above chaos.[5] Art, however, is at least as often reflective or reactive—a mirror to society, as opposed to society itself. What political expression normally tries to stabilize, artistic expression tries to destruct.[6] Moreover, whereas art often speaks in extreme and eidetic images,[7] the symbolism of politics, i.e., language, is more likely to be measured, safe, and conventional.[8] But these mainstream identities of art and politics reverse themselves at the extremes. Political speech can be powerful, inspiring, even revolutionary.[9] Artistic expression can be dull, witless, and soporific.[10] It is said

exemplars of beauty. *See* HARTT, *supra* note 2, at 446. The appellation "Gothic" was given to the style as a reaction of disgust by the Italian Renaissance establishment who saw the work as the barbarism of nomadic tribes like the Goths. *See id.* The initial reaction to Impressionism was that it was "so disconcerting that cartoonists predicted it would cause pregnant woman to miscarry." *Id.*

5. *See* ROBERT HUGHES, SHOCK OF THE NEW 113 (1980). Perhaps challenging or incendiary art becomes beautiful, as Elizabeth Bowden suggests, after it stops hurting; that is, after the revolution it becomes the norm.

6. One need merely compare the preamble of the United States Constitution—our society's most closely held values expressed as a framework for perpetual self-governance, U.S. CONST. preamble ("in order to form a more perfect Union, establish justice, insure domestic tranquility . . . and secure the Blessings of Liberty to ourselves and our Posterity")—with the painting *L.H.O.O.Q.* by Marcel Duchamp—a cheap reproduction of the *Mona Lisa* with a beard and mustache added by the artist, *see* DAWN ADES ET AL., MARCEL DUCHAMP 131-32 (1999).

7. Aristotle saw the purpose of art as catharsis; the viewer identifies with a character in a play, and through this sympathetic understanding, stabilizes his own perceptions of the world. *See* S.H. BUTCHER, ARISTOTLE'S THEORY OF POETRY AND FINE ART 236-68 (2d ed. 1898) (noting that "through pity and fear [tragedy] effect[s] the . . . *katharsis*, or purgation, of these emotions"). This catharsis will hardly be achieved with expressions so banal that no one will identify with them.

8. One need look no further than the tax code for speech so mundane that reading it will no doubt produce, even for an accountant or tax attorney, a desire for catharsis, but little hope for its fruition. *See, e.g.*, 26 U.S.C. § 1258(d)(3)(A)(i) (1994) (stating "for purposes of applying this subtitle to such position for periods after such position becomes part of such transaction, such position shall be taken into account . . .").

9. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."); KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 60 (Frederick Engels ed., Charles H. Kerr & Co. 1946) ("Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win. Working men of all countries, unite!").

10. This ironic flux of identities is emblematic of the philosophy of pragmatism, which recognizes that "the world hinges on multiple points of view," making experience the grounds (stasis) in a critique of a fluid universe, which includes the observer in the world of constantly shifting things. *See* Timothy Parrish, Imagining Emerson's *Mestizo* American 8-9 (1989) (unpublished Ph.D. dissertation, University of Washington (Seattle)) (on file with the *Houston Law Review*); *see also* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980) 161 (1982) (arguing that the pragmatism of John Dewey and William James exhorts the reader to reject

that everything is political;[11] some critics, moreover, hold that anything is art.[12] If there is a difference then, this is it: all art is political, but not all political expression is artistic.

An example of this premise is found in the events surrounding the National Endowment for the Arts (NEA) over the last decade, culminating in the Supreme Court's decision in *National Endowment for the Arts v. Finley*.[13] Congress, in an attempt both to save the NEA from its detractors and to placate them, inserted language in the enabling statute of the NEA that included decency and respect among the criteria used to judge grant applications.[14] And although this may have been an "artful" compromise that saved the NEA, it also gutted the ability of the agency to fund (worthy) artistic expression because decency and respect are often antithetical to art. The decency and respect clause is not art, but pure politics. That is the difference.

Constitutional precedent holds that when the government, through its spending power, acts as speaker or buyer, it is permitted to attach conditions on the award of government money that (to an extent) prohibit the speech of the recipient.[15] This Note will argue that arts funding falls outside of this precedent and, therefore, the decency and respect clause unconstitutionally permits viewpoint discrimination.[16]

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the certainty of Descartes and the "grounding" of philosophy and art within the context of history, i.e., experience). Ultimately, perhaps art and politics are twin-halves of the same desire to make sense out of the present by reflection on the past and speculation about the future.

11. *See* Nancy A. Weston, *The Fate, Violence, and Rhetoric of Contemporary Legal Thought: Reflections on The Amherst Series, the Loss of Truth, and Law*, 22 L. & SOC. INQUIRY 733, 778-79 (1997) (book review) (noting that several essayists in the book *Identities, Politics, and Rights*, argue collectively that, "[t]he 'constitutive' account of self . . . is at one with the view that everything arises from, consists in the effects of, and so must be available to, human manipulation, undertaken in satisfaction of preferences and claims—in short, that everything is political"); *see also* Neal Devins, *The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth*, 85 GEO. L.J. 691, 702 (1997) (reviewing LOUIS MICHAEL SIEDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF (1996)) (critiquing the argument in the book *Remnants of Belief* that everything is political, making constitutional discourse and interpretation a nullity).

12. *See* Martha Bayles, *The Shock-Art Fallacy*, ATLANTIC MONTHLY, Feb. 1994, at 20 (noting that most Americans accept the right of artists to do anything and call it art).

13. 524 U.S. 569 (1998).

14. *See* 20 U.S.C. § 954(d)(1) (1994).

15. *See* Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (finding that the government, when funding family planning clinics, could predicate the award of federal money on the condition that the beneficiary did not counsel patients concerning abortion). Refer to notes 72-80 *infra* and accompanying text for an extended discussion of the *Rust* decision.

16. *See* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of*

Three analytical strands weave through this issue. The first strand consists of a series of fundamental constitutional questions at play in *Finley*: (1) can the government restrict the content of an artist's speech; (2) is a government denial of funding to an artist, based upon the content of her artwork or speech, an impermissible abridgement of speech given that the artist is only being denied government money, and can still express herself any way she chooses; and (3) does the decency and respect clause of 20 U.S.C. § 954(d)(1) on its face violate the First Amendment prohibition of government abridgement of speech? The first two questions are addressed in Part III.A; the third question forms the case analysis in Part III.B.

A corollary to the third question is if a condition of "decency and respect" is an impermissible government restriction on artistic speech, how can a government restriction of funding based upon artistic merit be constitutionally valid? Should the government not strive, in this context, to be neutral? If so, is there a principled distinction to be made between standards of "decency and respect" and standards of "excellence?" To explore this inquiry, this Note will discuss the *necessity* of government funding of the arts. This Note will argue that government support of the arts is a vital part of a rational and liberal society, and that anything less than unfettered patronage by the government will stifle artistic expression, resulting not only in unconstitutional limitations on free speech, but also in concomitantly banal art, which further disenfranchises the already marginalized members of the community.

The third analytical strand, discussed in Part III.D, considers the potential impact of the decision in *Finley* both for the NEA and other fields in which the government supports through funding, rather than through speaking or buying. This Note concludes that the decision in *Finley*, coupled with another recent Supreme Court decision,[17] has the potential to chill speech in a number of areas.

Neutrality in Government-Funded Speech, 67 N.Y.U. L. REV. 675, 680 (1992) (contending that the First Amendment's neutrality mandate should influence constitutional reviews of government funding of speech because such funding raises concerns of citizen indoctrination and government skewing of the marketplace of ideas).

17. *See Rust*, 500 U.S. at 173. Refer to notes 154-61 *infra* and accompanying text (highlighting the majority's reliance on *Rust* in deciding *Finley*) and notes 72-80 *infra* and accompanying text for a complete analysis of *Rust*.

II. RECITATION OF THE CASE

In 1987, the NEA granted money to a North Carolina contemporary arts group promoting an exhibit of photographs.[18] One of them, by Andres Serrano, depicted a crucifix immersed in a jar of urine entitled "Piss Christ."[19] A political watchdog group from Mississippi, the American Family Association, protested the exhibition and lobbied Congress.[20] Their efforts resulted in twenty-seven senators sending a joint letter to the NEA demanding that that agency refuse to finance this type of "'shocking, abhorrent and completely undeserving'" work.[21] At about the same time, the University of Pennsylvania's Institute of Contemporary Art organized an exhibition of photographs by Robert Mapplethorpe with assistance from an NEA grant.[22] Of the 150 photographs exhibited, only a few caused any controversy; those tendentious photographs depicted homoerotic and sadomasochistic themes amongst biracial couples.[23] A group of congressmen reacted to a public outcry over the exhibition and government support of the Mapplethorpe and Serrano photographs by calling for an end to the NEA.[24]

After much congressional debate, a compromise measure was reached in the "Helms Amendment," named after the controversial North Carolina senator who led the anti-NEA movement in Congress.[25] The amendment provided that NEA funds could not be "used to promote, disseminate, or produce materials which in the judgement of the [NEA] . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, [and] sexual exploitation."[26] This marked the first time that Congress had placed any content

18. *See* JOSEPH WESLEY ZEIGLER, ARTS IN CRISIS: THE NATIONAL ENDOWMENT FOR THE ARTS VERSUS AMERICA 69 (1994).

19. *See id.*

20. *See id.* at 70-71.

21. *See id.* at 70-73.

22. *See id.* at 73.

23. *See id.*; *see also* CULTURE WARS 319-27 (Richard Bolton ed., 1992).

24. *See* 135 CONG. REC. H5633 (daily ed. Sept. 13, 1989) (statement of Rep. Rohrabacher) (proposing that all government funding of the NEA be cut because "American taxpayers [were] furious that their hard-earned money [was] spent on so-called art that [was] obscene, indecent, blasphemous and racist").

25. *See* ZEIGLER, *supra* note 18, at 79-80 (noting Helms' rationale for the Amendment: "'[a] difference exists between an artist's right to free expression, and his right to have the Government, that is to say the taxpayers, pay him for his work . . .'").

26. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989) (codified as amended at 20 U.S.C. § 954 (1994)).

restrictions on NEA grants.[27] To enforce the Helms Amendment, the NEA required grant applicants to sign an "Obscenity Pledge," prior to receiving funding, that they would not use government funds to create or promote any materials that, in the judgment of the NEA, could be considered obscene.[28] This obscenity pledge was invalidated as unconstitutionally vague in *Bella Lewitzky Dance Foundation v. Frohnmayer*.[29]

The appropriations bill also set aside funds to create an independent commission of constitutional law scholars who would review the NEA funding process.[30] The Commission's 1990 report found no constitutional mandate for public subsidy of the arts, but recommended striking content restrictions on the award of grants.[31] After lengthy debate, Congress adopted the Williams-Coleman Amendment ("the Amendment"), a bipartisan effort to save the NEA; the Amendment was codified at 20 U.S.C. § 954(d)(1).[32] The provision reads as follows:

> 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

27. *See* Mary Ellen Kresse, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?*, 39 BUFF. L. REV. 231, 254-56 (1991) (noting that the NEA had come under attack before—in 1984 in response to an NEA-funded production of Verdi's *Rigoletto* that portrayed ethnic and racial groups in a negative light, and in 1985, in response to the alleged funding of pornographic poetry—but that at that time Congress had rejected content-restrictive proposed amendments in favor of a more general mandate that the funded projects promote excellence, portray exceptional talent, and have significant literary, scholarly, cultural, or artistic merit).

28. *See* Richard Bolton, *Introduction* to CULTURE WARS, *supra* note 23, at 5.

29. 754 F. Supp. 774, 782 (C.D. Cal. 1991) (finding "the NEA certification unconstitutionally vague because it leaves the determination of obscenity in the hands of the NEA"). In reaching its decision, the court also found that the NEA exerted considerable influence over all funding of the arts in the United States. *See id.* at 785. An artist, therefore, could not simply ignore the certification requirement for fear of losing funding from *all* sources, public and private. Consequently, the certification stood as an "obstacle in the path of the exercise of fundamental speech rights." *See id.*

30. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 575 (1998).

31. *See id.* (suggesting, in place of content restrictions and the certification requirement, a strengthened role for advisory panels and a "statutory reaffirmation" of respect for the diversity of American beliefs and values).

32. *See id.* at 576.

> for the diverse beliefs and values of the American public . . . .[33]

Also in 1990, just before Congress passed the Williams-Coleman Amendment, the NEA denied grants to four artists—Karen Finley, Tim Miller, Holly Hughes, and John Fleck—against the recommendations of an NEA peer advisory panel.[34] These artists sued to challenge the refusal of their grant application and, after Congress enacted the Amendment, joined with an arts organization to challenge the constitutionality of the "decency clause."[35]

The NEA agreed to settle the individual artist's claims.[36] The District Court then granted summary judgment in favor of the artists on their facial constitutional claim and enjoined enforcement of 20 U.S.C. § 954(d)(1).[37] A Ninth Circuit panel upheld the District Court's ruling.[38] The Supreme Court granted certiorari and reversed.[39]

III. ANALYSIS

A. Two Constitutional Questions

As noted above, there are three constitutional questions involved in the *Finley* case. As a prelude to analyzing the three opinions in *Finley*, this Note will discuss the case law relevant to the first two questions—can the government suppress disfavored artistic expression, and can the government suppress artistic expression as part of a condition to receipt of government funding.

1. Can the Government Suppress Disfavored Artistic Expression? The First Amendment of the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . ."[40] Written or spoken words are clearly speech; any law that limits such expression is subject to First Amendment scrutiny.[41] Moreover, more than just words can

33. 20 U.S.C § 954(d)(1) (1994).

34. *See Finley*, 524 U.S. at 577.

35. *See id.* at 577-78. The artists were joined by the National Association of Artists' Organizations (NAAO). *See id.*

36. *See id.* at 578 (revealing that the settlement included payment of the denied grants, damages, and attorney's fees).

37. *See id.*

38. *See* Finley v. National Endowment for the Arts, 100 F.3d 671, 674 (9th Cir. 1996).

39. *See Finley*, 524 U.S. at 580.

convey meaning or express a viewpoint. Such symbolic speech is also afforded First Amendment protection.[42] Furthermore, artwork is generally considered speech; the Supreme Court has written: "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[43] Given the Court's statement, it seems fairly clear that the art in question is a form of speech subject to some level of First Amendment protection.

In analyzing free speech issues under the First Amendment, commentators generally classify the regulation of speech into two types: (1) regulation based upon the content of speech; and (2) regulation without regard to the content of speech.[44] The former

40. U.S. CONST. amend. I.

41. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 794-798 (2d. ed. 1988) (indicating that any such limit on speech will be scrutinized to determine its ultimate purpose). If the limit is aimed at the communicative impact of the statutorily prohibited conduct, it is unconstitutional absent a showing by the government that the prohibited message somehow created a "clear and present danger" or otherwise lacked First Amendment protection. *See id.* A limit *not* aimed directly at communicative impact, however, but rather at an altogether separate goal in which communication is only incidentally affected, such as a statute prohibiting graffiti on government buildings to preserve their aesthetic and functional value, is not unconstitutional. *See id.*

42. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 317 (1990) (striking down an anti-flag burning statute because it "suppresse[d] expression"); Spence v. Washington, 418 U.S. 405, 405-06, 415 (1974) (per curiam) (holding that a peace symbol attached to an American flag was protected speech).

43. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981) (finding that nude dancing was constitutionally protected). It is not clear, however, whether art completely without political content is fully protected by the First Amendment. *Compare* Close v. Lederle, 424 F.2d 988, 990-91 (1st Cir. 1970) (refusing to find a violation of the First Amendment in a decision by the administration of the University of Massachusetts to remove an art professor's display of his art, which contained nudity and sexual references, from a university building), *with* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (noting that poetry, painting, and music are "unquestionably shielded" by the First Amendment). In his dissent in *Finley*, Justice Souter cites *Hurley* to assert that "[i]t goes without saying that artistic expression lies within . . . First Amendment protection." *Finley*, 524 U.S. at 602 (Souter, J., dissenting).

44. *See* TRIBE, *supra* note 41, § 12-2, at 789-90. At least one commentator has noted the imprecision of the term "content" in this context. *See* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1210 (1993). Ms. Sabrin argues that First Amendment content jurisprudence blurs the distinction between arguably permissible government denial of funding based upon content that lacks artistic merit and denial of funding based upon indecent content, which she argues is unconstitutional. *See id.* The majority in *Finley* makes this analytical error in arguing that the decency clause will not result in impermissible viewpoint (i.e., content) discrimination because the same statute requires the NEA to make funding decisions based upon content *quality*. *See Finley*, 524 U.S. at 585 (asserting that

is subject to strict scrutiny.[45] *Finley* clearly presents an attempt to restrict the content of speech.[46] Accordingly, the respondents challenged Section 954(d)(1) as impermissibly viewpoint based.[47] They argued that the decency clause impermissibly discriminated against the expression of art that failed to meet the standard of decency.[48] They brought a facial challenge—as

"[a]ny content-based considerations . . . in the grant-making process are a consequence of the nature of arts funding"). The majority argues that because artistic excellence necessarily requires content discrimination, further content discrimination based upon a decency standard is permissible. *See id*. at 585. Justice Souter's dissent correctly distinguishes between the two types of "content." *See id*. at 605-06 (Souter, J., dissenting) (arguing that denial of funding based solely on indecency is not a concomitant determination of artistic merit). Refer to Part III.B *infra* for a complete analysis of the diverse opinions in *Finley*.

45. *See* TRIBE, *supra* note 41, § 12-3, at 798-99. Under the strict scrutiny test, the government must show that regulation of content serves a compelling state interest and that the restrictive law is narrowly drawn to achieve that end. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (noting that to justify a content-based differentiation in the treatment of print media under a state taxation scheme, the "[s]tate must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end").

46. The principal inquiry in determining if a law regulates content, and is therefore subject to strict scrutiny, concerns whether the purpose of the regulation stems from government disagreement with the message conveyed. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In *Finley*, the content of the art (what it is trying to say), along with the form of the expression, is subject to the decency standard of Section 954(d)(1). Quite clearly the purpose of Section 954(d)(1) is to express government disapproval of what the government deems as indecent art.

Obscene art—that is art that is determined to be legally obscene under the *Miller* test, outlined below—like any other type of obscene speech is not protected by the First Amendment, and therefore the government may regulate it with impunity. *See id*. § 12-6 at 909. The *Miller* test is a three-part inquiry to determine obscenity. For a finding of obscenity the trier of fact must decide:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined [as obscene] by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)). Refer to note 234-35 *infra* and accompanying text for Professor Harry Clor's contrasting definition of obscenity and its effect on the art in question. The art produced by the respondents in *Finley* would most likely avoid a label of obscene under the *Miller* test given the breadth of the test, and the fact that only a small portion of the art involved nudity or sexual themes.

47. *See Finley*, 524 U.S. at 578. The respondents' other cause of action—that Section 954(d)(1) violates the vagueness doctrine of the Fifth Amendment—will not be addressed in this paper. *See id*.

48. *See* Respondents' Brief at *13, National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (No. 97-371), *available in* 1998 WL 47281 (noting that the decency and respect clause exemplified the "essence of viewpoint discrimination" in that it directed the NEA to "favor applicants whose perspectives are 'respectful' of American values and 'decent,' and to disfavor those whose views are deemed 'disrespectful' or 'indecent'").

opposed to an as-applied challenge—and as both the majority and dissent acknowledged, a facial challenge is difficult to uphold.[49] The majority noted that a facial challenge can be advanced only if the respondents "demonstrate a substantial risk that application of the provision will lead to the suppression of speech."[50] Yet despite this difficulty, the respondents would have won this case had the issue been strictly limited to the First Amendment.[51] The issue becomes much more slippery, however, when First Amendment principles collide with the notion that the government in this instance is neither affirmatively nor obviously restricting speech, but rather is simply refusing to fund it.

2. Can the Government Suppress Artistic Expression as Part of a Condition to Receipt of Government Funding? The second question is governed by a line of First Amendment cases stemming from a jurisprudential standard known as the doctrine of unconstitutional conditions. This doctrine covers a range of situations; and because many, if not most issues arising under the doctrine are politically charged, it is continually being revised.[52] To answer the second query, this Note will argue that the most current version of the unconstitutional conditions test renders Section 954(d)(1) invalid. Moreover, this Note will discuss two cases involving the First Amendment and the unconstitutional conditions doctrine which frame the arguments for the petitioner and respondent in *Finley*.[53]

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49. The majority cited *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), in claiming that one who attempts a facial constitutional challenge bears a heavy burden. *See Finley*, 524 U.S. at 580. Both the majority and dissent cite *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990) to show the disfavored status of a facial challenge. *See Finley*, 524 U.S. at 580; *id.* at 617 (Souter, J., dissenting).

50. *Finley*, 524 U.S. at 580 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

51. *Cf.* Texas v. Johnson, 491 U.S. 397, 414 (1989) (holding that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

52. *See* Donald L. Beschle, *Conditional Spending and The First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117, 1128 (1992); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416-19 (1989) (noting that the doctrine has "survived major divisions and shifts of temperament" and observing that the Court's application of the doctrine in each of these contexts has not been consistent, creating a state of "doctrinal disarray").

53. Refer to notes 72-107 *infra* and accompanying text for a complete discussion of *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995).

The venerable unconstitutional conditions doctrine[54] holds that the government may not predicate the receipt of a grant on forfeiture of the grant beneficiaries' constitutional rights, even if the government may withhold the grant altogether.[55] And while not all government benefits or affected constitutional rights are implicated under this analysis,[56] the situation in *Finley* seems to fit perfectly into this framework.

The doctrine has been inconsistently applied,[57] however, perhaps because the concerns raised by the condition are varied.[58] Earlier applications of the doctrine dealt with federalism and the Tenth Amendment's reservation of power to the states.[59] The most recent standard for unconstitutional conditions jurisprudence promulgated by the Court is the *Dole* test.[60] In *South Dakota v. Dole*,[61] the Court upheld a congressional scheme restricting federal highway funds to states that permitted the sale of alcohol to anyone under the age of twenty-one.[62] The Court set forth a four-part test for unconstitutional conditions analysis: (1) the funding involved

54. *See* Sullivan, *supra* note 52, at 1415 & n.1 (noting that "[c]ommentators have overwhelmingly supported the doctrine's basic premises"). Professor Sullivan notes that the doctrine dates from the *Lochner* era. *See id.* at 1416.

55. *See id.* at 1415.

56. *See id.* at 1424. Dean Sullivan argues that although not all government benefits fit into this type of analysis, "direct subsid[ies] or provision[s] of other government largesse" do. *Id.* at 1424. Moreover, she notes that not all constitutional rights that are restricted by government funding trigger the doctrine; restriction of individual free speech rights does, however, give rise to unconstitutional conditions analysis. *See id.* at 1426.

57. *See id.* at 1416 (contrasting the Court's holding in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), that the selective exemption from state taxes of some magazines on the basis of content unconstitutionally infringed speech, with that of *Harris v. McRae*, 448 U.S. 297 (1980), that the selective subsidy of the medical expenses of childbirth, but not abortion, was a permissible infringement on reproductive rights).

58. *See* Beschle, *supra* note 52, at 1128. Professor Beschle points out that the differing issues falling under the unconstitutional conditions doctrine—for example, federalism, the reservation of states' rights under the Tenth Amendment, or First Amendment concerns—prevent both a universal standard for application of the doctrine and a general theory of unconstitutional conditions. *See id.*; *see also* William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 244 (1989) (concluding that any attempt to formulate a unified theory of unconstitutional conditions is futile); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 338 (1989) (arguing that the constitutionality of a given condition is a function of the particular constitutional issue, and therefore, a general theory will not be analytically useful).

59. *See* Beschle, *supra* note 52, at 1117.

60. *See id.* at 1121.

61. 483 U.S. 203 (1987).

62. *See id.* at 205-06.

must be pursuant to the "general welfare"; (2) the attached condition must be unambiguous—the beneficiary must understand the choice presented; (3) the attached condition must bear a direct relationship to one of the main purposes of the program in question; and (4) there can be no independent unconstitutional circumstance that would otherwise bar the government's spending power.[63] Under the *Dole* test, the "decency" condition required by Section 954(d)(1) as a prerequisite to receipt of government money arguably becomes an unconstitutional condition, violating the third prong of the test. The enabling statute of the NEA states that the main purposes of the endowment include promotion of "professional excellence," and the encouragement of "public . . . appreciation of the arts."[64] Arguably the requirement that funding be predicated on promotion of standards of "decency" is contrary, if not antithetical, to the promotion of artistic appreciation and excellence.

Webster's New International Dictionary defines excellence as "the state of possessing good qualities in an eminent degree."[65] Decency, on the other hand, is defined as "whatever is proper or becoming" or "conformity to standards of taste, propriety, or quality."[66] Clearly the promotion of an eminent degree of good qualities can—and most likely should—be achieved without any reference to or dependence on propriety and conformity. Like the distinction between artistic and political expression, here the latter is normative and stabilizing while the former is a quality that the latter tries to stabilize. Moreover, the statute's vague language about respect and decency arguably run afoul of *Dole*'s second prong.[67] Therefore, under *Dole*, Section 954(d)(1) is an impermissible unconstitutional condition.

Although clearly pertinent in answering the second question of this Note's inquiry, the *Dole* test was not used in the *Finley* analysis. Perhaps this is because of the inconsistencies in the application of unconstitutional conditions as noted above.[68] Or, perhaps *Dole* was overlooked because the right at stake in *Dole* emanated from the Twenty-first Amendment, not the First, as in *Finley*.[69] Most likely however, the *Dole* test was not employed—

63. *See id*. at 207-08.

64. *See* 20 U.S.C. § 954(c)(1)-(10) (1994).

65. WEBSTER'S DICTIONARY, *supra* note 4, at 791.

66. *Id*. at 584.

67. *See Dole*, 483 U.S. at 207.

68. Refer to notes 60-61 *supra* and accompanying text (sketching the varied uses of the doctrine).

69. *See Dole*, 483 U.S. at 205.

despite being on point—because of two other unconstitutional conditions cases involving First Amendment speech rights—*Rust v. Sullivan*,[70] and *Rosenberger v. Rector and Visitors*.[71]

Rust forms the backbone of the government's argument in support of Section 954(d)(1).[72] In that case, the plaintiffs challenged a regulation prohibiting health care providers that received federal family planning funds from discussing abortion with their patients.[73] The Court held that the health care provider's free speech rights were not infringed because they had the opportunity to discuss their views outside of the confines of the federally funded activity.[74] In *Finley*, the government argued that *Rust* permits content discrimination in arts subsidies presumably so long as the artist still has the freedom to express her views outside the scope of a federally funded grant.[75] In *Rust*, the Court held:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[76]

Moreover, the Court argued that merely refusing to fund a

70. 500 U.S. 173 (1991). *See generally* Cole, *supra* note 16, at 679 (noting that "the majority and dissenting opinions in *Rust* are permeated by unconstitutional conditions rhetoric and analysis").

71. 515 U.S. 819 (1995). Professor Beschle posits that the problem of unconstitutional conditions defies a singular exegesis. *See* Beschle, *supra* note 52, at 1128. He cites Professor Sullivan's 1989 *Harvard Law Review* article, inter alia, in noting, "The more notable attempts to analyze the question of unconstitutional conditions have . . . attempted to produce standards that are equally applicable" to the myriad of constitutional rights addressed using the doctrine. *See id*. at 1128 & n.83. And although he sees some validity in a single analytical standard, Professor Beschle concludes, "Too easy an analogy between cases primarily concerned with federalism and those primarily concerned with individual rights may lead to entirely unsatisfactory results . . . ." *Id*. at 1128.

72. *See, e.g.*, Petitioners' Brief, at *20, 22 National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (No. 97-371) (relying heavily upon *Rust* as a basis for their argument).

73. *See Rust*, 500 U.S. at 199-203 (holding that the regulations do not violate the First Amendment free speech rights of private Title X fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies).

74. *See id*. at 198-99 (explaining that employees who were voluntarily employed for a Title X project must observe the restrictions while at work, but are free to engage in any speech outside employment).

75. *See* Petitioners' Brief at *27-29, *Finley* (No. 97-371).

76. *Rust*, 500 U.S. at 193.

protected activity does not rise to the level of penalizing the activity.[77] In famous dicta, the *Rust* Court also argued that government funding of a class in democracy would not in turn require the government to "encourage competing lines of political philosophy."[78] The Court's rationale seems to be that the First Amendment does not affirmatively entitle subsidized speech. Thus, the government may choose, based upon content, not to support speech without encroaching on free speech rights. Therefore, the *Rust* holding would seem to suggest that Section 954(d)(1) is not an invalid condition on government funding.[79] If the government can bar family planning counselors who receive federal money from discussing abortion, it can require artists who receive federal funding to create only "decent" art.

The *Rust* Court added an important qualification to this rule, however, stating:

> This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized that the existence of a Government "subsidy," in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity[]" . . . . Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines . . . .[80]

Thus, *Rust* does not operate in a vacuum, the unalloyed government gag envisioned by the *Finley* majority is actually a restrained restraint.

Another unconstitutional conditions case dealing with First Amendment free speech rights, and seemingly at odds with *Rust*, is used by the respondents,[81] and frames the other side of the relevant case law. In *Rosenberger v. Rector and Visitors*,[82] the

77. *See id*. (citing Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)).

78. *Id*. at 194.

79. Refer to notes 154-58 *infra* and accompanying text for an analysis of *Rust* in the discussion of the majority opinion.

80. *Rust*, 500 U.S. at 199-200 (citations omitted).

81. *See* Respondents' Brief at *10, 11, 14, 15 *Finley* (No. 97-371).

82. 515 U.S. 819 (1995).

University of Virginia funded the costs of printing publications by student groups.[83] The University denied such funding to a student organization that published a paper with a Christian editorial viewpoint.[84] The denial of funding was based upon University rules governing disbursement of the funds that prohibited funding for any paper that "'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[85]

The Court held that the guideline denying funding was impermissible viewpoint discrimination.[86] The Court acknowledged as precedent its own distinction between content and viewpoint discrimination within the context of state-created limited forums,[87] with the former being permissible if discrimination of the subject matter of the speech preserves the limited purposes of the forum.[88] In contrast, viewpoint discrimination—which the Court labels "an egregious form of content discrimination"[89]—occurs when the government attempts to regulate speech because of the "specific motivating ideology or the opinion or perspective of the speaker."[90] Such discrimination is not permissible.[91] Relying upon the precedent in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court held that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[92] That is, according to the Court, the refusal of funding was based upon the prohibited perspective, not its general subject matter.[93] Given this ruling, Section 954(d)(1) arguably can be seen as an attempt

83. *See id*. at 822.

84. *See id*. at 826-27 (observing that the University had previously certified the organization as eligible for funding, which it would not have done if the group were considered a "'religious organization'").

85. *Id*. at 823, 827 (alteration in original) (noting that the University made this decision after examining the group's first issue of the paper).

86. *See id*. at 831-37 ("[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

87. *See id*. at 829. (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993)). In *Lamb's Chapel*, the Court held that permission to use school property to present all sides of an issue except the religious view was impermissible viewpoint discrimination, not permissible content—i.e., subject matter—exclusion. *See Lamb's Chapel*, 508 U.S. at 394-96.

88. *See Rosenberger*, 515 U.S. at 829.

89. *Id*.

90. *Id*.

91. *See id*.

92. *Id*. at 831.

93. *See id*.

by the government to refuse funding based upon what it deems as an indecent perspective.

The Court made two other important rulings in *Rosenberger*. First, the Court rejected the University's argument that *Rosenberger* could be distinguished from *Lamb's Chapel* because *Rosenberger* involved funding rather than facility access.[94] The University supported its argument by citing *Widmar v. Vincent*,[95] which stated that a university has an unqualified right to make academic decisions in determining how to allocate limited resources.[96] Furthermore, the University cited *Rust v. Sullivan* to argue that given the right to discriminate in making funding decisions, the University's content-based funding decisions were permissible.[97] The University argued that if the precedent concerning impermissible viewpoint discrimination governing facility access were also applied to funding decisions, such precedent, "'would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions that schools, colleges, and other government entities routinely make in the allocation of public funds.'"[98]

The Court rejected this argument, finding *Rust* inapplicable, given that *Rust*, in this Court's reading, stood for the proposition "that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[99] Moreover, the Court argued that in *Rust* "the government did not create a program to encourage private speech but instead used private speakers to *transmit specific information pertaining to its own program*."[100] The Court reasoned in *Rosenberger* that the University was not speaking, nor was it subsidizing dissemination of a preferred message, but was instead disbursing funds to encourage a diversity of views from private speakers.[101] In such a situation, the Court stated that viewpoint-based restrictions were improper.[102]

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94. *See id*. at 832-34.

95. 454 U.S. 263 (1981).

96. *See Rosenberger*, 515 U.S. at 833. The Court in *Widmar* struck down exclusion of religious groups from use of school facilities; the same facilities were available to all other student groups. *See Widmar*, 454 U.S. at 265, 276-77.

97. *See Rosenberger*, 515 U.S. at 832-33.

98. *Id*. at 833 (quoting Respondents' Brief at *16, *Rosenberger* (No. 94-329), *available in* 1995 WL 16452).

99. *Id*.

100. *Id*. (emphasis added).

101. *See id*. at 834.

102. *See id*.

Applying this reading of *Rust* to the facts in *Finley* suggests that Section 954(d)(1) is an impermissible condition upon funding given that the NEA, like the University in *Rust*, is surely not an example of the government speaking. Moreover, the mission of the NEA, like the university in *Rust*, is not to transmit a government-preferred message.[103] In fact, the language of Section 954(d)(1)—which mirrors the language of another section of the NEA enabling legislation[104] with an emphasis on diversity—suggests, in accordance with the *Rosenberger* reading of *Rust*, a government attempt to allocate funds to encourage a diversity of views from private speakers.

The University's argument in *Rosenberger* that the *Lamb's Chapel* distinction between permissible content discrimination and impermissible viewpoint discrimination was inapplicable because funding, not facility access, was at issue,[105] has a corollary in the University's argument that funding of speech is constitutionally different from conditions of facility access because money is limited and physical facilities are not.[106] This is the second point raised in *Rosenberger* with implications for the *Finley* case. The Court rejects the scarcity argument, holding:

> [T]he underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong. . . . The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in Lamb's Chapel been scarce, . . . our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in Lamb's Chapel] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.[107]

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103. *See* 20 U.S.C. § 954(c)(1)-(10) (1994) (identifying funding priorities for the NEA, which emphasize individual artists' expressions and include "giving emphasis to American creativity and cultural diversity").

104. *See* 20 U.S.C. § 959(c) (1994) (providing that panels reviewing art to determine grant awards must be comprised of "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view"). Refer to notes 181-83 *infra* and accompanying text for a discussion of Justice Souter's belief that the NEA's interpretation of Section 954(d)(1) renders Section 959(c) superfluous—which is a constitutionally disfavored conclusion.

105. *See Rosenberger*, 515 U.S. at 832.

106. *See id.* at 835.

107. *Id.* (emphasis added).

Clearly, the Court is saying that scarcity of funding, by itself, in no way justifies viewpoint discrimination. Obviously, the NEA does not have the money to award grants to all applicants; thus the NEA faces an analogous situation. The *Rosenberger* holding suggests that Section 954(d)(1) should therefore be deemed an unconstitutional condition, an example of impermissible viewpoint discrimination, in the absence of an acceptable neutral principle. And while neither "artistic excellence" nor "decency" are neutral terms, the former is acceptable within the context of the mission of the NEA; the latter is antithetical to that mission.[108]

3. Summary. The relevant case law suggests that art is considered speech, and that the government cannot infringe upon an artist's free speech rights simply because it finds her viewpoint indecent. Whether denial of funding is such government infringement is controlled by the elusive unconstitutional conditions doctrine. In the NEA context, a requirement of decency seems to be an unconstitutional condition under the general theory. Such a general theory however, seems analytically imprecise. Two cases dealing with unconstitutional conditions as they relate specifically to the First Amendment and its free speech clause, therefore, frame the two sides of the issue, and provide the competing analyses.

B. Case Analysis: Is the Statute an Example of an Impermissible Condition on Government Funding?

1. Barking up the Wrong Tree. Pablo Picasso once said, "[p]eople who try to explain pictures are usually barking up the wrong tree."[109] The same could be said about the *Finley* majority's misinterpretation of Section 954(d)(1). Although her argument is seemingly plausible, Justice O'Connor's misunderstanding of art—both as a dynamic element in a society founded on liberal, pragmatic ideals, and as a politicized reflection of those values—eviscerates her position, and suggests that her reading of art and law is an exercise in barking up the

108. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 613-15 (1998) (Souter, J., dissenting) (supporting this reading of *Rosenberger* and noting that "[t]he N.E.A.'s purpose is to 'support new ideas' and 'to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry'" (second alteration in original) (quoting 20 U.S.C. § 951 (7), (10) (1994)). Clearly such a mission would require discrimination in terms of artistic merit or excellence, but would not tolerate such a tepid standard as decency.

109. *See* PICASSO ON ART 23 (Dore Ashton ed., 1972).

wrong tree.

Justice O'Connor begins the majority opinion by attempting to answer the respondents' argument that Section 954(d)(1) is a classic example of impermissible viewpoint discrimination in that it constrains the NEA's capacity to award grants to certain types of artistic expression.[110] Justice O'Connor attacks this argument by pointing to the NEA's own construction of Section 954(d)(1).[111] The NEA claimed that the language in Section 954(d)(1) merely exhorts them to consider decency and respect in awarding grant money, but does not impose any absolute restrictions on funding.[112] Moreover, the NEA claimed it had adequately applied Section 954(d)(1) by merely ensuring that the peer advisory panels involved in determining grant awards were representative of various backgrounds and points of view.[113] Justice O'Connor then admitted that although the NEA's implementation of Section 954(d)(1) by using diverse review panels was not within the Court's purview in this case,[114] it was nevertheless clear to her that the NEA's reading of the statute as merely advisory was correct.[115]

To support her reading, Justice O'Connor compared what she read as the merely hortatory language of Section 954(d)(1) with the certain and affirmative restraints on the NEA's funding authority in 26 U.S.C. § 954(d)(2), which prohibits the NEA from funding obscenity.[116] This argument is specious. Justice O'Connor apparently was saying that if Congress had wanted to affirmatively restrict or deny funding for indecent or disrespectful art, it would have done so with clear authority, as it did in the case of denying funding for obscenity. Congress had clear authority to deny funding for obscene art, however, because producing it was illegal.[117] In fact, Section 954(d)(2) can be seen as surplusage; Congress certainly has no authority to

110. *See Finley*, 524 U.S. at 580.

111. *See id.*

112. *See id.* at 580-81 (asserting that Section 954(d)(1) does not prohibit outright funding of indecent or disrespectful art, but merely asks that the grantmakers incorporate these as "'considerations'" in the process).

113. *See id.* at 581 (attributing this assertion to Randolph McAusland, Deputy Chairman for Programs, NEA).

114. *See id.* Despite this assertion, it is clear from the text of the opinion that the majority believes the NEA's implementation of Section 954(d)(1) is sufficient, and concomitantly, not adverse to free artistic expression.

115. *See id.*

116. *See id.* (contending that when Congress has intended to constrain the NEA's grant-making authority, it has done so "in no uncertain terms").

117. Refer to note 46 *supra* (discussing the *Miller* test, the well-established legal doctrine for determining obscenity).

affirmatively fund obscene art. Denying the NEA the opportunity to do so was merely stating the obvious.[118] Congress does not however, have clear authority to limit the NEA's ability to fund indecent or disrespectful art; to do so would be potentially unconstitutional.[119]

Justice O'Connor further bolsters her argument that the language of Section 954(d)(1) was merely advisory and did not compel viewpoint discrimination by describing the political context surrounding Section 954(d)(1) adoption.[120] This argument makes less sense than its predecessor. That the passage of Section 954(d)(1) was a bipartisan effort[121] to save the NEA does not suggest that the decency and respect clause was not intended to discriminate. Justice O'Connor quoted a sponsor of Section 954(d)(1) as saying, "'If 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.'"[122] That assertion was groundless. If Congress's intention in passing Section 954(d)(1) was to maintain the integrity of freedom of expression, the Amendment was superfluous; freedom of expression already existed in 1990. What Congress actually did in passing Section 954(d)(1) was to save the NEA from extinction.[123] Such an act, however, does not necessarily further the cause of freedom of expression, especially when in saving the NEA, Congress had to create a statute which, at least symbolically, had the effect of

118. Given the highly charged political nature of the NEA, it is easy to understand how Congress, concerned about the political ramifications of using taxpayers' (i.e., voters') money to fund art that may at times be inaccessible, incomprehensible, or offensive, would disingenuously take the high road by inserting into the NEA's charter an admonition not to fund obscenity. That such an admonition would be obvious to any lawmaker is unimportant in comparison to its symbolic value to the average voter-taxpayer that Congress will fund art but will not tolerate filth. Arguably, such *realpolitik* thinking led to the adoption of Section 954(d)(1) as well. One can imagine a Congressperson choosing the appropriate NEA rhetoric for a given constituency. To a group of art patrons she might say, "We paid lip-service to the art bashers by including some watered-down language about respect and decency; we did what we had to do to save the NEA." To a group less favorable towards the NEA she could point to the same legislation and say, "I won't allow your tax dollars to pay for art that is indecent, or that does not respect our cherished American beliefs."

119. Refer to Part III.A *supra* (discussing the constitutional principles governing conditions on funding and artistic expression).

120. *See Finley*, 524 U.S. at 581-82 (explaining that the legislation was a "bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its rule making authority").

121. *See id*.

122. *Id*. at 582 (quoting 136 CONG. REC. H9459 (daily ed. Oct. 11, 1990) (statement of Rep. Pat Williams)).

123. *See id*.

limiting the content, scope, or type of art that the NEA could fund.[124]

Based upon the premises that Section 954(d)(1) only admonished the NEA to consider "decency and respect," and that the Amendment was not intended to preclude certain types of speech, Justice O'Connor argued that the legislation would not necessarily be used as a "tool for invidious viewpoint discrimination."[125] She compared the instant case with *R.A.V. v. City of St. Paul*,[126] and noted that the Court upheld a facial challenge to a municipal ordinance that criminalized placing a symbol on private or public property "'which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'"[127] Justice O'Connor noted that this legislation was found facially unconstitutional because its "dangers were . . . more evident and more substantial."[128] She argued that the "decency and respect" standards of Section 954(d)(1) in comparison, did not pose a "realistic danger" to First Amendment values because such standards do not chill speech with express threats of viewpoint censorship.[129] Absent such express threats, Justice O'Connor

124. It is the NEA, not Congress, that has interpreted Section 954(d)(1) as merely advisory, and implemented the statute by having diverse viewpoints represented on peer advisory panels. *See id*. at 580-81. Justice O'Connor's reliance on the political context of the Amendment's adoption to show that Section 954(d)(1) does not compel the NEA to discriminate based on viewpoint, therefore, begs the question as to what Congress actually intended. Moreover, Justice O'Connor's acceptance of the political rhetoric espoused by the sponsors of Section 954(d)(1) appears disingenuous. It is clear that the sponsors had the laudable goal of saving the NEA from either extinction or some impermissible funding standard (for example, the obscenity pledge previously attached to the NEA's enabling legislation, and subsequently found unconstitutional). It does not follow, however, that such a goal carries with it a commensurate goal of allowing the NEA to spend taxpayer's money with impunity. As Justice O'Connor herself admitted, in passing Section 954(d)(1) Congress chose not to allow any particular viewpoint. *See id*. at 581-82 (revealing Congressional discomfort with prohibiting certain categories of expression). It seems more plausible then, that by passing Section 954(d)(1), Congress was testing the political and constitutional waters, rather than trying to maintain the integrity of freedom of expression.

An implication buried in this part of Justice O'Connor's argument is that in saving the NEA, albeit in a potentially truncated form, Congress did on some level further the cause of free expression, given that government patronage of art is arguably necessary in a rational and liberal society. Refer to Part III.C.2 *supra* (arguing that a vigorous public debate is a core value of a liberal society). Again, however, such a laudable deed does not relieve Congress of the burden of writing legislation devoid of unconstitutional conditions.

125. *Id*. at 582.

126. 505 U.S. 377 (1992).

127. *See Finley*, 524 U.S. at 582 (citing *R.A.V.*, 505 U.S. at 380).

128. *See id*.

129. *See id*. at 583.

concluded that the terms in Section 954(d)(1), "by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face."[130] By "their nature" I read Justice O'Connor as saying that because "decency" and "respect" are both imprecise and (seemingly) innocuous—at least in comparison to the language in *R.A.V. v. City of St. Paul*—no viewpoint discrimination will follow from their acceptance. This logic is flawed.

The statutory language in *R.A.V.* was certainly more precise than that used in Section 954(d)(1).[131] But the latter legislation was imprecise arguably because Congress had written clearer restrictions into the NEA's enabling legislation, only to have them be declared unconstitutional.[132] Thus the imprecise terms of "decency" and "respect," along with the exhortation that the Chairman[133] take them into account, can be seen as Congress's attempt to place limits on NEA funding without getting caught.

Moreover, whether "decency" and "respect" are precisely defined or not, it seems clear that an artist seeking patronage would amend, or curtail her expression, knowing that the person who ultimately decides which projects receive funding will consider decency and respect as part of the funding determination. Most likely she would tailor her expression to fit the terms if they were precisely defined, and, if the meanings were unclear, she would either not speak, or curtail her speech in an attempt to conform to what she thought the terms might mean. In either scenario viewpoint discrimination is axiomatic, and the integrity of free speech is hardly maintained.

Justice O'Connor made much of the imprecise language issue. She cited from the respondents' brief to show that both parties were in agreement that "decency" and "respect" were multifaceted terms capable of myriad readings.[134] To her, this

130. *Id.*

131. The statute in *R.A.V. v. City of St. Paul* specifically stated that anyone who placed an object or symbol such as a "'burning cross or Nazi swastika'" that would "'arouse[ ] anger, alarm, or resentment in others'" would be guilty of a misdemeanor. *See R.A.V.*, 505 U.S. at 380.

132. *See* Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp 774, 785 (C.D. Cal. 1991) (holding that "once the plaintiffs were chosen for grant[s] on the basis of artistic merit, the government may not place restrictions on disbursement of those grants that require grantees to certify to obscenity provisions that are vague").

133. *But see Finley*, 524 U.S. at 591 (Scalia, J., concurring in the judgment) (noting that the language "'taking into consideration general standards of decency and respect. . . .'" is a dangling modifier, and that it is less than entirely clear that it is the chairperson who is asked to do the considering).

134. *See id.* at 583 (comparing the respondents' assertion that decency "'is likely to mean something . . . different 'to a septegenarian [sic] in Tuscaloosa and a teenager in Las Vegas'" to the NEA's less colorful, though similar position that

argument proves that Section 954(d)(1) "does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views."[135] However, Justice O'Connor cited from the section of the respondents' brief arguing that Section 954(d)(1) was unconstitutionally vague,[136] not from any argument made by the respondents concerning their viewpoint challenge—the point Justice O'Connor was refuting.[137] Such subterfuge exemplifies the legal parsing that Justice O'Connor would rely upon to argue in favor of Section 954(d)(1).

Relying upon her misapplication of the respondents' argument, Justice O'Connor then summarized what she read as the respondents' argument: that the criteria of Section 954(d)(1) were so subjective and vague that the potential exists for viewpoint discrimination.[138] She countered by arguing that precisely because the criteria of Section 954(d)(1) can be so varied, and because the legislation was merely hortatory, 954(d)(1) was conceptually equivalent to the language in the NEA's enabling statute requiring grants to be awarded on the basis of artistic merit or excellence.[139] This conclusion is untenable. Excellence and merit, like decency and respect, are inherently subjective terms, which in their application in awarding grants will necessarily vitiate a stance of absolute neutrality by the government. That fact however, does not render

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Section 954(d)(1) is "susceptible to multiple interpretations" (quoting Respondents' Brief at *41, *Finley* (No. 97-371) *available in* 1998 WL 47281).

135. *Id.*

136. *See id.* (citing generally to Respondents' Brief at 42-49).

137. *See Finley*, 524 U.S. at 588-90 (addressing the vagueness argument).

138. *See id.* at 583-84. This is a rather poor summation of the respondents' argument concerning viewpoint discrimination. The respondents argued the following: First, the NEA's attempt to avoid the constitutional issue through statutory construction is fallacious. By the government's own admission, the statute requires the consideration of "decency and respect" in reviewing grant applications. *See* Respondents' Brief at *12. Second, this requirement causes the NEA to favor respectful or decent art and to disfavor art that lacks these qualities. *See id.* at *13. Given the rule from *Rosenberger* that "'ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts,'" the fact that the issue here occurs within the context of government funding does not, therefore, permit the government to engage in otherwise impermissible viewpoint discrimination. *See id.* at *13-14 (quoting Rosenberger v. Rector and Visitors, 515 U.S. 819, 830 (1995)). Third, because the government concedes that the NEA is not a program for government speech, but rather an entity directed at supporting private speech in a "'traditional sphere of free expression,'" the rule from *Rust* allowing an award of government funds to be predicated on a condition that limits the grant beneficiaries speech is inapplicable. *See id.* at *14 (citing Rust v. Sullivan, 500 U.S. 173, 199-200 (1991)).

139. *See Finley*, 524 U.S. at 583-85 (positing that the NEA's enabling statute "contemplate[ed] a number of indisputably constitutional applications . . . of § 954(d)(1)").

the concepts equivalent. In fact, as previously noted, the contrasting definitions of excellence and decency suggest that the latter term is antithetical in the lexicon of art.[140] Moreover, if the NEA were not permitted to make content-based award decisions, the program would be in violation of its own legislative mission[141] and would be merely a government hand-out program operating on a first-come-first-served basis. Furthermore, it does not follow that allowing one mitigation of neutrality necessarily allows further mitigation. One does not inexorably permit the other,[142] as Justice O'Connor argued.[143]

Next, after citing some "indisputably" permissible applications of both the decency and respect prongs of Section 954(d)(1), Justice O'Connor admitted that these permissible applications standing alone are not sufficient to withstand a First Amendment challenge.[144] She argued, however, that she remained unpersuaded that other applications of the language in Section 954(d)(1) "will give rise to the suppression of protected expression."[145] To make this point, Justice O'Connor again pointed to the inherently discriminatory content-based considerations of arts funding.[146] Moreover, she cited several criteria by which the NEA may make a content-based distinction between competing projects.[147] The examples of content-based discrimination she cites, however, can be equated to the permissible criteria of excellence or merit.[148] Justice O'Connor, therefore, did not escape her conundrum of equating decency and respect with artistic excellence and merit.

Justice O'Connor also argued that the inherent competition for NEA grants distinguished the instant case from *Rosenberger*,

140. Refer to notes 65-66 *supra* and accompanying text (discussing the relationship between decency, excellence, and artistic merit).

141. *See* 20 U.S.C. § 954(d) (1994) ("[T]he Chairperson shall ensure that . . . artistic excellence and artistic merit are the criteria by which applications are judged . . . .")

142. This would be equivalent to saying that because the government can restrict one's right to yell "fire" in a crowded theatre, the government can, therefore, also restrict one's right to yell "theatre" in a crowded fire station.

143. *See Finley*, 524 U.S. at 584-85.

144. *See id.* at 585.

145. *Id.*

146. *See id.* at 585-86 (stating that because award money was limited, the NEA could not fund every project that came within its purview).

147. *See id.* at 585.

148. *See id.* (noting that funding can be based on "technical proficiency," "creativity," "anticipated public interest in or appreciation," "contemporary relevance," "educational value," "suitability for appeal to special audiences," "service to a rural or isolated community," or to "increase public knowledge of an art form").

which was therefore inapplicable as precedent.[149] For her, the NEA's mandate to make judgments based upon artistic quality differed from the situation in *Rosenberger*, in which government funding was available to any organization connected to the educational purpose of the University.[150] Nevertheless, both situations involve a government subsidy designed to encourage a wide range of viewpoints from private speakers.[151] This similarity far outweighs the slight difference Justice O'Connor used to distinguish *Rosenberger*. And as Justice Souter noted in his dissent, the very language of *Rosenberger* renders Justice O'Connor's argument moot.[152] *Rosenberger* held that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."[153]

Rust, however, is on point for Justice O'Connor.[154] For her, Section 954(d)(1) was an example of Congress's ability to "'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.'"[155] Under *Rust*, Congress's power to use government funding to advocate for certain ideas does not result in viewpoint discrimination; thus, to Justice O'Connor, Section 954(d)(1) was a permissible condition on funding.[156] As noted, however, the *Rust* ruling contains a rather important exception to the rule that the government can discriminate against disfavored viewpoints in the funding context if the speaker has the opportunity to speak freely outside the government-funded

149. *See id*. at 586.

150. *See id*.

151. *See id*. at 613 (Souter, J., dissenting) (describing the similarities between the NEA and the student activities fund in *Rosenberger*).

152. *See id*. at 614 (Souter, J., dissenting) (noting that the *Rosenberger* Court anticipated and specifically rejected the distinction Justice O'Connor is now making).

153. Rosenberger v. Rector and Visitors, 515 U.S. 819, 835 (1995). Justice Souter also noted that the Majority's use of competition, as distinguished from scarcity, was uncompelling semantics. *See Finley*, 524 U.S. at 614 & n.8 (Souter, J., dissenting).

154. *See id*. at 588.

155. *Id*. (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

156. *See Finley*, 524 U.S. at 587-88 (relying upon Congress's "wide latitude to set spending priorities").

forum.[157] Justice O'Connor made no mention of this aspect of *Rust*, ignoring it completely rather than distinguishing it.[158]

Finally, Justice O'Connor concluded with a distinction between as-applied and facial challenges. She noted that because none of the respondents alleged actual viewpoint discrimination,[159] no as-applied challenge to Section 954(d)(1) could be addressed. Therefore, Justice O'Connor proffered a test: the statute was constitutional "[u]nless [it] is applied in a manner that raises concern about the suppression of disfavored viewpoints. . . ."[160] This test, of course, recognized the potential for viewpoint discrimination inherent in the language of Section 954(d)(1). Such recognition renders Justice O'Connor's entire argument superfluous. She was willing to find Section 954(d)(1) unconstitutional; as she noted however, the NEA had not applied the statute since the inception of their appeal.[161]

In summary, Justice O'Connor's opinion, with its disingenuous arguments, its misapplication of arguments to the contrary, its superficial reliance on *Rust*, its misreading of *Rosenberger*, and its flawed logic, seems little more than a rubber stamp of Congress's desire to apply a popular brake on the NEA.

2. Seeing Paint, but Not Flowers—and Certainly Not Female Body Parts. If Justice O'Connor can be seen as "barking up the wrong tree,"[162] Justice Scalia's concurrence can be seen as barking at no trees whatsoever. Consider another art analogy. Georgia O'Keeffe is famous for her giant paintings of flower

157. *See* Rust v. Sullivan, 500 U.S. 173, 199-200 (1991) (emphasizing that the Government may not restrict speech in areas traditionally recognized as open to free, public speech and is thus limited in its restrictions by the vagueness and overbreadth doctrines).

158. *See Finley*, 524 U.S. at 588.

159. *See id.* at 577-78. Justice O'Connor noted that the individual respondents actually received grants after filing suit. *See id.* She failed to mention, however, that these grant awards were part of the settlement of the original suit, and thus were not made under the auspices of Section 954(d)(1). *See id.* (noting that at the district court level, the NEA settled on the individual artists' statutory and as-applied claims by paying the amount of the original award, damages, and fees). Moreover, Justice O'Connor was being disingenuous in noting that no other artists could allege viewpoint discrimination in any particular funding decision. The respondents won summary judgment at the District Court level, and the district court also enjoined enforcement of Section 954(d)(1); therefore, the government had not applied Section 954(d)(1) since June of 1992. *See id.* at 578.

160. *Id.* at 587 (prefacing her test with the NEA's concession that a more pressing constitutional question would arise if it was deliberately trying to exclude certain, specific viewpoints).

161. *See id.* at 578.

162. Refer to note 109 *supra* and accompanying text (quoting Picasso's famous explanation of the futility of trying to explain art).

petals and landscapes of the southwest United States.[163] In many of these paintings art critics have noted subtle, and at times not so subtle, references to female genitalia.[164] In the face of such a suggestion, one can imagine Justice O'Connor writing an opinion that there is no such reference. Justice Scalia's opinion, however, would deny that even the primary image of flower petals and a landscape existed, and that the painting was nothing more than a collection of brushstrokes and colors.

For Justice Scalia, Section 954(d)(1) meant what it said, and said what it meant.[165] He seems to have been unwilling to address the language of the statute in any context other than his own (which he seems to regard as universal).[166] Moreover, for Justice Scalia, what the statute says is without question constitutional.[167]

Like the majority opinion, Justice Scalia's concurrence relies on *Rust* without mentioning the qualification to the rule in that opinion.[168] For Justice Scalia, the qualification is irrelevant; he "regard[ed] the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable."[169] Likewise, Justice Scalia argued

163. *See* JEFFREY HOGREFE, O'KEEFFE: THE LIFE OF AN AMERICAN LEGEND 108 (1992) (describing O'Keeffe's sense of scale).

164. *See id*. at 130 (commenting that many viewed O'Keeffe's flower paintings as a continuation of the sexuality of her earlier work).

165. *See Finley*, 524 U.S. at 590-92 (Scalia, J., concurring in the judgment) (emphasizing the clarity of the statute and accusing the majority of "gutting it").

166. *See id*. at 594-95 (Scalia, J., concurring in the judgment) (noting that the political context of the passage of Section 954(d)(1) had no bearing on the statute's meaning or constitutionality). Although this Note argues that Justice O'Connor's citing of the political context does not aid her in proving the constitutionality of Section 954(d)(1), refer to notes 120-24 *supra* and accompanying text, the context has the potential to give this legislation—or for that matter, any legislation—meaning. Justice Scalia was correct in saying that the political context is irrelevant in determining its constitutionality. *See Finley*, 524 U.S. at 594-95 (Scalia, J., concurring in the judgment). But, that assertion does not, therefore, make the context dispositive as to the meaning of the statute.

167. *See id*. at 590 (Scalia, J., concurring in the judgment) (noting that Section 954(d)(1) "[b]y its terms . . . establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional").

168. *See id*. at 597 (Scalia, J., concurring in the judgment). Refer to note 66 *supra* and accompanying text (citing the limitation of the *Rust* rule, drawn from the *Rust* opinion itself). Both the majority and concurrence seem to read *Rust* as an end to the unconstitutional conditions doctrine, at least as it applies to the First Amendment. *See, e.g.*, *id*. at 588; *id*. 597 (Scalia, J., concurring in the judgment). But clearly, *Rust* does not give the government free license to quiet disfavored speech in the context of government subsidies simply because the speaker has the opportunity to speak outside the subsidy context.

169. *Finley*, 524 U.S. at 599 (Scalia, J., concurring in the judgment). Justice Scalia added, "The government, *I* think may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned."

that *Rosenberger* was inapplicable as precedent both because the situation in *Finley* did not resemble the limited public forum created by the government in *Rosenberger* and because, according to Justice Scalia, the direct business of government is to favor and disfavor various points of view, which it may do either directly or by funding others to do so.[170]

3. The Right Tree at Last. Justice Souter dissented and got the issue right. He began by citing precedent to establish both that art is protected speech and that government suppression of disfavored ideas is prohibited in the subsidy context.[171] Moreover, for Justice Souter, the controlling question was what the government's purpose is when enacting legislation that infringes upon speech.[172] Therefore, Justice Souter argued, because the text of Section 954(d)(1) indicated that Congress' purpose in enacting the statute was to prevent the funding of indecent or disrespectful art, a constitutional reading of Section 954(d)(1) was impossible.[173]

Justice Souter then attacked three points raised by the majority: (1) that Section 954(d)(1) would not engender viewpoint discrimination sufficient to uphold a facial challenge because its terms were imprecise and capable of varied interpretations;[174] (2) that the statute was constitutional given that the NEA had complied with it merely by assuring that the advisory panels involved in awarding grants were populated by people of diverse

Id. (Scalia, J., concurring in the judgment).

170. *See id*. at 598-99 (Scalia, J., concurring in the judgment).

171. *See id*. at 600-03 (Souter, J., dissenting) (providing examples of artistic expression protected under the First Amendment's speech clause).

172. *See id*. at 603 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). In *Ward*, the Court found that the government's purpose controls the determination of "whether [it] ha[d] adopted a regulation of speech because of disagreement with the message it conveys." *See Ward*, 491 U.S. at 791.

173. *See Finley*, 524 U.S. at 602-05 (Souter, J., dissenting). Justice Souter, like Justice O'Connor, looked to the political context surrounding the adoption of Section 954(d)(1) to aid in understanding the statute. Justice Souter, however, had a vastly different interpretation of the political context. He quoted a sponsor of the legislation as saying that "'[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds.'" *Id*. at 603 (Souter, J., dissenting) (alteration in original) (quoting 136 CONG. REC. 28624 (1990) (statement of Rep. Coleman)). Justice Souter also quoted the author of Section 954(d)(1) as saying that it "'add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account.'" *Id*. at 604 (Souter, J., dissenting) (alteration in original) (quoting 136 CONG. REC. 28631 (1990) (statement of Rep. Henry)).

174. *See Finley*, 524 U.S. at 605-07 (Souter, J., dissenting).

backgrounds;[175] and (3) that Section 954(d)(1) was permissible because it was merely hortatory.[176]

Justice Souter reasoned that the first argument was contrary to precedent.[177] For him, Section 954(d)(1) was a paradigm of viewpoint discrimination.[178] For Justice Souter, the essence of Section 954(d)(1) "means that art that disrespects the ideology, opinions, or convictions of a significant segment of the American public is to be disfavored, whereas art that reinforces those values is not."[179] Justice Souter cited several cases holding that disrespect or indecency cannot be forbidden or regulated by the government.[180]

Justice Souter attacked the majority's second point by arguing that the diverse backgrounds scheme was an implausible construction of Section 954(d)(1).[181] Moreover, he noted that such a reading of the statute would be redundant because Section 959(c) already provided that review panels must comprise diverse points of view.[182] Furthermore, Justice Souter noted that a reading of a statute that rendered it superfluous was disfavored.[183]

Justice Souter argued that the majority's third point was not a fair reading of Section 954(d)(1).[184] Given the rhetoric surrounding the passage of Section 954(d)(1), which did not seem merely hortatory,[185] Justice Souter noted that the statute "cannot

175. *See id*. at 607-09 (Souter, J., dissenting).

176. *See id*. at 609-10 (Souter, J., dissenting).

177. *See id*. at 605 (Souter, J., dissenting).

178. *See id*. at 606 (Souter, J., dissenting) (describing Section 954(d)(1) as "the very model of viewpoint discrimination, it penalizes any view disrespectful to any belief or value espoused by someone in the American populace").

179. *Id*. (Souter, J., dissenting).

180. *See id*. at 605-07 (Souter, J., dissenting) (citing, inter alia, Reno v. American Civil Liberties Union, 521 U.S. 844, 849, 858-60, 885 (1997) (upholding a facial challenge to a statute that regulated indecent material on the internet); United States v. Eichman, 496 U.S. 310, 312 (1990) (striking down a statute that prohibited burning a United States flag); and Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989)) (holding that "[s]exual expression which is indecent but not obscene is protected by the First Amendment")).

181. *See Finley*, 524 U.S. at 607-08 (Souter, J., dissenting) (again quoting the author of Section 954(d)(1) as saying that the decency and respect clause "'mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded'") (quoting 136 CONG. REC. 28672 (1990) (statement of Rep. Henry)).

182. *See id*. at 608-09 (Souter, J., dissenting).

183. *See id*. at 609 (Souter, J., dissenting) (citing Freytag v. Commissioner, 501 U.S. 868, 877 (1991)).

184. *See id*. (Souter, J., dissenting).

185. Refer to notes 120-24 *supra* and accompanying text (noting Justice O'Connor's quotation of a sponsor of Section 954(d)(1), whose remarks indicate that the purpose of the bill was to require that the NEA be limited to funding only decent

be read as tolerating awards to spread indecency or disrespect, so long as the review panel . . . and the Chairperson have given some thought to the offending qualities and decided to underwrite them anyway."[186] Moreover, Justice Souter argued that even if the "merely hortatory" argument were plausible, Section 954(d)(1) would still be unconstitutional because its criteria, whether taken into consideration or actually applied, disfavor certain types of expression.[187]

Justice Souter then distinguished the precedent in *Rust.*[188] As he noted, *Rust* holds that when the government uses subsidies to act as a speaker, or in the same context, when the government acts as buyer, viewpoint discrimination is permissible.[189] Justice Souter pointed out, however, that through the NEA, the government admitted that it was acting neither as speaker nor buyer.[190] Instead, for Justice Souter, in the context of art subsidies, the government was acting as a patron.[191] Justice Souter argued that patronage is distinct from speaking or buying, because as a patron, the government "financially underwrit[es] the production of art by private artists and impresarios for independent consumption."[192] Clearly, the key difference between government-as-patron and government-as-speaker or -buyer is the independence of production and consumption to which Justice Souter alluded. This independence creates a division between the government and the creation and resulting disposition of the subsidy, thus rendering the *Rust* ruling inapt.[193] As Justice Souter noted, the category of government-as-patron does not analogize well into the speaker

and respectful art).

186. *Finley*, 524 U.S. at 609 (Souter, J., dissenting).

187. *See id*. at 610 (Souter, J., dissenting).

188. *See id*. at 612 (Souter, J., dissenting).

189. That is, when the government, through its spending power, pays money to achieve a certain end, it is considered to be a buyer. *See id*. at 612 (Souter, J., dissenting); Rust v. Sullivan, 500 U.S., 194 (1991). As Justice Souter notes, in such a context the government has the right to define the limits of the program and control for viewpoint expression. *See Finley*, 524 U.S. at 610-12 (Souter, J., dissenting) (explaining that when the government is a buyer or speaker it operates in a zone of activity free of First Amendment restraints). As Justice Souter noted, outside of the context of buying, the Court has repeatedly held that suppression of unpopular ideas is impermissible. *See id*. at 612 (Souter, J., dissenting) (citing Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983)).

190. *See Finley*, 524 U.S. at 611 (Souter, J., dissenting). Arguably, the government is buying freedom of expression in subsidizing art.

191. *See id*. (Souter, J., dissenting).

192. *Id*. (Souter, J., dissenting).

193. *See id*. at 612-13 (Souter, J., dissenting) (distinguishing the role of government in *Rust* from the role of government in *Finley*).

and buyer category; therefore, content regulation of government patronage is impermissible regulation of private speech.[194]

After distinguishing *Rust*, Justice Souter argued that *Rosenberger* was the controlling precedent, which "teaches that the First Amendment forbids decisions based on viewpoint popularity."[195] Short of legislating the NEA out of existence, Justice Souter argued that Congress may not require it to turn away applicants whose ideas are dangerous.[196]

Finally, Justice Souter argued against the majority's reading of the potential chill of Section 954(d)(1) on artistic expression, noting that "to whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid esthetic."[197] For Justice Souter, such a power to chill was a clear example of overbreadth, and he argued that Section 954(d)(1) should be struck down as facially invalid.[198] To Justice Souter—and anyone with a sense of the absurd—the majority did not perceive the irony in creating a statute that seeks to encourage free thinking and inquiry while simultaneously denying recognition of "virtually any expression capable of causing offense in any quarter."[199]

C. Why the Government Should Patronize Art, and Why Patronage Should Be Unfettered

This Note has argued that the "decency and respect" language of Section 954(d)(1) is an unconstitutional condition on its face. Furthermore, any application of the statute[200] will likely result in government viewpoint discrimination. Nevertheless, any arts funding necessarily contains an element of viewpoint discrimination in that art is judged on excellence or merit. This raises the following questions. First, why is distinction based on merit permissible when distinction based on standards of decency and respect is not? Second, should not the government be neutral

194. *See id*. at 611-12 (Souter, J., dissenting) (clarifying that the government as patron falls on "the wrong side of the line" between the permissible and the impermissible).

195. *Id*. at 613-14 (Souter, J., dissenting).

196. *See id*. at 614 (Souter, J., dissenting) (citing Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983)).

197. *Id*. at 621 (Souter, J., dissenting) (noting that artists may censor their work to avoid offending the NEA or "refrain from seeking NEA funding altogether").

198. *See id*. at 622 (Souter, J., dissenting) (describing the "significant power" of Section 954(d)(1) to chill artistic expression).

199. *Id*. at 623 (Souter, J., dissenting).

200. I assume that, given the Court's ruling in Finley, the NEA will at some point change its interpretation of Section 954(d)(1) as requiring only diverse advisory panels for a harsher, more invasive reading.

in First Amendment jurisprudence?[201] And third, can a principled distinction be made between the concepts of excellence and decency? There are three reasons for an affirmative answer to each question.

1. Excellence Is the Only Tenable Point of the NEA and (Perhaps) Art. The NEA was created when Congress passed the National Foundation on the Arts and Humanities Act in March of 1965.[202] The purpose of the NEA was the advancement of "artistic freedom and creativity, not government-approved, officially 'acceptable' art."[203] The enabling statute of the NEA identifies only broad funding criteria, including "professional excellence."[204] Clearly then, the point of the NEA is to promote merit, not to reflect government policy—except of course the policy that art enhances a society's political and aesthetic experience. To argue that any other criteria should be the basis of funding decisions would be to say either that the NEA exists to indoctrinate the American people through the promotion of nonthreatening art, or that the NEA is merely a first-come, first-served benefit program. Neither is the case. Therefore, a distinction can be made between excellence and decency criteria in that funding art based on its decent qualities runs counter to the purpose of the NEA.

Moreover, the government cannot be neutral in funding art because if art can be defined at all, a characteristic of that definition would be excellence.[205] That is, what separates "art"

201. *See* Beschle, *supra* note 52, at 1118 (arguing that the First Amendment requires neutrality, but that neutrality is not clearly defined, and is not the same for different First Amendment protections, such as religion and speech). Professor David Cole argues that because it is vital for citizens to know the government's position on a given issue, absolute government neutrality is as deleterious to application of First Amendment jurisprudence as is unfettered content discrimination. *See* Cole, *supra* note 16, at 681. Professor Cole proposes a "'spheres of neutrality'" approach to this problem, suggesting that in settings like public universities, public forums, and the press, the government should allow a degree of independence to speakers without regard to government funding. *See id.* at 681-82. *But see* Kathleen Sullivan, *A Free Society Doesn't Dictate to Artists*, N.Y. TIMES, May 18, 1990, *reprinted in* CULTURE WARS, *supra* note 23, at 211-12 (arguing that esthetic excellence should be judged on a neutral and nonpartisan basis). Professor Sullivan is incorrect; aesthetic excellence is an example of viewpoint discrimination, and therefore, is not neutral. Nevertheless, such a criterion is the only acceptable one.

202. National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. §§ 951-968 (1994)).

203. MARJORIE HEINS, SEX, SIN AND BLASPHEMY: A GUIDE TO AMERICA'S CENSORSHIP WARS 117 (1993).

204. *See* 20 U.S.C. § 954(c)(1) (1994).

205. Refer to notes 66-67 *supra* and accompanying text (distinguishing excellence from decency).

from everything else is that in some way "art" excels; it is more beautiful, more stirring, more shocking, more ironic, more dangerous, even more banal than other modes (or manifestations) of human expression. The point is that the government decision to fund art necessarily requires the funding of excellence. To award grant money based upon any other criteria would be to create an agency that funds something other than art. With the enactment and subsequent affirmation of 954(d)(1), perhaps the NEA should be newly christened the NESE—the National Endowment for Soothing Expression.

2. A Liberal Society Requires Funding of Art or Any Speech that Vitalizes Public Debate. In considering the relationship between democracy and culture, philosophy professor Richard Bernstein notes John Dewey's concern with a symbiotic decline in culture and democracy.[206] Citing Dewey, Professor Bernstein adds:

> The greatest threat to democracy, thought Dewey, came from inside, rather than from any outside force. Herein lies the paradox of democracy, which has no final solution: democracy can only exist as a moral ideal, not simply as a set of institutions. There must be some underlying consensus, some willingness to talk, to listen, and to engage in rational persuasion; without some set of procedures there can be no democracy. At the same time, democracy needs—indeed requires—controversy. It needs the imagination of different opinions. In order for a democracy to live and flourish, it must work to foster real controversy, which is based on different conceptions of the good life, of what is good for the public.[207]

The First Amendment is an embodiment of this liberal value at the core of American society. The greatest value of the First Amendment is that, "[m]ore than any other single provision of the Constitution, [it] commits the government to fundamental liberal values."[208] These values include a tolerance of unorthodox points of view, and a distaste for repressing as untrue ideas and opinions that are in flux, those that are "becoming."[209] The commitment of the First Amendment, then, is to encourage

206. *See* RICHARD BERNSTEIN, AM. COUNCIL FOR ARTS PUB. F. PROGRAM, THE ARTS AND HUMANITIES UNDER FIRE: NEW ARGUMENTS FOR GOVERNMENT SUPPORT 6 (2000) (noting that Dewey thought as each institution—democracy and culture—declines, it concomitantly engenders the decline of the other).

207. *Id*. (emphasis added).

208. Beschle, *supra* note 52, at 1130.

209. *See id*.

vigorous public debate, given that few, if any, ideas in society are settled.[210] The NEA furthers this goal because art often shocks or disturbs mainstream society. In short, the government should fund art because artistic expression is speech that adds to public debate. Conversely, a government program that funds only "decent and respectful" art will add nothing but surplusage to public debate; such a program acts merely as an echo, Yes, speech is fostered, but at the expense of debate, inquiry and criticism—the hallmark of rational, pragmatic public expression. As Professor Cole notes, the danger of allowing content discrimination in arts funding lies "in the indoctrinating effect of a monopolized marketplace of ideas."[211]

Moreover, public debate requires both speakers and listeners.[212] In a liberal society, government-funded speech creates possibilities for more inclusive public debate; the government can use its great resources to bring speech to people and places that otherwise would not hear such expression.[213] The line between educating the public and indoctrinating them, however, can be narrow.[214] An unfettered NEA effects the former, bringing challenging and difficult art to all parts of the country. An NEA under the auspices of Section 954(d)(1) speaks to the latter ideal. A government program that funds only decent and respectful speech will in no way increase the number of listeners (and of course speakers) in the public debate.[215] Therefore, the richness and vigor of such debate is diminished, and the purpose of the First Amendment is lost, or rendered impotent.

3. Government Funding of Art Should Be Unrestricted Because Controversial Art Often Deals with "Taboo" Subjects. A corollary to the argument that a democratic society requires unfettered, government-sponsored public debate[216] is found in the

210. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 3 (1996). Professor Fiss argues that speech should be valued in a democratic society not because it indulges individualistic self-expression but because "it is essential for collective self-determination." *Id*.

211. Cole, *supra* note 16, at 680.

212. *See* FISS, *supra* note 210, at 3 (adding that First Amendment theory must take notice of the potential conflict between the interests of speakers and listeners).

213. *See* Beschle, *supra* note 52, at 1137-39.

214. *See* HUGHES, *supra* note 5, at 97-105.

215. The original proponents of the NEA felt that only by making "the end product [of funded art] the sole responsibility of the performing artists" could Congress "fulfill the dreams of the American people to make available the fruits of culture to all [ ] citizens." 111 CONG. REC. (1965) (statement of Rep. Helstoski)

216. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (per curiam) (noting that the use of public money to enlarge public discussion is vital to a self governing people).

idea that much controversial art deals with difficult subjects existing on the periphery—if at all—of society.[217] Most of Robert Mapplethorpe's pictures did not cause an uproar; the vitriol was directed only at those photos depicting homoerotic and sadomasochistic acts, and those involving biracial homosexual couples.[218] Moreover, it seems unlikely that Serrano's "Piss Christ" would have caused any controversy if in the photograph something besides a sacred Christian icon were shown immersed in urine.[219] These images speak about values and ideas that mainstream society finds offensive or intolerable.

Homosexuality and religious criticism, however, are legitimate subjects for public debate. Moreover, when the government funds such challenging expression, it gives a voice to marginalized or powerless people, thereby simultaneously increasing public debate and political power.[220] Thus, the NEA can increase cultural equity both for speaker and listener by furthering access to art of people of differing backgrounds and viewpoints, by people with differing backgrounds and viewpoints.[221] As Professor Louis Hartz points out, the basic ethical problem of a liberal society does not concern the tyranny of the majority so much as the tyranny of unanimity.[222] Lack of knowledge or recognition of differences in society fosters such unanimity.[223] The NEA can and should serve as an instrumentality disseminating such knowledge.

This Note has argued that any restrictions the government might place on funding in the arts context would be detrimental for society both because free expression would be chilled—and in

217. *See* Bolton, *supra* note 28, at 5.

218. *See* Philip Brookman, *Preface to* CULTURE WARS, *supra* note 23, at xvii (quoting one of the few offended reviewers as stating, "'I've been here four times already and this show disgusts me more each time I see it'").

219. *See* Robert Brustein, *Don't Punish the Arts*, N.Y. TIMES, June 23, 1989, *reprinted in* CULTURE WARS, *supra* note 16, at 42 (revealing that even long time "friend of the arts" Congressional Representative Sidney R. Yates reacted negatively to Serrano's *Piss Christ*).

220. *See* Bolton, *supra* note 28, at 5.

221. *See* Margaret Jane Wyszomirski & Kevin V. Mulcahy, *The Organization of Public Support for the Arts*, *in* AMERICA'S COMMITMENT TO CULTURE: GOVERNMENT AND THE ARTS, 121, 138 (Kevin V. Mulcahy & Margaret Jane Wyszomirski eds., 1995) (anticipating that this function will become even more challenging as demographic diversity increases).

222. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 11 (1955). Professor Hartz formulates a liberal society that rejects Puritanism and stasis in favor of a pragmatic ideal of values in flux. *See generally id.* at 3-32.

223. *See, e.g.*, HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 34-35 (Viking Press 1963) (describing the Nazi government's methodical and complete social isolation of Jews during 1935 and the belief among many Jews that under such conditions they "would be able to live unmolested").

a liberal society free speech, especially criticism of the government, is critical—and because the resultant banal art would stand as a symbol of government repression, much like the state-sponsored and approved art of Nazi Germany, Fascist Italy, and Stalinist Russia.[224] In short, the government should not fund banal art.[225] An argument can be made however, that the art involved in the *Finley* case,[226] and the art that began the controversy about the NEA, is such banal and meaningless art. Critic Martha Bayles makes such an argument. For her, Karen Finley smearing chocolate on her naked body is not so much an example of *"epater les bourgeoisie"*[227] as it is a retread of 100 years of modernism.[228] As Bayles points out, when Frank Wedekind presented his version of performance art at the turn of the century—a one-man show wherein he lambasted the government, cursed profanely, urinated, and masturbated—or in 1910, when Filippo Marinette ascended St. Mark's cathedral in Venice, spewing leaflets critical of architectural tradition—and vowing to "'go out into the street, launch assaults . . . and introduce the fisticuff into the artistic battle'"—such acts were shocking, an attempt, "to jettison the past, to mock aesthetic standards, to provoke the audience, to erase the line between art and life, and to exploit the shock potential of the mass media."[229] According to Bayles, the difference between the beginnings of Modernism and current "shocking" art is that, whereas the

224. *See, e.g.*, HUGHES, *supra* note 5, at 97-105 (describing the criminalization of most art forms by Stalin, glorification of the Fascist regime by Mussolini, and Hitler's reflection of unified, regular ideology through neoclassic architecture).

225. And, of course, prior to the controversies in the late 1980s and early 1990s, Congress agreed, given that the sole criteria for an award were artistic excellence and merit.

226. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 574-75 (1998) (listing works with homoerotic, sadomasochistic, and anti-religious themes as the impetus for Section 954(d)(1)).

227. A famous French expression concerning art meaning "shock the middle class." *See* J.E. MANSION, HARRAP'S NEW STANDARD FRENCH AND ENGLISH DICTIONARY 48 (R. P. L. Ledesert & Margaret Ledesert eds., Charles Scribner's Sons 1973).

228. *See* Bayles, *supra* note 12, at 18 (sketching several accounts of shocking artistic expression from the turn of the twentieth century that mirror today's scandals).

229. *Id* at 18. Bayles's collection of vignettes also includes Piero Mazoni peddling jars of excrement and Marina Abramovic's 1974 performance in Naples in which she allowed spectators to arm themselves with razor blades and slash her bare skin. *See id*. Earlier examples of art that shocked the conscience include Edouard Manet's *Dejeuner sur l'Herbe* ("Luncheon on the Grass"), which depicts a nude female enjoying a picnic with two clothed males, *see* HARTT, *supra* note 2, at 841-42, and, in a different medium, Igor Stravinsky's *The Rite of Spring*, which inspired "riotous behavior" during its 1913 premier, *see* MICHAEL OLIVER, IGOR STRAVINSKY 58-64 (1995).

former was truly revolutionary, today's shock art has no one left to shock, except through obscenity.[230] That is, although the middle class might not want to pay for Karen Finley to have the opportunity to paint her bosom with candy, her opportunity to do so on her own, and call it art no less, is unquestioned by society.[231] In other words, the only shock to the middle class in such "shock art" is having to foot the bill for it. Therefore, Bayles argues, these recycled cliches of early modern art do not shock in any positive sense; they do not challenge society's values.[232] Instead, for Bayles, they merely depict or represent the obscene.[233] But, Bayles does not argue that such work is obscene by the standards of the *Miller* test; she looks to Professor Harry Clor's definition of obscenity to challenge the efficacy of current "shock art."[234] Professor Clor defines obscenity as degrading or making a public display of certain human dimensions of life such as sex, defecation, death, and birth, so that the larger human context of such acts is lost.[235] For Bayles, obscenity thus defined is shocking because it induces shame, a natural response to "nakedness, eroticism, and suffering."[236] Moreover, she sees art that tries to shock in an era when people are willing to accept anything as art (as long as they do not have to pay for it) as merely exploitive; for Bayles, artists who are creating what she sees as obscene art try to induce a reaction of repression, but merely engender shame.[237] Finally, Bayles notes the irony of an artist purporting to disrupt the social order and then complaining when the society she wishes to destabilize will not pay her bills.[238]

This is an interesting—and funny—argument. And to an

230. *See* Bayles, *supra* note 12, at 20.

231. *See id*. at 20. Bayles believes "[m]ost of us accept, however dubiously, the right of artists to do anything they want." *Id*.

232. *See* Bayles, *supra* note 12, at 20 (explaining that artists like Karen Finley exploit their audiences' sense of shame—an apolitically universal sensibility—but do nothing to challenge the political beliefs of those in power).

233. *See id*.

234. *See id*. (distinguishing Professor Clor's definition of obscenity from the one adopted by the Supreme Court).

235. *See* HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 225 (1969). In contrast, the Supreme Court's definition of obscene essentializes "sexual conduct" depicted in a particular manner and requires that such conduct be devoid of "serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

236. Bayles, *supra* note 12, at 20.

237. *See id*.

238. *See id*. (attributing to George Orwell the observation that "there are some ideas so preposterous that only an intellectual could believe them"). Bayles adds, "'[o]r an NEA grantee.'" *Id*.

extent, Bayles is correct; breasts dipped in chocolate and then displayed as a statement of artistic revolution and political fury does not so much stretch the limits of bourgeois notions of art, as much as strain the credulity of all but the hopelessly sycophantic. Nevertheless, while some controversial postmodern art is not so much shocking to the social order as it is pointless, ridiculous, or just gross, much controversial art deals with issues and groups at the margins of society—homosexuals, atheists, or those who denounce the religious or social order.[239] Bayles correctly denounces tepid, derivative ranting served-up as blisteringly original anti-hegemonic art, but fails to recognize that at least some of what she abhors is repellent to the bourgeoisie not because they understand it as unoriginal or shame-inducing junk that they choose not to support, but because in spite of its silliness, it also attacks the majority's sacred values.[240] In other words, the "art" of Karen Finley et al. may indeed be nonsense, but at least some of it strikes a nerve and causes at least some faction of the "majority" to call for its suppression. And that is a problem. America's commitment to a public debate that resonates with the voices of the periphery, and not just the voices of the mainstream, rests in part on a continued commitment to support a traditional avenue for expression of marginalized groups—the NEA.

D. The Potential Impact of 20 U.S.C. § 954(d)(1)

It is unclear from the majority opinion whether the holding in *Finley* is broad or narrow. There can be two scenarios, however, in which this decision has a potential effect: (1) specifically in arts funding; and (2) given the Courts' reaffirmation of *Rust* and limitation of *Rosenberger*, the constitutionality of the NEA.

1. Arts Funding After Finley. Clearly the Court's decision in *Finley* will have a chilling effect on artistic expression. An NEA grant is an imprimatur of sorts; receipt of an NEA grant sends a message to the art world that the artist is worthy and respectable.[241] Such an imprimatur often leads to greater

239. *See* Bolton, *supra* note 28, at 5.

240. *See generally Art of Politics on Display in Feud Over New York Museum Exhibit*, HOUS. CHRON., Sept. 28, 1999, at 8A (describing the controversy surrounding a picture of the Virgin Mary surrounded by elephant feces; the image caused a furor with many who viewed it as an attack on Catholicism); *see also* CULTURE WARS, *supra* note 16 (reprinting apoplectic diatribes by such conservative luminaries as Pat Buchanan and Rev. Donald Wildmon, who see art such as Serrano's *Piss Christ* as nothing more than an attack on Christian values).

opportunities for private funding.[242] Moreover, NEA grants are often matching grants.[243] Therefore, in whatever conditional manner the grants are disbursed, it is likely that artists will continue to seek NEA funding. It follows therefore, that if NEA grant money continues to be highly sought after, artists will conform their work to whatever expectations they think the government requires.[244]

This is troubling for a number of reasons. Even without a drastic interpretation and application of Section 954(d)(1), as the *Finley* respondents pointed out, an artist seeking NEA grant money will be judged on the entire body of her work, not just the work for which she is seeking a grant.[245] Necessarily then, an artist will try to conform as much of her work as possible to what she thinks the NEA wants. In this way the chill on expression will be on art outside the scope of government funding; clearly, this is an example of direct content discrimination outside of the subsidy context.[246]

Furthermore, artists whose aesthetic impulse leads them into territory that the government disfavors because it is indecent or disrespectful may forgo altogether an attempt to secure an NEA grant. Such artists may find it concomitantly difficult to secure private funding.[247] In such a scenario, the rigorous public debate envisioned by the First Amendment will be diminished; without funding of any kind, it is a virtual certainty that such difficult or challenging art will be neither expressed nor heard.

After *Finley*, it will not be difficult for artists to judge what the terms "decency and respect" mean. Over time, a body of funded and unfunded art will develop defining them. An artist seeking a grant need only look to what the NEA tends to favor to formulate an understanding of the terms, and then conform her

241. *See* Wyszomirski & Mulcahy, *supra* note 221, at 138.

242. *See id.*

243. *See* 145 CONG. REC. H5488 (daily ed. July 14, 1999) (statement of Rep. Woolsey) (claiming that NEA funds leverage 11 times as many private dollars); *id.* at H5489 (statement of Rep. Nadler).

244. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 621 (1998) (Souter, J., dissenting) ("In the world of NEA funding, this is so because the makers or exhibitors of potentially controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether.").

245. *See* Respondents' Brief at *8-9, 15, 49, National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (No. 97-371), *available in* 1998 WL 47281.

246. *See Finley*, 524 U.S. at 621-22 (Souter, J., dissenting) ("'[T]he NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors. . . .'" (second alteration in original) (quoting Bella Lewitsky Dance Foundation v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1991))).

247. *See id.* at 622.

work to the dictates of the government to secure a grant. Ultimately, then, any application of Section 954(d)(1), even the current interpretation of the statute as requiring only diverse advisory panels, can lead to what Justice Souter describes as a "timid esthetic."[248]

An example of such *realpolitik*—the arts community bending to political pressure—may exist in the words of current NEA Chairperson, William Ivey. In an October 1993 interview, Ivey put an optimistic face on the future of the NEA. Citing a strong economy and a balanced budget, Ivey claimed, "'the politics of anger against the NEA haven't held up and don't seem to be playing so well . . . . Slade Gorton is a great example of that.'"[249] The article then noted that Senator Gorton of Washington, once an NEA foe, later played a key role in "saving it."[250] Of course, many in the arts community would argue that the NEA has not been saved, and that the Supreme Court's affirmation of Section 954(d)(1) in *Finley* has all but ended government support of artistic excellence.[251] William Ivey wants to look on the bright side—and his cheery disposition reflects perhaps the legacy of *Finley*; his rhetoric in the interview centered on "diversity."[252] Ivey stated, "'Honoring our diverse traditions must be a given. We have to look for value in each tradition . . . . In our democracy, there is the ideal that no matter where you are from, whether you are rich or poor, your cultural heritage has standing.'"[253] Moreover, Ivey opined, "'The NEA has to line up all the great cultural traditions on our shores to see what is best in each tradition . . . . It is the great challenge in a democracy to nurture not one single culture but all of them.'"[254] Does the NEA chairperson care about artistic excellence? Apparently not. It appears as though he is parroting the Section 954(d)(1) line. No wonder Slade Gorton is now an enthusiastic supporter of the NEA; its head has seen the light, and respects diversity, not merit. Although Professor Ivey and the NEA respect all that is decent about the diverse traditions of America, it seems the quest for excellence will not be on the Chairperson's agenda—unless, of

248. *Id.* 621 (Souter, J., dissenting).

249. R.M. Campbell, *NEA Chief Optimistic*, HOUS. CHRON., Oct. 23, 1998, (Zest), at 21.

250. *See id.*

251. *See, e.g.*, Karen Finley, *The Art of Offending*, N.Y. TIMES, Nov. 14, 1996, at A23 (arguing that the NEA no longer exists, and "is now merely a facade").

252. *See* Campbell, *supra* note 249, at 21 (characterizing the evolution of art as a product of interaction between cultures, concluding that all cultures should be valued equally).

253. *Id.* (alteration in original).

254. *Id.*

course, excellence serendipitously interrupts his apotheosis of diversity. Such rhetoric seems to ring a death knell for unfettered government support of the arts.

2. Is the NEA Itself Even Constitutional? Beyond the obvious potential repercussions *Finley* has for artists seeking government money, a recent case from the Seventh Circuit had NEA foes brandishing their "death-to-NEA" bats, and zipping them through the air in so many practice swings, all giddy at the prospect of a precedent that would invalidate the constitutionality of the NEA. In *Southworth v. Grebe*,[255] the Seventh Circuit held that a university's use of a mandatory student fee to fund private political groups was a violation of the First Amendment right not to be compelled to subsidize the speech of others.[256] In the case, a group of students sued the University of Wisconsin, alleging that the latter's use of a mandatory student activity fee to fund private political and ideological activities which the objecting students found offensive—socialist, gay and lesbian, and environmental groups—compelled them to subsidize these offensive ideologies.[257] The Seventh Circuit upheld a part of the district courts' injunction against the University barring the school from further funding of private political groups.[258] The court held that "the burden on the plaintiff's First Amendment right to 'freedom of belief' outweighs any governmental interest" in compelled funding.[259] As George Will—no fan of the NEA[260]—noted, a broad reading of the "right to believe" enunciated in *Southworth* might result in the NEA itself being declared unconstitutional.[261]

The Supreme Court, however, did not make George Will's

255. 151 F.3d 717 (7th Cir. 1998), *rev'd*, Board of Regents v. Southworth, 68 U.S.L.W. 4220 (U.S. Mar. 22, 2000) (No. 98-1189).

256. *See id.* at 732-33 (concluding that under a three-prong analysis assessing germaneness, vital policy interests of the government, and burdening of free speech, the Regents could not use the allocable portion of the mandatory student activity fee "to fund organizations which engage in political or ideological activities, advocacy, or speech").

257. *See id.* at 718-20 (reviewing mechanisms used to allocate funds as well as specific instances of political activism undertaken by the student organizations complained of by the objecting students).

258. *See id.* at 734-35 (upholding the injunction's prohibition against using objecting students' mandatory activity fees, but lifting the portion of the injunction detailing measures the Regents must take to comply with the injunction).

259. *Id.* at 735.

260. *See* George F. Will, *The Helms Bludgeon*, WASH. POST, Aug. 3, 1989, at A27 (suggesting that because of a lack of standards, the NEA should be renamed the NEE—the National Endowment for Everything).

261. *See* George F. Will, *When Conservatives Go to Court*, WASH. POST, Oct. 22, 1998, at A25.

day. the Court reversed the Seventh Circuit nine to zero in *Board of Regents v. Southworth*.[262] Noting that the University had in place a viewpoint neutral requirement, which thus protected students' First Amendment interests, and that the school had secured the fee "for the sole purpose of facilitating the free and open exchange of ideas by, and among its students," the Court rejected the respondent's argument that charging the fee was a violation of their First Amendment rights.[263]

Thus, the potential irony of *Southworth*—at the appellate level, the respondents' right of free expression gave them the potential to silence the most marginalized voices in society (all in the name of free speech)—has become pitiable absurdity in light of *Finley*. The Court acknowledged that the University of Wisconsin, like the government via the NEA, furthers its mission and educates its constituents by encouraging a wide range of speech.[264] According to the Supreme Court, however, only the former entity need be concerned about viewpoint neutrality. The Court framed the issue in *Southworth* as "whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech."[265] And in answering in the affirmative, the Court, citing *Rosenberger*, noted that "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, *all in the interest of open discussion, it may not prefer some viewpoints to others*."[266] Presumably, the Court forgot to mention its precedent in *Finley* that preferring one viewpoint over another is permissible when one viewpoint is decent or respectful of the diverse beliefs of the American people and the other is not.[267]

Southworth clearly means that the NEA is constitutional; the NEA bashers did not get exactly what they wanted. But, it is also clear that the *Rosenberger-Southworth* line of cases does not include *Finley*—at least not officially.[268] Thus, the NEA will continue to sport its government tag and the public debate will suffer from it.

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262. *See* Board of Regents v. Southworth, 68 U.S.L.W. 4220 (U.S. Mar. 22, 2000) (No. 98-1189).

263. *Id.* at 4223-24.

264. *See id.* at 4224 ("[I]ts mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects . . . .").

265. *Id.* at 4225.

266. *Id.* (emphasis added).

267. Refer to Part III.B.1 (discussing the implications of the Court's holding in *Finley*).

268. *See Southworth*, 68 U.S.L.W. at 4225 ("The Court has not held that when the government speaks the rules we have discussed come into play.").

IV. CONCLUSION

The government cannot restrict the content of artistic expression. Nor can it condition an award of government money on the forfeiture of a fundamental constitutional right. Section 954(d)(1) is an unconstitutional condition on free speech, and the Supreme Court was wrong in deciding otherwise in *Finley*. Outside these legal boundaries, the decision is wrong because it will inhibit open debate in society, especially among those on society's fringes. When President Johnson signed the Arts and Humanities Bill,[269] he declared, "'[a]rt is a nation's most precious heritage. For it is in our works of art that we reveal to ourselves, and to others, the inner vision which guides us as a nation.'"[270] The struggle in *Finley* ultimately is the struggle to reflect this inner vision in a particular way. Should the national vision that art reflects be the art of compromise, or the unfettered freedom of expression? The amended language of Section 954(d)(1), now approved by our highest Court, is a reflection of the former. Perhaps that is as it should be. The genius of our politics is compromise; such genius brought forth a nation where the cherished ideals of a diverse people could flourish.

Nevertheless, the art that our nation will sponsor under Section 954(d)(1) will also reflect this compromise, a concept that produces political viability, but banality and repetition, not art. Moreover, what is produced by NEA funding under the rubric of art will not reflect the sacrosanct values of our nation. Perhaps the most important of these values is the right of anyone to speak their mind without fear of retribution. Artistic expression sponsored by the federal government will now reflect fear of expression that is not respectful and decent, and public debate will suffer from a dearth of voices. The substitute value reflected by the result of NEA grants will be that our nation is decent, respectful—except of one's right to speak her mind—and afraid of what anyone outside the mainstream of society may want to express. The irony of such a reflection would be funny were it not also tragic.

Neil C. Patten

269. Pub. L. No. 89-209, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. §§ 951-968 (1994)).

270. Joan Mondale, *Introduction* to ASSOCIATED COUNCILS OF THE ARTS, CARTER ON THE ARTS 9 (1977).