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THE CULTURAL WAR OVER NEA FUNDING: ILLOGICAL STATUTORY DECONSTRUCTION ERODES EXPRESSIVE FREEDOM*

Gary D. Allison†

I can seldom do positive good to another person without limiting him. I can, it is true, simply give him money, but even in this extreme case, where I seem to place no bonds on him, he inevitably faces the question of what conduct on his part will lead me to give money to him again.¹

I. INTRODUCTION

National Endowment of the Arts v. Finley² presented the United States Supreme Court with an opportunity to articulate clear standards as to whether the Free Speech Clause of the First Amendment³ permits the viewpoints of applicants to be a factor in awarding non-entitlement government benefits. Congress supplied this opportunity in 1990 when it amended § 5(d) of the National Foundation on the Arts and Humanities Act (NEA Act),⁴ governing applications for funding under the National Endowment of the Arts’ (NEA) programs of contracts, grants-in-aid, or loans, so that it states:

(d) Application for payment; regulations and procedures.

No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of

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decency and respect for the diverse beliefs and values of the American public [hereinafter referred to as the decency and respect clause]; and

(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment of the Arts [hereinafter referred to as the obscenity clause].

The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the project, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.\(^5\)

Section 5(d) was amended in response to intense public anger generated by controversial works of two photographers, Robert Mapplethorpe and Andres Serrano.\(^6\) Both artists received support from organizations which had obtained NEA financial assistance.\(^7\) Up roar over the funding of these controversial works prompted Congress to enact a much more restrictive regulation of the NEA's financial assistance process,\(^8\) but a federal district court judge declared the NEA's certification process for implementing this requirement to be unconstitutionally vague,\(^9\) and the decision was not appealed.\(^10\) As a consequence, § 5(d), as amended, reflected Congress' desire to enact legislation capable of withstanding constitutional scrutiny\(^11\)

6. Mapplethorpe's work, entitled The Perfect Moment, featured shocking homoerotic images. Serrano's work, entitled Piss Christ, was a photograph of a plastic cross immersed in a beaker containing the artist's urine. See Endowment, 118 S. Ct. at 2172.
7. Mapplethorpe's work was given a retrospective exhibit by the Institute of Contemporary Art and the University of Pennsylvania with help of a $30,000 NEA grant. Serrano received a $15,000 grant from the Southeast Center for Contemporary Art. See id.
   (a) None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.
10. See Endowment, 118 S. Ct. at 2173.
11. In extolling the virtues of his amendment, Rep. Coleman stated:

   Let me say that there are some, including the gentleman from California [Mr. Rohrabacher], who want to put into legislative language specific activities and projects which may not receive funding by the NEA. Let me say that if we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member's aversions end, others with different sensibilities and with different values begin.

   So I do not think any of us want to get into the business of determining which pieces of art
which would prevent the NEA from being financially involved with works similar to those of Mapplethorpe and Serrano.\textsuperscript{12}

Shortly after it was enacted, the decency and respect clause was constitutionally attacked by four performance artists in a lawsuit brought against the NEA for allegedly "violate[ing] their First Amendment rights by denying their applications on impermissible political grounds and by failing to adhere to procedural safeguards mandated by the First Amendment."\textsuperscript{13} Indeed, the controversial nature of these artists' past performances had drawn political fire,\textsuperscript{14} leading the Chairman of the NEA to deny their applications after they had received funding approval from an NEA review panel.\textsuperscript{15}

Thus, it appeared that the stage was set for the federal courts to provide a straightforward analysis of whether the First Amendment permits government to use viewpoint based criteria in determining who is eligible to receive non-entitlement benefits. The language of the decency and respect clause seems clearly to require the NEA to take "into consideration general standards of decency and respect for the diverse beliefs and values of the American public"\textsuperscript{16} when judging the merits of applicants for NEA funding. Congressional debate revealed that the decency and

\footnotesize{

\textsuperscript{12} For example, Rep. Coleman, the cosponsor of the amendment, stated in debate, "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds. That is a statement of common sense, of prudence, of sensitivity to the beliefs and values of those who, after all, pay the taxes to support this Federal agency." \textit{Id.}

\textsuperscript{13} Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1462 (C.D. Cal. 1992) [hereinafter \textit{Finley Trial}].

\textsuperscript{14} The performance artists included “Karen Finley and Holly Hughes of New York; Tim Miller of Santa Monica, and John Fleck of Los Angeles. The work of Hughes, Miller and Fleck is political and gay in its orientation. Finley’s is stridently feminist, with strong political overtones. Most of the artists occasionally employ on-stage partial nudity as part of their work.” 136 \textit{Cong. Rec. H9,420} (Oct. 11, 1990) (quoting Allan Parochini, \textit{Frohnmayer Denies NEA 4’ Grant Appeals, LOS ANGELES TIMES, Oct. 11, 1990}). More specifically, “[t]he oeuvres d’art for which the four individual plaintiffs in this case sought funding have been described as follows:

Finley’s controversial show, ‘We Keep Our Victims Ready,’ contains three segments. In the second segment, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. Holly Hughes’ monologue ‘World Without End’ is a somewhat graphic recollection of the artist’s realization of her lesbianism and reminiscence of her mother’s sexuality. John Fleck, in his stage performance ‘Blessed Are All the Little Fishes,’ confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance ‘Some Golden States’ from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols.

\textit{Endowment}, 118 S. Ct. at 2183 n.2 (Scalia, J., concurring) (quoting from Note, 48 \textit{WASH. & LEE L. REV.} 1545, 1546, n.2 (1991) (citations omitted)).

\textsuperscript{15} According to one account, “Frohnmayer’s decision to reject the fellowships in July came within days after he reportedly told a group of arts leaders in Seattle that ‘political’ problems between the NEA and Congress would make it necessary to scuttle the Finley fellowship application. However, accounts of what Frohnmayer said at the meeting have varied. Some people in attendance [sic] recalled the [sic] Frohnmayer mentioned Finley and the political need to reject grants in detail, others said they remembered no specific discussion of Finley.” 136 \textit{Cong. Rec. H9,420} (Oct. 11, 1990) (quoting Allan Parochini, \textit{Frohnmayer Denies NEA 4’ Grant Appeals, LOS ANGELES TIMES, Oct. 11, 1990}).

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respect clause was designed to prevent the NEA from providing financial assistance to those who would create, perform or display works of art that many Americans would regard as indecent or lacking in respect for the beliefs and values of a significant segment of the American public. The denials of the four plaintiffs' NEA funding applications were apparently orchestrated by the NEA's Chairman out of concern that their works would be deemed indecent by Congress, if not by large segments of the public. Under these circumstances, it appeared that the Endowment case would turn on the issue of whether non-entitlement government benefits programs are so functionally unique in relation to traditional First Amendment doctrines and policies that they should be accorded a patronage exception from First Amendment scrutiny, even if viewpoint selection criteria are used to determine who should be their beneficiaries.

It would not be appropriate for the Court to embrace a patronage exception analysis to determine the constitutionality of a non-entitlement government benefit program if traditional First Amendment analytical techniques are applicable. Specifically, a patronage exception analysis should not be considered if the government program in question: (1) uses viewpoint discrimination to deny some people access to a traditional sphere of free expression, such as a public forum or a government program designed to generate a diversity of viewpoints; or (2) retains

17. See Congressional remarks quoted supra note 11.
18. See supra notes 14-15 and accompanying text.
19. "Nothing in the Constitution requires the Government to freely grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985) (citing Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 136 (1977)). "The Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." Id. at 800. "Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." Id. The Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." Id. at 802.

"Traditional public fora are those places which..." Id. (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1982)). "Public streets and parks fall into this category." Id. (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

"[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." Id. (citing Perry, 460 U.S. at 45, 46 n.7). The government creates a public forum by designation "only by intentionally opening a nontraditional forum for public discourse." Id. (citing Perry, 460 U.S. at 46). "Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Id. (citing Perry, 460 U.S. at 46). "The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent." Id.

"Not every instrumentality used for communication, however, is a...public forum...." Id. at 803 (citing U.S. Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 130 n.6. (1981)). "We will not find that a public forum has been created in the face of clear evidence of a contrary intent...nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." Id. (citing North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977)). Key factors to whether government property or a government controlled means of communication is a public forum include whether government limits access to them, or "where the principal function of the property [or communication channel] would be disrupted by [the] expressive activity [at issue]." Id. at 804.

"Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling [government] interest and the exclusion is narrowly drawn to achieve that interest." Id. at 800 (citing Perry, 460 U.S. at 45). This strict scrutiny standard also applies where the government seeks to exclude a speaker from a designated public forum. See id. at 800. "Access to
a private grantee for purposes of disseminating a favored government message; or (3) punishes potential beneficiaries for exercising their free speech rights.

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a nonpublic forum ... can be restricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." [Id. (citing Perry, 460 U.S. at 46).]

In the recent case of Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995), the U.S. Supreme Court relied on precedents from cases involving designated, limited, and public fora in determining that it was unconstitutional for the University of Virginia to deny a publication with a decidedly religious viewpoint access from a school sponsored program run by students from the Student Activity Fund (SAF) which subsidized student publications. See Rosenberger, 515 U.S. at 829-37. By characterizing the SAF as "a forum more in a metaphysical than in a spatial or geographic sense," Id. at 830, the Court left open the possibility that programs for subsidizing the expression of others are not designated public fora. Id. Compare Justice Scalia's views that Rosenberger is distinguishable from Endowment because Rosenberger involved a limited public forum, see Endowment, 118 S. Ct. at 2184 (Scalia, J., concurring), with Justice Souter's statement that he "cannot agree that the holding of Rosenberger turned on characterizing its metaphorical forum as public in some degree." Endowment, 118 S. Ct. 2192 n.10 (Souter, J., dissenting) (opining that "I[like this case, Rosenberger involved viewpoint discrimination, and we have made it clear that such discrimination is impermissible in all forums, even non-public ones (citing Cornelius, 473 U.S. at 806). ... Accordingly, Rosenberger's brief allusion to forum analysis was in no way determinative of the Court's holding.").

Practically, however, the Court's recent decision makes it difficult to determine whether such government subsidy programs are public fora by stating that "the same principles [as those applied to spatial or geographic public fora] are applicable." Rosenberger, 515 U.S. at 830 (citing Perry, 460 U.S. at 46-47 (forum analysis of a school mail system), and Cornelius, 473 U.S. at 801 (forum analysis of charitable contribution program).

The notion that the government may not discriminate by viewpoint in granting subsidies to generate a diversity of viewpoints was derived from the Ninth Circuit Court of Appeal's interpretation of Rosenberger. See Finley v. National Endowment for the Arts, 100 F.3d 671, 682-83 (9th Cir. 1996) [hereinafter Finley Appeal]. This interpretation was based on language from the majority opinion in Rosenberger that distinguished the subsidy program at issue there with government procured speech in support of its own point of view, to wit: "It does not follow, however, ... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmission of a message it favors but instead expends funds to encourage a diversity of views from private speakers." Rosenberger, 515 U.S. at 834.

Finally, the concept that the government may not impose viewpoint restrictions on subsidies that affect access to traditional spheres of free expression is derived from Rust v. Sullivan, 500 U.S. 173 (1991), wherein the Court justified treating government funding of the dissemination of its own viewpoint differently from attaching speech restrictions on university funding by stating: "[w]e 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 of the First Amendment." Rust, 500 U.S. at 200 (citing Keyishian v. Board of Regents, State Univ. of N.Y., 385 U.S. 589, 603, 605-06 (1967)) (emphasis added). 20. In Rust v. Sullivan, the U.S. Supreme Court held that speech restrictions placed on government grantees to ensure that they convey a government favored message tailored to the purposes of a valid government program is constitutional. See Rust, 500 U.S. at 193-99. The basis of this decision was the Court's view that 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.

Id. at 193.

21. See Endowment, 118 S. Ct. at 2176-77, where the Court compares the effects of the decency and respect clause to those of a municipal criminal ordinance directed against placing symbols on public or private property in order to arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." Id. at 2176 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992)). In so doing, the Court observed that the R.A.V. "provision set forth a clear penalty, proscribed views on particular 'disfavored subjects,'" (quoting R.A.V., 505 U.S. at 391), and "suppressed 'disfavored idea[s], conveyed by a distinctive message.'" (quoting R.A.V., 505 U.S. at 393). Id. "In contrast, the 'decency and respect' criteria do not silence speakers by expressly 'threaten[ing] censorship of ideas.'" Id. (quoting R.A.V., 505 U.S. at 393). See also Finley Trial, 795 F. Supp. at 1463, where the District Judge observed that:

even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedoms of speech or

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(4) imposes prior restraints on, or otherwise chills, the exercise of free speech rights by potential beneficiaries.22

In 1976, the United State Court of Appeals for the First Circuit virtually announced a patronage exception for arts funding programs in Advocates for the Arts v. Thomson, Jr.23 By the time Endowment reached the U.S. Supreme Court, the patronage exception had been rejected by the United States District Court for the Central District of California24 and a three-judge panel of the United States Court of Appeals for the Ninth Circuit,25 in opinions that declared the decency and respect clause to be unconstitutional.26

Time and circumstances seemed ripe for the United States Supreme Court to establish a clear cut precedent regarding the patronage exception for arts funding

associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958). Such interference with constitutional rights is impermissible.

Finley Trial, 795 F. Supp. at 1463. The District Judge then applied these observations to the plaintiffs' complaint to hold that the plaintiffs had stated a claim for relief, for they "complain that their applications were denied based on the content of their past performances, constituting in effect a penalty for past speech." Finley Trial, 795 F. Supp. at 1464.

22. Prior restraints are government attempts to prohibit persons from engaging in specific expressive behavior. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). They are unconstitutional unless drawn to regulate non-expressive behavior the government has a right to regulate. See id. at 153. Moreover, such restraints are also unconstitutional if they make "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official ..." Id. at 151. When the constitutional right involved is Free Speech, a discretionary permit system constitutes "an unconstitutional censorship or prior restraint ...." Id.

Speech may be chilled if it is covered by a statute that is not constitutional in all its possible applications. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992). The U.S. Supreme Court has fashioned the overbreadth doctrine to permit persons to challenge laws that are constitutional as applied to them if the laws also "penalize[s] a substantial amount of speech that is constitutionally protected." Id. at 130 (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)). "This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." Id. at 129 (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985); New York v. Ferber, 458 U.S. 747, 772 (1982)).

Vague laws are those which are written with such little specificity that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what [behavior is prohibited]." Grayned v. City of Rockford, 408 U.S. 104, 108 (1971). "[W]here a vague statute 'abuts[] upon sensitive areas of basic First Amendment freedoms,' (citing Baggett v. Bullitt, 377 U.S. 360, 372 (1964)) it 'operates to inhibit the exercise of [those] freedoms.'" Id. at 109. (citing Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961)). "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." Id. (citing Baggett v. Bullitt, 377 U.S. at 372, quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

23. 532 F.2d 792 (1st Cir. 1976) [hereinafter Advocates]. In Advocates, the Court of Appeals rejected a claim that a magazine's First Amendment rights had been violated by the refusal of the Governor and the Council of New Hampshire to award it a grant-in-aid because it had published a filthy poem in a previous issue. See id. at 793. Responding to the plaintiff's assertion that it had been subjected to a prior restraint, the Court of Appeals stated:

"[P]ublic funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. ... A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to First Amendment protection as "speech," courts have no particular institutional competence warranting case-by-case participation in the allocation of funds."

Id. at 795-96 (citations omitted).


25. See Finley Appeal, 100 F.3d at 681-83.

26. See Finley Trial, 795 F. Supp. at 1476; Finley Appeal, 100 F.3d at 683-84.
programs. Unfortunately, as will be discussed in detail below, the proponents of the decency and respect clause brought to the Supreme Court an array of statutory interpretations supporting the proposition that the decency and respect clause does not create substantial risks that NEA funding decisions will turn on the use of discriminatory viewpoint selection criteria. These arguments were rejected by the lower courts, but they became a prime focus of the Justices who joined in the majority opinion in Endowment, which upheld the constitutionality of the decency and respect clause. As a consequence, the Endowment holding failed to establish a clear cut patronage exception precedent and left in place discriminatory viewpoint selection criteria that give the NEA unbridled discretion to reject funding applications because of the viewpoints expressed in the applicants’ artistic endeavors. The Court saved the decency and respect clause by interpreting it in a manner that relieves the NEA from any obligation to refrain from giving financial assistance to the creation, display, or performance of artistic works that either are indecent or express contempt for the beliefs and values of important segments of the American public.

II. THE MAJORITY’S RESULT-ORIENTED DECONSTRUCTION

A. The Majority Deconstructs Rather Than Interprets the Decency and Respect Clause

As amended, § 954(d)(1) is not a model of grammatical correctness. As Justice Scalia so caustically pointed out, “[t]he phrase ‘taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public’ is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached (unless one jumps out of paragraph (1) to press “Chairperson” into service).”

This awkward phrasing permitted the proponents of the decency and respect clause to argue that the decency and respect standards apply only to the Chairperson’s actions in establishing regulations and procedures governing the application process for securing NEA funding. Acting on this interpretation, the NEA Chairperson determined that the decency and respect clause did not require the

27. See Finley Appeal, 100 F.3d at 676-77, 680-81.
29. See Endowment, 118 S. Ct. at 2175-77.
30. See id. at 2180.
31. See id. at 2193 (Souter, J., dissenting) (observing that “[t]he NEA does not offer a list of reasons when it denies a grant application, and an artist or exhibitor whose subject raises a hint of controversy can never know for sure whether the decency and respect criteria played a part in any decision by the NEA to deny funding.”).
32. See id. at 2180 (Scalia, J., concurring) (complaining that “[t]he operation was a success, but the patient died.” What such a procedure is to medicine, the Court’s opinion in this case is to law. It sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more.”).
33. Endowment, 118 S. Ct. at 2180.
34. See Finley Appeal, 100 F.3d at 676.
regulations governing the NEA funding process to be changed because the diversity of backgrounds and viewpoints among the members of the NEA advisory panels would ensure that funding decisions concerning "the artistic excellence and merit of individual applications would . . . reflect general standards of decency and show respect for the diverse beliefs and values of the American public."35

Moreover, the proponents argued that if the decency and respect criteria were intended by Congress to be applied to funding decisions, the criteria were to be used as factors in judging the artistic excellence or merit of the applications, rather than as separate criteria on which applications would succeed or fail.36 The point of this argument was that the artistic excellence and merit criteria were themselves so vague that little, if any, dangers to free expression were added by requiring the artistic criteria to be informed somewhat by the inherently vague decency and respect standards.37

Finally, the proponents argued that the 'take into consideration' command is "merely hortatory, . . . stop[p]ing[ ] well short of [imposing] an absolute restriction."38 As such, the NEA may make "awards to projects that might be deemed 'indecent' or 'disrespectful,' [and is not required] to place conditions on grants, [and need not give those] factors . . . any particular weight in reviewing an application."39

The lower courts rejected the proponents' interpretations of the decency and respect clause. First, they both found that the plain meaning of the statute makes it mandatory that the NEA consider whether works are indecent or disrespectful in making determinations that applications have artistic excellence or merit.40 Second, both courts found that adopting the NEA's view that the decency and respect criteria were satisfied simply by having diverse advisory panels would render superfluous another provision of the NEA Act which "requires that the composition of Peer Review Panels reflect 'wide geographic, ethnic, and minority representation as well as . . . diverse artistic and cultural points of view.'"41 In addition, the District Court found that "[i]t defies logic to argue that explicit additions to the 'artistic merit' standard are merely implicit in the assessment of artistic merit, [for h]ad Congress believed that 'decency' and 'respect for diverse views' were naturally embedded in

35. Id.
36. See Finley Trial, 795 F. Supp. at 1470 ("Defendants contend . . . that 'decency' and 'respect' . . . are factors only to the extent that they are implicit in the assessment of artistic merit.").
37. See Endowment, 118 S. Ct. at 2177 ("Given the varied interpretations of the criteria, and the vague extortion to 'take them into consideration,' it seems unlikely that this provision will introduce any greater element of selectivity than the determination of 'artistic excellence' itself.").
38. Id. at 2175.
39. Id.
40. See Finley Trial, 795 F. Supp. at 1470 (backing this plain meaning interpretation). The judge cited, in general, to comments made during the debate by members of the House of Representatives as to whether to enact the decency and respect clause. The judge found "that the 'decency' provision was intended to act as a bar to funding controversial projects or artists." Id. at 1470 n.16 (citing 136 CONG. REC. H9,410-57 (Oct. 11, 1990)). See also Finley Appeal, 100 F.3d at 676-77 (interpretation backed by the Appeals Court's analysis of the legislative history which led it to conclude that Congress "intended to change the standard NEA applied in judging applications, not simply to ask the NEA to consider the problem.").
41. Finley Trial, 795 F. Supp. at 1471 (discussing the requirements of U.S.C. § 959(c)).
the concept of ‘artistic merit,’ there would be no need to elaborate on that standard.’”

Going further, the Appeals Court expressly rejected the notion that the decency and respect criteria must be upheld because those criteria are no more vague than the artistic excellence and merit criteria and therefore to reject them would require the Court to declare artistic excellence and merit to be unconstitutional as well.

Writing for the majority, Justice O’Connor adopted almost verbatim the proponents’ interpretation of § 954(d)(1). In supporting the proponents’ contentions that the decency and respect standards were merely hortatory, the Court stated:

It is clear . . . that the text of § 954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA’s grant-making authority, it has so done in no uncertain terms. See § 954(d)(2) (“[O]bscenity is without artistic merit, is not protected speech, and shall not be funded.”).

Asserting that her interpretation of § 954(d)(1) was backed by the legislative history of its amendment, Justice O’Connor characterized Congress’ final work product as a provision with criteria that “inform the assessment of artistic merit [but does not] disallow any particular viewpoints.” Thus, Justice O’Connor viewed § 954(d)(1) as legislation that “admonishes the NEA merely to take ‘decency and respect’ into consideration, and . . . was aimed at reforming procedures rather than precluding speech . . .” Finally, after observing that the decency and respect criteria are very subjective, she concluded that “[g]iven the varied interpretations of the criteria, and

42. Finley Trial, 795 F. Supp. at 1471.
43. See Finley Appeal, 100 F.3d at 681 n.18. This notion was raised in the dissenting opinion. See id. at 689 (Kleinfeld, J., dissenting) (“There is no principled way to keep the arts grants but strike the decency and respect clause. Either Congress can provide for arts grants with vague criteria, or it cannot provide for them at all.”).
44. Justice O’Connor’s interpretation of § 954(d)(1) was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Breyer and Ginsburg.
45. Endowment, 118 S. Ct. at 2176.
46. Justice O’Connor asserted that the legislative debate demonstrated that “[t]he legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA’s funding or substantially constraining its grant-making authority.” Id. (citing 136 CONG. REC. 28,626, 28,632, 28,634 (1990)). She noted that an Independent Commission created to advise Congress as to how to respond to the problem of the NEA funding indecent and disrespectful artistic works recommended that “additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as part of a definition of ‘artistic excellence’), rather than isolated and treated as exogenous considerations.” Id. (citing INDEPENDENT COMMISSION, REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS 89 (1990), 3 Record, Doc. No. 151, EX. K).
47. Endowment, 118 S. Ct. at 2176.
48. Id.
49. Id. at 2176-77 (“Respondents assert, for example, that ‘[o]ne would be hard-pressed to find two people in the United States who could agree on what the ‘diverse beliefs and values of the American public’ are, much less on whether a particular work of art ‘respects’ them;’ and they claim that ‘[d]ecency’ is likely to mean something very different to a septuagenarian in Tuscaloosa and a teenager in Las Vegas.” Br. for Resp’ts at 41). The NEA likewise views the considerations enumerated in § 954(d)(1) as susceptible to multiple interpretations. See DEP’T OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS FOR 1992: HEARING BEFORE THE SUBCOMM. ON INTERIOR AND RELATED AGENCIES OF THE HOUSE COMM. ON APPROPRIATIONS, 102d Cong. 234 (1991) (testimony of John Frohmayer) (“[N]o one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions.”).
the vague exhortation to ‘take them into consideration,’ it seems unlikely that this provision will introduce any greater element of selectivity than the determination of ‘artistic excellence’ itself.\textsuperscript{50}

In sum, the lower courts interpreted the decency and respect clause as a Congressional mandate that the NEA may not deem works of art to have artistic merit if it finds they are indecent or disrespectful,\textsuperscript{51} while the Supreme Court interpreted it as merely a Congressional request that the NEA at least think about whether works of art are indecent or disrespectful before finding them to have artistic merit.\textsuperscript{52} Although the differences in these interpretations were subtle, the effects the contrasting interpretations produce are dramatically different. The lower courts believed the decency and respect clause to be a Congressional prohibition against the NEA funding controversial works of art similar to Mapplethorpe’s homoerotic photographs and Serrano’s seemingly anti-Christian photograph.\textsuperscript{53} In contrast, the Supreme Court concluded that the decency and respect clause was an expression of Congressional concern that still left the NEA with total discretion to fund any work of art it finds to have artistic merit, even if similar to Mapplethorpe’s and Serrano’s.\textsuperscript{54} All the courts agreed that the decency and respect criteria were extremely vague.\textsuperscript{55} Their contrasting views of the clause as a prohibition or a mere expression of concern dictated their opposing holdings as to whether the decency and respect clause: (1) unconstitutionally denies artists access to a traditional sphere of free expression, such as a government program designed to generate diversity of viewpoints or a designated public forum;\textsuperscript{56} (2) constitutes a valid condition to ensure that grantees will produce artistic works consistent with government-favored viewpoints tailored to carrying out the purposes of a valid government program;\textsuperscript{57} (3) is unconstitutionally overbroad;\textsuperscript{58} or (4) is unconstitutionally vague.\textsuperscript{59}

\textbf{B. The Majority Rejects Theories of Unconstitutional Access Denial}

Proponents of the decency and respect clause argued “that the denial of plaintiffs’ grant applications does not constitute injury to plaintiffs’ First Amendment interests because the denial is merely a refusal to subsidize plaintiffs’ expressive

\textsuperscript{50} Endowment, 118 S. Ct. at 2177.
\textsuperscript{51} See Finley Appeal, 100 F.3d at 676-77, 679; Finley Trial, 795 F. Supp. at 1470 n.16 and accompanying text.
\textsuperscript{52} See Endowment, 118 S. Ct. at 2176.
\textsuperscript{53} See Finley Appeal, 100 F.3d at 676-77, 680; Finley Trial, 795 F. Supp. at 1470 n.16 and accompanying text.
\textsuperscript{54} See Endowment, 118 S. Ct. at 2176.
\textsuperscript{55} See Endowment, 118 S. Ct. at 2176-77, 2179; Finley Appeal, 100 F.3d at 680-81, 683; Finley Trial, 795 F. Supp. at 1471-72.
\textsuperscript{56} Compare Endowment, 118 S. Ct. at 2178 (distinguishing Endowment from Rosenberger), with Finley Appeal, 100 F.3d at 681-82, and especially 682 n.20, and Finley Trial, 795 F. Supp. at 1473-75.
\textsuperscript{57} Compare Endowment, 118 S. Ct. at 2179, with Finley Appeal, 100 F.3d at 679, 681-83.
\textsuperscript{58} Compare Endowment, 118 S. Ct. at 2177-78, with Finley Appeal, 100 F.3d at 683 n. 24 and accompanying text, and Finley Trial, 795 F. Supp. at 1473-76.
\textsuperscript{59} Compare Endowment, 118 S. Ct. at 2179-80, with Finley Appeal, 100 F.3d at 680-81, 683, and Finley Trial, 795 F. Supp. at 1471-72.
activities—not a barrier to their exercise." In response, opponents of the clause argued that the U.S. Supreme Court has applied First Amendment analysis to government subsidizing of expression where traditional spheres of free expression (public fora and universities) were involved.

The District Court based its holding that the decency and respect clause is subject to First Amendment scrutiny on the opponents' view that the NEA arts funding program possesses the characteristics of a traditional sphere of free expression, as that term was coined in Rust v. Sullivan to describe the role of universities in American life articulated in Keyishian v. Bd. of Regents of the Univ. of the State of N.Y. In Keyishian, the Court expressed its view that free expression within the university is vital to the maintenance of a healthy and prosperous democracy by noting that:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Citing Keyishian, the Court in Rust stated:

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 of the First Amendment.

In reliance on the legislative history and findings of the act creating the NEA, the District Court held that the role of artistic expression in the life of our nation justified treating it as a traditional sphere of free expression after concluding that "[a]rtistic expression, no less than academic speech or journalism, is at the core of a democratic society's cultural and political vitality." The trial court supported this conclusion by quoting from the Report of the Senate Committee that helped create the

60. Finley Trial, 795 F. Supp. at 1463.
61. See id. at 1473.
62. See Finley Trial, 795 F. Supp. at 1473-75.
64. 385 U.S. 589, 603 (1967).
65. Id. (citations omitted).
66. Rust, 500 U.S. at 200 (emphasis added) (citing Keyishian, 385 U.S. at 603, 605-06).
NEA, which described the Committee’s intent as follows:

   It is the intent of the committee that in the administration of this act there be
given the fullest attention to freedom of artistic and humanistic expression. . . .
Countless times in history artists and humanists who were vilified by their
contemporaries because of their innovations in style or mode of expression have
become prophets to a later age.

   Therefore, the committee affirms that the intent of this act should be the
encouragement of free inquiry and expression. The committee wishes to make
clear that conformity for its own sake is not to be encouraged, and that no undue
preference should be given to any particular style or school of thought or
expression. . . . The standard should be artistic and humanistic excellence.68

Further, the District Court opined that from the legislative findings in the NEA Act69
“[i]t is clear . . . artistic expression serves many of the same values central to a
democratic society and underlying the First Amendment as does scholarly expression

68. Id. (citing S. REP. NO. 300, at 3-4 (1965)) (emphasis added).
   parts:

§ 951. Declaration of findings and purposes
The Congress finds and declares the following:

   . . . .

(3) An advanced civilization must not limit its efforts to science and technology alone,
but must give full value and support to the other great branches of scholarly and
cultural activity in order to achieve a better understanding of the past, a better analysis
of the present, and a better view of the future.
(4) Democracy demands wisdom and vision in its citizens. It must therefore foster and
support a form of education, and access to the arts and the humanities, designed to
make people of all backgrounds and wherever located masters of their technology and
not its unthinking servants.

   . . . .

(6) The arts and the humanities reflect the high place accorded by the American people
to the nation’s rich cultural heritage and to the fostering of mutual respect for the
diverse beliefs and values of all persons and groups.
(7) The practice of art and the study of the humanities require constant dedication and
devotion. While no government can call a great artist or scholar into existence, it is
necessary and appropriate for the Federal Government to help create and sustain not
only a climate encouraging freedom of thought, imagination, and inquiry but also the
material conditions facilitating the release of this creative talent.

   . . . .

(9) Americans should receive in school, background and preparation in the arts and
humanities to enable them to recognize and appreciate the aesthetic dimensions of our
lives, the diversity of excellence that comprises our cultural heritage, and artistic and
scholarly expression.
(10) It is vital to a democracy to honor and preserve its multicultural artistic heritage
as well as support new ideas, and therefore it is essential to provide financial assistance
to its artists and the organizations that support their work.
in other fields.” This conclusion paraphrases the tenth finding, which states: “It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.”

Seeking to refute the opponents’ traditional sphere of free expression arguments, the proponents argued that public forum analysis was most relevant to the issue of whether the decency and respect clause violated the First Amendment. The proponents then argued that NEA funding program was not a public forum because:

unlike public fora, NEA funding is a limited resource, and . . . the NEA cannot parcel out its limited budget on a purely content-neutral, first-come-first-served basis as governments must do in allocating use of a public forum. Instead, . . . the agency must select a small percentage of the many applicants based on its subjective judgment of which of the exceptionally talented artists would best promote the statute’s objectives.

The District Court rejected the proponents’ public forum analysis, finding that the university as a traditional sphere of free expression was the most relevant First Amendment model because “[i]n both settings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable.” Noting that the fact of limited public funding “does not permit the government to impose whatever restrictions it pleases on speech in a public university,” the trial court reasoned that neither funding limitations nor the need to use subjective professional judgments about who and what gets funded gives “the government . . . free rein to impose whatever content restrictions it chooses” on arts funding programs. As a consequence, the District Court held that “government funding of the arts is subject to the constraints of the First Amendment.”

The Ninth Circuit Court of Appeals adopted the District Court’s traditional sphere of free expression analysis and added a new rationale—government encouragement of “a diversity of views from private speakers” for subjecting arts funding programs to First Amendment scrutiny. It supported its conclusion that the NEA arts funding program was designed to encourage a diversity of viewpoints from

70. *Finley Trial*, 795 F. Supp. at 1474.
72. See *Finley Trial*, 795 F. Supp. at 1475.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. *Finley Appeal*, 100 F.3d at 681-82 (citing *Rust*, 500 U.S. at 200, wherein the Court justified treating government funding the dissemination of its own viewpoint differently than government-imposing speech restrictions on university funding by stating it has 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 of the First Amendment.” (citing *Keyishian*, 385 U.S. 589, 603, 605-06)).
79. See id.
private speakers by partially quoting the tenth and seventh findings in the NEA Act for the proposition that "a democracy must ‘honor and preserve its multicultural artistic heritage as well as support new ideas’ and that Congress intended ‘to help create and sustain ... a climate encouraging freedom of thought, imagination, and inquiry.’"\textsuperscript{80} Thus, the Court of Appeals held "that government funding of the arts, in the circumstances of this case, must be viewpoint-neutral."\textsuperscript{81}

In defending its holding, the Court of Appeals interpreted \textit{Rosenberger} as taking a "much broader view of the First Amendment’s applicability to subsidized speech"\textsuperscript{82} to reject the proponents’ contention that the traditional sphere of free expression doctrine was "limited to ‘special places’ and ‘special relationships.’"\textsuperscript{83} It also relied on \textit{Rosenberger} to refute the dissenting Judge’s assertion that only government funding that constitutes "a generally available benefit" is subject to First Amendment scrutiny, so that government may "support only a certain viewpoint" when its program provides "grants [that] are prize[s] given to a select few."\textsuperscript{84} To do so, the Court of Appeals quoted \textit{Rosenberger} for the proposition that "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."\textsuperscript{85}

However, the U.S. Supreme Court, per Justice O’Connor, rejected the proponents’ traditional sphere of free expression theory by distinguishing the nature of the government subsidy program in \textit{Rosenberger} from the NEA grants program.\textsuperscript{86} Adopting substantially the views of dissenting Appeals Court Judge Kleinfeld, Justice O’Connor found that:

In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately "encourage a diversity of views from private speakers." The NEA’s mandate is to make aesthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in \textit{Rosenberger}—which was available to all student organizations that were "related to the educational purpose of the University,"—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to "all newspapers and other periodical publications."\textsuperscript{87}

In other words, the Court was unwilling to impose the viewpoint neutrality rules articulated in \textit{Rosenberger} to a selective process based on artistic merit in which

\textsuperscript{80} Id. at 682 (citing 20 U.S.C. § 951(10) (1994)).
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 682 n.20 (citing \textit{Rosenberger}, 115 S. Ct. at 2517, for the proposition that a government program that subsidizes expression can be subjected to First Amendment scrutiny even though it is not "a traditional physical forum").
\textsuperscript{83} Id.
\textsuperscript{84} Finley Appeal, 100 F.3d at 683.
\textsuperscript{85} Id. (citing to \textit{Rosenberger}, 115 S. Ct. at 2519).
\textsuperscript{86} See \textit{Endowment}, 118 S. Ct. at 2178.
\textsuperscript{87} Id. (citations omitted).
"absolute neutrality is simply ‘inconceivable.’”

C. A Bare Majority Embraces the Government-as-Speaker Doctrine

In Rust, the U.S. Supreme Court held that speech restrictions, which are placed on government grantees to ensure that they convey a government-favored message and are tailored to the purposes of a valid government program, are constitutional.\(^{89}\) The basis of this decision was the Court’s view that 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.\(^{90}\)

This government-as-speaker aspect of Rust played no role in the District Court’s opinion. But, the Court of Appeals held that its applicability to government funding of expression was limited by Rosenberger to circumstances “when [government] is the speaker or when it enlists private entities to convey its own message.”\(^{91}\) As noted above, the Court of Appeals regarded the NEA arts funding program as analogous to a traditional sphere of free expression as embodied in universities rather than as an example of where government seeks to convey its own messages by retaining the services of a private party.\(^{92}\)

In a rather cryptic paragraph, the U.S. Supreme Court, per Justice O’Connor,\(^{93}\) appeared to adopt the government-as-speaker rationale as expressed in Rust to uphold the decency and respect clause. Without citation to earlier precedent, Justice O’Connor stated that “we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”\(^{94}\) After citing Regan v. Taxation with Representation of Wash,\(^{95}\) for the proposition that “[s]o long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities,”\(^{96}\) Justice O’Connor noted that Congress had amended the purposes of the NEA funding program “to provide that arts funding should ‘contribute to public support and confidence in the use of taxpayer funds,’ and that ‘public funds . . . must

\(^{88}\) Id. (citing Advocates, 532 F.2d at 792, 795-796).
\(^{89}\) See Rust, 500 U.S. at 193-99.
\(^{90}\) Id. at 193.
\(^{91}\) Finley Appeal, 100 F.3d at 681 (quoting Rosenberger, 515 U.S. at 833).
\(^{92}\) See id. at 681-83.
\(^{93}\) Evidently, this assertion was so startling that Justice Ginsburg declined to support it, leaving the Court with a bare majority that included Chief Justice Rehnquist, and Justices Stevens, Kennedy and Breyer. See Endowment, 118 S. Ct. at 2171.
\(^{94}\) Id. at 2179.
\(^{96}\) Endowment, 118 S. Ct. at 2179.
ultimately serve public purposes the Congress defines."97 Implying that this new statement of the NEA's purposes converted the NEA arts funding program from one that encourages a diversity of viewpoints from private speakers to one that enlists private speakers to carry out a more focused government mission, Justice O'Connor ended this portion of her opinion with the *Rust* quote set forth in the first paragraph of this section.98

D. The Majority Rejects Facial Overbreadth Arguments

Speech may be chilled if it is covered by a statute that is not constitutional in all its possible applications.99 The U.S. Supreme Court has fashioned the overbreadth doctrine to permit persons to challenge laws that are constitutional as applied to them if the laws also "penaliz[e] a substantial amount of speech that is constitutionally protected."100 "This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court."101

Under the heading "First Amendment injury,"102 the District Court found the decency and respect clause to be unconstitutionally overbroad because it seeks to suppress protected speech.103 The bases of this holding were (1) the District Court's interpretation of the decency and respect clause as a prohibition against the NEA funding indecent or disrespectful works of art,104 and (2) the District Court's reliance on past precedents proclaiming indecent expression to be protected speech.105 From these bases, the District Court held that the decency and respect clause "clearly reaches a substantial amount of protected speech," thereby "giv[ing] rise to the hazard that 'a substantial loss or impairment of freedoms of expression will occur. . . ."106 The Court of Appeals did not expressly take up overbreadth analysis other than to express in a footnote its agreement with the District Court's conclusion.107

The U.S. Supreme Court, per Justice O'Connor,108 framed the overbreadth issue as whether "the criteria in § 954(d)(1) are sufficiently subjective that the agency

97. *Id.* (quoting relevant portions of 20 U.S.C. § 951(5) (1994)).
98. *See id.* (quoting relevant portions from *Rust*, 500 U.S. at 193).
100. *Id.* at 130 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).
103. *See id.* at 1475-76.
104. *See discussion of the District Court's interpretation of the decency and respect clause notes 62-77 and accompanying text."
105. *See Finley Trial*, 795 F. Supp. at 1476 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), "expression which is indecent but not obscene is protected by the First Amendment . . ."); *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978) ("prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality").
107. *See Finley Appeal*, 100 F.3d at 683 n.24.
108. Joining Justice O'Connor's opinion as to the overbreadth issue were Chief Justice Rehnquist and Justices Stevens, Kennedy, Ginsburg and Breyer. *See Endowment*, 118 S. Ct. at 2171.
could utilize them to engage in viewpoint discrimination" in a manner that would "give rise to the suppression of protected speech." Justice O'Connor's analysis began with an assertion that the decency criterion could be constitutionally applied to educational programs that might receive NEA arts funding. She then asserted, without citing supporting precedent, that the respect criterion would be constitutional as applied to efforts by the NEA to satisfy its mandates to "honor and preserve [the nation's] multicultural artistic heritage," fund projects "that reach, or reflect the culture of a minority, inner city, rural, or tribal community," and fund projects that "give[e] emphasis to American . . . cultural diversity." Conceding, as she must, "that reference to these permissible applications would not alone be sufficient to sustain the statute against [a facial overbreadth challenge]," Justice O'Connor nevertheless concluded that "we [are not] persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression." She justified this conclusion by interpreting the decency and respect clause as an adjunct to the already highly subjective artistic excellence and merit criteria that make the process of awarding NEA grants inherently subjective and incapable of being made viewpoint neutral.

E. The Court Unanimously Rejects Void-for-Vagueness Arguments

Vague laws are those which are written with so little specificity that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what [behavior is required]." Where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms . . . .' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. Opponents of the decency and respect clause argued that its terms are inherently subjective, and that "the very nature of our pluralistic society generates . . . an infinite number of values and beliefs [so] . . . there may be no national 'general

109. Id. at 2177.
110. See id. (citing Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) for the proposition that it is "well established that 'decency' is a permissible factor where 'educational suitability' motivates its consideration.").
112. See supra notes 99-101 and accompanying text.
114. See supra notes 99-101 and accompanying text.
115. Endowment, 118 S. Ct. at 2177.
116. Id. (emphasis added).
117. See id. at 2177-78. See also discussion of the U.S. Supreme Court's interpretation of the decency and respect clause, supra notes 44-59 and accompanying text.
119. Id. at 109 (citing Baggett v. Bullitt, 377 U.S. at 372, quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
120. Finley Trial, 795 F. Supp. at 1471 (citing Smith v. Goguen, 415 U.S. 566, 573 (1974) ("what is contemptuous to one [person] may be a work of art to another"); Cohen v. California, 403 U.S. 15, 25 (1971) ("one [person]'s vulgarity is another's lyric").
standards of decency."121 They therefore asserted that the decency and respect clause was unconstitutionally vague.122

The District Court agreed with the opponents and found the decency and respect clause unconstitutionally vague.123 It based its vagueness holding on its analysis that this provision clearly gives rise to each of the three evils identified in Grayned:

(1) it creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone’s subjective understanding of the standard;

(2) panelists, the Council, and the Chairperson are given no guidance in administering the standard; each apparently is expected to draw on her or his own personal views of decency or some ephemeral “general American standard of decency;” and

(3) it necessarily causes the imposition of self-censorship wider than the line drawn by the statute because the line is, in effect, imperceptible.124

After interpreting the decency and respect clause as a prohibition against the NEA funding of indecent or disrespectful art work,125 and rejecting a number of assertions by the proponents that the clause should be immune from constitutional scrutiny,126 the Court of Appeals sustained the District Court’s analysis and held the decency and respect clause is void-for-vagueness.127 It did so by finding that the decency and respect standard:

gives rise to the danger of arbitrary and discriminatory application. . . . It grants government officials power to deny an application for funding if the application offends the officials’ subjective beliefs and values. Inevitably, NEA’s decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist’s point of view. Under such a grant of authority, funding may be refused because of the artist’s political or social message or because the art or the artist is too controversial. This danger is especially pronounced because a vague statute effectively shields decisions from review. Where First Amendment liberties are

121. Id. at 1471-72 (citing Bullfrog Films v. Wick, 646 F. Supp. 492, 505 (C.D. Cal. 1986) (finding USIA regulation impermissibly vague because “how is one to determine what is ‘misrepresentative’ of an open, diverse and pluralistic society as is the United States”), aff’d, 847 F.2d 502 (9th Cir. 1988)).
122. See id. at 1471.
123. See id. at 1472.
124. Id. at 1472 (citing Grayned, 408 U.S. at 108-09).
125. See FinleyAppeal, 100 F.3d at 676-78, 680. See also discussion, supra notes 40, 43, 51-53 and accompanying text.
126. See id. at 679.
127. See id. at 680-81.

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at stake, such a grant of authority violates fundamental principles of due process.\textsuperscript{128}

In dissent, Appeals Judge Kleinfeld asserted that if the decency and respect clause is void-for-vagueness, so are the equally subjective terms “artistic excellence” and “artistic merit.”\textsuperscript{129} The Court of Appeals rejected this assertion by distinguishing between the considerations involved in applying the terms artistic excellence or artistic merit and those involved in applying the decency and respect terms.\textsuperscript{130} First, it speculated, without detailed analysis, that “the two sets of criteria” differ in the “extent to which” they “implicate the policy concerns underlying the ‘void-for-vagueness’ doctrine.”\textsuperscript{131} Second, it noted that the arts funding decisions are to be made through an advisory panel process involving art experts who have “expertise in determining ‘artistic excellence and artistic merit’ . . . [but] have no corresponding expertise in applying such free-floating concepts as ‘decency’ and ‘respect.’”\textsuperscript{132}

In reversing the lower courts’ holdings that the decency and respect clause is unconstitutionally vague, the U.S. Supreme Court, per Justice O’Connor,\textsuperscript{133} came close to embracing a patronage exception by stating:

The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. . . . We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.\textsuperscript{134}

However, rather than adopt a blanket patronage exception for government funded expression, Justice O’Connor reverted back to a contextual analysis and embraced Judge Kleinfeld’s “[t]here is no principled way to keep the arts grants but strike the

\textsuperscript{128} Id. (footnote omitted).
\textsuperscript{129} Id. at 688-89.
\textsuperscript{130} See id. at 680-81 n.18.
\textsuperscript{131} See Finley Appeal. 100 F.3d at 680-81 n.18 (citations omitted).
\textsuperscript{132} Id.
\textsuperscript{133} Justice O’Connor was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Ginsburg and Breyer with respect to the vagueness portion of her opinion for the Court. See Endowment, 118 S. Ct. at 2171. In addition, writing in concurrence for himself and Justice Thomas, Justice Scalia agreed with the Court that the decency and respect clause was not void-for-vagueness, but did so on grounds that the vagueness clause does not apply to government funding criteria. See id. at 2184. He also cheekily offered his observation that:

If the vagueness doctrine were applicable, the agency charged with making grants under a statutory standard of “artistic excellence”—and which has itself thought that standard met by everything from the playing of Beethoven to a depiction of a crucifix immersed in urine—would be of more dubious constitutional validity than the “decency” and “respect” limitations that respondents (who demand to be judged on the same strict standard of “artistic excellence”) have the humorlessness to call too vague.

\textit{Id.} at 2184-85. Justice Souter in dissent also agreed that the decency and respect clause was not void-for-vagueness for reasons substantially identical to those of Judge Kleinfeld and Justice O’Connor. See \textit{id.} at 2196 n.17. Thus, for varying reasons the U.S. Supreme Court unanimously rejected the lower courts’ holdings that the decency and respect clause was unconstitutional under the void-for-vagueness doctrine.

\textsuperscript{134} Endowment, 118 S. Ct. at 2179.
decency and respect clause" approach.135

F. The Majority Punts the Patronage Exception Invitation

In Advocates, a case decided before the NEA arts funding selection criteria were amended by the decency and respect clause, the First Circuit Court of Appeals developed a patronage exception that virtually insulated NEA arts funding decisions from First Amendment scrutiny.137 After being the recipient of one NEA grant, the plaintiff, a literary journal, was denied a second NEA grant allegedly because the NEA decision makers thought a poem published by the plaintiff prior to submitting its application for a second grant was filth.138 The plaintiff challenged the constitutionality of the NEA arts funding selection process as it was applied to it, contending that its First Amendment rights had been violated because the denial of its application on the basis of the NEA decision makers' "personal adverse reaction" to a single poem constituted an unconstitutional restraint.139 Seeking to ensure that such unconstitutional denials would not occur again, the plaintiff asked as relief that "narrow standards and guidelines" be imposed on NEA arts funding decisions "to ensure that . . . [they] be based on 'literary or artistic merit' rather than on the decision maker's 'prejudices or his disagreement with what is being said. . . ."140

In rejecting the plaintiffs' claim, the First Circuit ruled that First Amendment scrutiny of NEA arts funding decisions was inappropriate.141 Four grounds were articulated for this conclusion. First, the Court of Appeals noted that NEA's arts funding process facilitates rather than regulates speech, so "[a] disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead."142 Second, it noted that arts funding decisions are

135. Finley Appeal, 100 F.3d at 689 (Kleinfeld, J., dissenting).
136. See Endowment, 118 S. Ct. at 2179-80 ("In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is constitutionally vague, then so too are all government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'").
137. See supra note 23 and accompanying text.
138. See Advocates, 532 F.2d at 793-94. The offending poem was Castrating the Cat by Michael McMahon:
- It is better to marry than to burn -
  St. Paul
  you may keep both balls preserved in a jar on the mantle piece
  he will be tamer more loving to his keepers
  he will not stay after cat cunt and his urine will not smell should he spray the mattress
- a simple swipe of scalpel along the scrotum and it is done -
  do not let the image of your own hulk drawn down a bannister of razor blades finger the inside of your sac
  think of him as a tenor in the choir
  and it is done the nurse washes her hands of him yes she smiles we clipped his wings -
  as above the errors flesh is heir to like St. Simeon on his desert pole unwashed in rags who picked
  up each worm that fell from his arm bid it eat and put it back.
139. See id. at 794.
140. Id. at 795.
141. See id. at 794:97.
142. Id. at 795 ("[P]ublic funding of the arts seeks 'not . . . to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge' artistic expression." (citation omitted)).
based on "the literary or artistic worth of competing applicants," so that "[t]he decision to withhold support is unavoidably based in some part on the 'subject matter' or 'content' of the expression."143 Third, it opined that attitudes toward art are so variable from time to time and from one individual to another that the "standard of artistic merit ... and guidelines elaborating it do not lend themselves to translation into First Amendment standards."144 Finally, it expressed grave doubt as to its ability to fashion a better arts funding process that would effectively root out personal bias in a cost effective manner.145 Nevertheless, the Court of Appeals may not have fashioned a true patronage exception, one that would have exempted the NEA arts funding process from all First Amendment scrutiny, because it held out the possibility that it would have subjected the NEA arts funding process to First Amendment and Equal Protection analysis if it had interpreted the plaintiff's claim as accusing the NEA arts funding decision makers of discriminating on the basis of viewpoint in judging funding applications.146

In upholding the decency and respect clause, the U.S. Supreme Court appeared to have embraced many elements of the patronage exception described above. Its rejection of the opponents' void-for-vagueness arguments was in part based on its notion that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."147 Moreover, the Court emphasized the subjectiveness of selective subsidy programs where selections are based on qualitative criteria such as artistic excellence and merit to justify its conclusions that the NEA arts funding process is neither a traditional sphere of free expression nor unconstitutionally vague or overbroad.148

But, the Court's constitutional rulings were derivative of its holding that the decency and respect clause did not require the NEA to reject arts funding applications on the basis of the applicants' viewpoints.149 This interpretation led the Court to assess the constitutionality of the NEA arts funding process as if the issue was more about the constitutionality of subjective, qualitative selection criteria, such as artistic excellence and merit, than about whether the government can discriminate on the basis of viewpoint in subsidizing expressive activity. Thus, the Court's decisions on

143. Id.
144. Advocates, 532 F.2d at 797. The Court also asserted that "courts have no particular institutional competence warranting case-by-case participation in the allocation of funds" given that such funding decisions "focus on the comparative merit of literary and artistic works." Id. at 795-96.
145. See id.
146. See id. at 798 ("The real danger in the injection of Government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others. To some extent this danger is tolerable because counterbalanced by the hope that public funds will broaden the range of ideas expressed ... But if the danger of distortion were to be evidenced by a pattern of discrimination impinging on the basic First Amendment right to free and full debate on matters of public interest, ... a constitutional remedy would surely be appropriate." (citations omitted)); see also id. at 798 n.8 ("We agree with the district court that distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the Equal Protection clause, if not the First Amendment, by penalizing the exercise of those freedoms." (citation omitted)).
147. See Endowment, 118 S. Ct. at 2179.
148. See id. at 2177-78 (rejecting the overbreadth arguments); id. at 2178 (rejecting the traditional sphere of free expression arguments); id. at 2179-80 (rejecting the void-for-vagueness arguments).
149. For a discussion of the United States Supreme Court's interpretation of the decency and respect clause, see supra notes 44-59 and accompanying text.
the overbreadth, traditional sphere of free expression, and vagueness issues all turned
on its notion that artistic excellence and merit are so inherently subjective that
expressive freedom is not materially threatened when these criteria are assessed in
part by considerations of whether art works are decent and respectful. 150 In addition,
the Court appeared to embrace the government-as-speaker rationale as partial
justification of its holding.151 More importantly, the Court held itself open to
conducting a more focused First Amendment analysis of the NEA arts funding
process if it receives “an as-applied challenge where the denial of the grant may be
shown to be the product of invidious viewpoint discrimination.”152 This contrasts
greatly with the views of Justices Scalia and Thomas, the Court’s only two
proponents of a real patronage exception. They only concurred in the Court’s
judgment,153 because they “regard the distinction between ‘abridging’ speech and
funding it as a fundamental divide, on this side [meaning funding] of which the First
Amendment is inapplicable, ”154 even if funding is allocated in accordance with
“content-and viewpoint-based criteria . . .”155

III. CRITIQUE

A. The Decency and Respect Clause Imposes Viewpoint-Based Selection Criteria

Despite its awkward wording, consideration of two questions:

(1) What were Congress’ objectives in enacting the decency and respect
clause?
(2) What were the effects of the decency and respect clause before it was
interpreted by the U.S. Supreme Court?

inevitably leads to the conclusion that Congress intended for the decency and respect
clause to be a prohibition against the NEA funding indecent and disrespectful works
of art. “[L]egislative intent of Congress is to be derived from the language and
structure of the statute itself, if possible, not from the assertions of codifiers directly
at odds with clear statutory language.”156 The wording of § 954(d)(1) suggests four

150. See Endowment, 118 S. Ct. at 2179.
151. See id. at 2179. See also discussion supra notes 93-98 and accompanying text.
152. Id. at 2178. Commenting on this prospect, the Court stated that:
If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into
a penalty on disfavored viewpoints, then we would confront a different case. We have stated that,
even in the provision of subsidies, the Government may not “aim at the suppression of dangerous
ideas,” . . . and if a subsidy were “manipulated” to have a “coercive effect,” then relief could be
appropriate.
Id. (emphasis added) (citations omitted).
153. See id. at 2180-85 (Scalia, J., concurring, joined by Justice Thomas).
154. Id. at 2184.
155. Id. at 2180.
meanings of varying plausibility:

(1) The Chairperson of the NEA is to take decency and respect into consideration when making rules and regulations governing the NEA arts funding evaluation process, and therefore the decency and respect criteria are not applicable to NEA arts funding decisions;\textsuperscript{157}

(2) The NEA arts funding decision makers should take decency and respect into consideration in judging whether applicants meet the artistic excellence and artistic merit criteria, but they are not required to deny funding to applicants proposing indecent or disrespectful projects, and the decency and respect criteria add essentially nothing to the funding decision process that was not already there by virtue of the artistic excellence and artistic merit criteria;\textsuperscript{158}

(3) The NEA arts funding decision makers should take decency and respect into consideration in judging every application, and the decency and respect criteria should be determinative as between projects of equal artistic excellence or merit;\textsuperscript{159}

(4) The decency and respect criteria prohibit the NEA from funding indecent and disrespectful art works no matter how great their artistic excellence or merit.\textsuperscript{160}

Of these possible meanings, the first is without plausibility for it makes the decency and respect criteria inapplicable to the NEA arts funding process, an outcome inconsistent with the decency and respect clause being located in a segregated and numbered paragraph that has as its subject the judging of NEA grant applications.\textsuperscript{161} The words “taking into consideration” cast some rebuttable doubt on the fourth interpretation that the decency and respect clause requires the NEA invariably to deny funding to all art works deemed indecent or disrespectful, for such words do not have the ring of command and contrast greatly with the “shall not be funded” command in § 495(d)(2) concerning obscene art works.\textsuperscript{162}

Read literally, the “taking into consideration” language requires the NEA arts funding decision makers simply to think about whether proposed art works are indecent or disrespectful.\textsuperscript{163} But, it defies logic to suggest, as the second interpreta-

\textsuperscript{157} This is the meaning asserted by the NEA, which also argued that its Chairperson’s determination that the diversity of the NEA arts panels would ensure that NEA arts decision makers would take decency and respect into consideration in judging applications satisfied the requirements of § 954(d)(1). See discussion, supra notes 34-35, 49 and accompanying text.

\textsuperscript{158} This is the meaning adopted by the U.S. Supreme Court. See Endowment, 118 S. Ct. at 2176-77.

\textsuperscript{159} This is the view adopted by Justices Scalia and Thomas. See id. at 2180-81 (Scalia, J., concurring, joined by Justice Thomas).

\textsuperscript{160} This is the view adopted by Justice Souter. See id. at 2186-87 (Souter, J., dissenting).

\textsuperscript{161} See id. at 2180 (Scalia, J., concurring). This reinforces Justice Scalia’s view that the NEA’s contention, that it complied with the requirements of the decency and respect clause simply because its diverse arts panels ensure that decency and respect will be considered in awarding NEA arts funding, “is so obviously inadequate that it insults the intelligence.” Id. at 2181.

\textsuperscript{162} See id. at 2176 (majority opinion).

\textsuperscript{163} See id. at 2176-77.
tion does, that the duty to take decency and respect into consideration in evaluating arts funding applications gives the NEA the green light to fund indecent and disrespectful works if the NEA conducts an analysis sufficient to uncover their indecency and disrespectfulness. The second interpretation also defies logic in suggesting that the decency and respect clause does not require the NEA arts funding decision makers to use any different mental approach in judging arts funding applications than they previously used when only required to determine if arts funding applications met the artistic excellence and merit criteria. Decency and respect are terms that are not synonymous with artistic excellence and artistic merit, and they are, after all, statutory additions to the factors the NEA arts funding decision makers must consider in judging applications.

The third interpretation honors the notion that additions to statutes must mean something. At minimum, it means that the decency and respect criteria must be applied to every NEA grant application, and that applications exhibiting indecency and disrespect are less likely to receive NEA funding than those which do not. Still, the decency and respect clause does not expressly say that as between two applications of equal artistic excellence and merit the indecent or disrespectful one should be denied.

It would seem then that none of the possible meanings of the decency and respect clause is irrefutably supported by its language. However, the record of the Congressional debate concerning the decency and respect clause leaves little doubt that Congress’ goal was to find a constitutional way of revising the NEA arts funding process so that indecent and disrespectful works of art would not be funded. It resonated with remarks such as those below:

In the words of a cosponsor of the bill that enacted the proviso, “works which deeply offend the sensibilities of significant portions of the public ought not to be
supported with public funds.” 136 CONG. REC. 28,624 (1990). . . . Another supporter of the bill observed that “the Endowment’s support for artists like Robert Mapplethorpe and Andres Serrano has offended and angered many citizens,” behooving “Congress . . . to listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again.” Id. at 28,642. Indeed, if there were any question at all about what Congress had in mind, a definitive answer comes in the succinctly accurate remark of the proviso’s author, that the bill “adds to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account.” Id. at 28,631.170

The majority opinion sought to blunt the thrust of this record by noting that Congress rejected targeting any distinct category of expression or viewpoints for funding denials,171 but the concepts of decency and respect embedded in the decency and respect clause are viewpoint-laden. As Justice Souter pointed out:

the First Amendment has never been read to allow the government to rove around imposing general standards of decency, see, e.g., Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997) (striking down on its face a statute that regulated “indecency” on the Internet). Because “the normal definition of ‘indecent’ . . . refers to nonconformance with accepted standards of morality,” FCC v. Pacifica Foundation, 438 U.S. at 740 (citations omitted), restrictions turning on decency, especially those couched in terms of “general standards of decency,” are quintessentially viewpoint based: they require discrimination on the basis of conformity with mainstream mores.172

. . . .

Just as self-evidently, a statute disfavoring speech that fails to respect America’s “diverse beliefs and values” is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the

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170. Id. at 2186-87 (Souter, J., dissenting). See also discussion supra notes 11-12 and accompanying text.
171. See id. at 2176, wherein the Court cited the following legislative history:

The legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA’s funding or substantially constraining its grant-making authority. See, e.g., 136 CONG. REC. 28,626, 28,632, 28,634 (1990). The Independent Commission had cautioned Congress against the adoption of distinct viewpoint-based standards for funding, and the Commission’s report suggests that “additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as part of a definition of ‘artistic excellence’), rather than isolated and treated as exogenous considerations.” REPORT TO CONGRESS, at 89. In keeping with that recommendation, the criteria in section 954(d)(1) inform the assessment of artistic merit, but Congress declined to disallow any particular viewpoints. As the sponsors of section 954(d)(1) noted in urging rejection of the Rohrabacher Amendment, “if we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member’s aversions end, others with different sensibilities and with different values begin.” 136 CONG. REC. 28,624 (statement of Rep. Coleman). . . . In contrast, before the vote on section 954(d)(1), one of its sponsors stated: “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.” 136 CONG. REC. 28,674.
172. Endowment, 118 S. Ct. at 2187 (Souter, J., dissenting).
American populace. Boiled down to its practical essence, the limitation obviously 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.  

NEA behavior after the enactment of the decency and respect clause demonstrates that it believed it had a duty to apply the decency and respect criteria to each funding application. As noted by the Court of Appeals:

In a meeting held on December 14 and 15, 1990, the Chairperson and National Council considered a number of proposals to implement the “decency and respect” provision. They did not question their obligation under § 954(d)(1) to judge grant applications according to “general standards of decency and respect for the diverse beliefs and values of the American public.” Instead, to satisfy this new obligation, NEA officials adopted the approach of having the Chairperson instruct advisory panel members to bring their own definitions of these terms “to the table” and make them “part of the deliberative process.”

In 1992, the NEA’s advisory council, overturned the review panel’s approval of two grants under circumstances that strongly suggested that the denials were at least content-based. Both grants involved sexually explicit visual materials that were only a part of the applicants’ overall applications. The NEA contended that the applications were denied funding on artistic merit grounds. However, this contention seemed questionable given that review panels are rarely overturned, and that the NEA’s reactions seemed to be more about being offended by some of the materials’ sexual content than about artistic quality. Later in 1992, a new NEA

173. Id. at 2188.  
174. Finley Appeal, 100 F.3d at 678 (citing Minutes of the December 1990 Retreat of the National Council on the Arts at 21, S.E.R. at 23).  
175. One applicant was the Franklin Furnace, described by The Washington Post as a “New York bastion of avant-garde art,” which had received NEA grants each of the previous sixteen years. See Kim Masters, Arts Agency Rejects 2 Grants; Chairman Questions ‘In Your Face’ Tactics, WASH. POST, Feb. 4, 1992, at D1. The other was The Highways, which The Washington Post identified as “a fledgling gallery in Los Angeles.” Id.  
176. The Furnace’s application contained a “videotape [on which] a monologuist using the name Scarlet O discusses attitudes about sexuality. She starts out dressed as a man (using a sexual prop) and shows highly explicit photographs of herself in various bizarre costumes that she uses to explore her sexual ‘persona.’ She then invites audience members to apply lotion to her nude body.” Id. Highways’ application contained twenty-five homoerotic photographs, “which included images of men engaged in oral sex . . . .” Id.  
177. “I simply question why anyone would submit any article like that which has so little attempt at artistic merit,” the NEA Chairperson, Frohmayer, exclaimed in a telephone interview, discussing The Furnace’s application. Id. “The rejection of the Furnace’s application did not involve Congress’ controversial requirement that the endowment consider ‘general standards of decency’ in awarding grants, he added. ‘There was no discussion of the decency standard whatsoever. It was all artistic merit.’ . . . The council concluded that the 25 photographs submitted by [Highways] were of mixed quality.” Id.  
178. See id.  
179. See id. Responding to a letter of protest from the Chair of the arts panel, who contended “that the grant rejections were motivated by ‘fear and threats of political reprisals,’” the NEA Chairperson expressed his belief “that the Furnace had deliberately provoked the endowment by submitting a tape in which the artist stripped down to a garter belt and stockings and invited an audience member to rub lotion between her legs. He described the submission as an ‘in your face’ move by the Furnace.” Id.
Chairperson overturned the recommendation of NEA expert advisors and "denied funding for two projects planned by galleries at the Massachusetts Institute of Technology [MIT] and Virginia Commonwealth University [VCU],"\textsuperscript{180} "both of which contained some sexual themes."\textsuperscript{181} Although she issued a press release saying that "the proposed exhibits were 'unlikely to have . . . long-term artistic significance,'"\textsuperscript{182} in a later interview she insisted that she was acting to keep Congress from dismantling the NEA.\textsuperscript{183} The Chairperson also voiced dismay that "[p]ress reports had cited the MIT and VCU applications as potentially controversial even before they were reviewed by the NEA advisory council at the beginning of May."\textsuperscript{184}

Establishing that Congress intended the decency and respect clause to be a mandate requiring the NEA to engage in viewpoint-based evaluations of arts funding applications, and that the NEA actually did so, is not sufficient to show conclusively that viewpoint discrimination in awarding arts funding violates the First Amendment. In the context of the NEA arts funding program, such viewpoint discrimination may be exempt from First Amendment scrutiny or incapable of producing First Amendment harms.

\textbf{B. The Government-As-Speaker Doctrine Does Not Apply}

In \textit{Rosenberger}, the U.S. Supreme Court stated that "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."\textsuperscript{185} Similarly, in \textit{Rust}, the Court held that the government does not violate the First Amendment when it imposes speech restrictions on grantees who receive money to further government projects unrelated to encouraging private speech if those restrictions are designed to ensure that the grantees engage only in activities that further the projects' goals and policies.\textsuperscript{186} As partial justification for its holding that the decency and respect clause is not facially unconstitutional, the Court in \textit{Endowment} cryptically invoked \textit{Rust}.\textsuperscript{187} However, a critical examination of the NEA arts funding program reveals that it does not involve the government speaking for itself, government hiring others to transmit its messages, or government restricting speech in furtherance of a

\textsuperscript{180} Kim Masters, \textit{NEA Chief Defends Grant Vetoes; Further Conflict Likely, Radice Says}, \textit{WASH. POST}, May 29, 1992 at D1.

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{See id.} "I guess you can't win for losing," she said. "The comfort I've drawn from all this is I knew I really thought about this carefully and made the best decision I could. . . . If the agency survives, people will say, 'I didn't agree with her, but thank God the endowment's still here.'" \textit{Id.}

\textsuperscript{184} \textit{Id.} "It was sad to see it played out so publicly," she said. Even the most meritorious project can be harmed by "a perception that's incorrect" if it gets publicized. When that happens, she said, "it certainly draws a line in the sand, whichever side you come down on." \textit{Id.}

\textsuperscript{185} \textit{Rosenberger}, 515 U.S. at 833.

\textsuperscript{186} \textit{See Rust}, 50 U.S. at 193-200. \textit{See also Rosenberger}, 515 U.S. at 833 (emphasizing that the program involved in \textit{Rust} was not designed "to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program").

\textsuperscript{187} \textit{See Endowment}, 118 S. Ct. at 2179.
project that does not encourage private speech.

There can be no doubt that the historical purpose of the NEA is to encourage private expression through funding arts projects that reflect artistic excellence and merit. In the process of enacting the NEA Act, Congress expressly found that:

The practice of art and the study of the humanities requires constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent. 188

... 

It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work. 189

Clearly, these findings evidence Congress' intent to fund artists not so they will express government ideas or convey government messages tailored to carrying out the purposes of a non-speech generating government program, but rather so they will develop new ideas of their own and express them through artistic media. This should be sufficient to debunk the idea that the NEA arts funding program is insulated from First Amendment scrutiny by the government-as-speaker doctrine.

In Endowment, however, a bare majority implied that Rust was made applicable to the NEA arts funding program by virtue of a new finding Congress added to the NEA Act which states:

It is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the humanities and the arts by local, state, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to provide public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve the public purposes Congress defines. 190

After quoting this finding, the majority cited Rust for the proposition that: "Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" 191 Presumably the Court intended for the

191. Endowment, 118 S. Ct. at 2179 (citing Rust, 500 U.S. at 193).
juxtaposition of these quotes to impart the idea that the decency and respect clause was a speech restriction designed to facilitate Congress' goal of funding only non-offensive works of art. If so, the Court has redefined the NEA program as designed to encourage private artists to express themselves through decent and respectful works of art that meet the highest standards of artistic excellence and merit. Thus, even as redefined, the NEA arts funding program is not subject to the government-as-speaker doctrine because the sanitized art it is designed to stimulate will still express the ideas of private speakers rather than those of the government.192

C. The Decency and Respect Clause May Produce First Amendment Injuries

Generally, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."193 The basis of this policy is that the failure to subsidize does not create any obstacle in the way of the private party exercising his or her fundamental right that was not already there.194 Justice Scalia has contended for some time that this should be the rule with respect to government subsidization of a private person's speech.195 He argued forcefully that this rule should be applied to the NEA arts funding program so that its constitutionality would be upheld even if the NEA engaged in blatant viewpoint discrimination.196 Justice Scalia colorfully expressed the basis of this argument by asserting:

The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech." To abridge is "to contract, to diminish; to deprive of." With the enactment of § 954(d)(1), Congress did not abridge the speech of those who disdain the beliefs and values of the American public, nor did it abridge indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. Avant-garde artistes such as respondents remain entirely free to epater les bourgeois; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. . . . "The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have

192. See id. at 2190, wherein dissenting Justice Souter asserts that:
   The Government freely admits, however, that it neither speaks through the expression subsidized by the NEA, nor buys anything for itself with its NEA grants. On the contrary, believing that "the arts . . . reflect the high place accorded by the American people to the nation's rich cultural heritage," § 951(6), and that "it is vital to a democracy . . . to provide financial assistance to its artists and the organizations that support their work," § 951(10), the Government acts as a patron, financially underwriting the production of art by private artists and impresarios for independent consumption.


194. See Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding a Connecticut regulation that denied state funding for abortions that were not medically necessary).


196. See Endowment, 118 S. Ct. at 2182-83 (Scalia, J., concurring).
any significant coercive effect."\textsuperscript{197}

On the surface, Justice Scalia's argument seems inviting, even compelling, but even he has had to acknowledge that the Court's public forum doctrine has expressly forbidden government to deny access to fora it has established on the basis of the speaker's viewpoint.\textsuperscript{198} Public fora are government owned or controlled property or channels of expression that have traditionally or by government designation been made available to private speakers who wish to engage the public in debate.\textsuperscript{199} Given that the purpose of public fora is to facilitate the "the free exchange of ideas,"\textsuperscript{200} speakers cannot be denied access to them on the basis of their viewpoints.\textsuperscript{201} In most cases, public fora constitute physical government property, but the recent \textit{Rosenberger} case treated cash subsidies as a designated public forum.\textsuperscript{202} There, as in this case, the government program involved helping private speakers generate diverse points of views.\textsuperscript{203} So, unless it can be distinguished from Endowment, \textit{Rosenberger} renders the decency and respect clause unconstitutional, assuming that the clause denies artists access to NEA arts funding on the basis of their viewpoints.

The majority and Justice Scalia contend that the NEA arts funding program does not constitute a public forum because it is limited to a few artists who can display great artistic excellence and merit.\textsuperscript{204} This may be a valid contention, because the Court has distinguished non-public fora from public fora on the basis of whether "government allows selective access for individual speakers rather than general access for a class of speakers."\textsuperscript{205} There is room to quibble about the type of forum involved in particular cases, because the designation of the class is not always a straightforward proposition.\textsuperscript{206} It could be argued in this case, for example, that the class of speakers is comprised of all artists who have attained a certain level of artistic ability. But, it could be more rationally argued that each artist is admitted to the forum individually on a project by project basis.

Thus, the NEA's arts funding program is probably a non-public forum. Nevertheless, the decency and respect clause still generates a First Amendment injury because access to a non-public forum cannot be denied on the basis of the speaker's

\textsuperscript{197} Id. at 2182-83 (citations omitted).
\textsuperscript{198} See id. at 2184, where Justice Scalia took pains to distinguish the NEA arts funding program from the University of Virginia's Student Activity Fund, which was treated as if it were a designated public forum in \textit{Rosenberger}. See \textit{Rosenberger}, 515 U.S. at 829-30.
\textsuperscript{200} See \textit{Cornelius}, 473 U.S. at 800.
\textsuperscript{201} See \textit{Rosenberger}, 515 U.S. at 829-30.
\textsuperscript{202} See id.
\textsuperscript{203} In \textit{Rosenberger}, the University of Virginia subsidized the printing costs of student publications from its Student Activity Fund. See id. at 822-25. The NEA arts funding program is designed to provide private artists with funding to help them "honor and preserve [the nation]'s multicultural artistic heritage as well as support new ideas . . ." 20 U.S.C. § 951(10), and "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent." 20 U.S.C. § 951(7) (1994).
\textsuperscript{204} See \textit{Endowment}, 118 S. Ct. at 2178 (majority opinion), 2184 (Scalia, J., concurring).
\textsuperscript{206} See \textit{John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW}, § 16.47(c), at 1147 (5th ed. 1995).
viewpoint. Moreover, this injury has been exacerbated by the fact that it is a product of a cultural war between those who espouse traditional family and religious values and artists who portray various aspects of alternative sexual choices and feminist critiques.

Finally, there is a question as to whether denying funding to artists on the basis of their viewpoints has a chilling effect on free speech for purposes of determining if the decency and respect clause is unconstitutionally overbroad. As Justice Scalia pointed out, a denial of funding does not unconstitutionally erect an obstacle to the exercise of a fundamental right. He also contends that a contrary view would "make the NEA the mandatory patron of all art too indecent, too disrespectful, or even too kitsch to attract private support." But, Justice Souter cited findings in an earlier U.S. District Court opinion that tended to demonstrate that NEA funding awards have become "an imprimatur that signifies the recipient's artistic value [such that they] lend prestige and legitimacy to projects and are therefore critical to the ability of artists . . . to attract non-federal funding sources . . . ." This led Justice Souter to conclude that the decency and respect clause may chill a great deal of artistic expression 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. Either way, to whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid esthetic. And either way, the proviso's viewpoint discrimination will "chill the expressive activity of [persons] not before the court." Forsyth County, 505 U.S. at 129. See App. 22-24 (declaration of Charlotte Murphy, Executive Director of respondent NAAO) (recounting how some NAAO members have not applied for NEA grants for fear that their work would be found indecent or disrespectful, while others have applied but were "chilled in their applications and in the scope of their projects" by the decency and respect provision).

IV. CONCLUSION

By deconstructing the decency and respect clause into an illogical interpretation, the Endowment majority avoided the stark choices presented by Justices Scalia and Souter. For having found that the decency and respect clause does not of its own

207. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (emphasis added)).

208. See supra notes 6-12 and accompanying text, describing the homoerotic, lesbian, feminist, and allegedly blasphemous themes that have provoked the enactment of the decency and respect clause.

209. See Endowment, 118 S. Ct. at 2182-84 (Scalia, J., concurring).

210. Id. at 2183.

211. Id. at 2195 (quoting Bella Lewitzky Dance Foundation v. Frohmayer, 745 F. Supp. 774, 783 (C.D. Cal. 1991)).

212. Id.
accord produce viewpoint discrimination, the Court could readily conclude that it is incapable of producing a First Amendment injury without adopting Justice Scalia's approach of insulating all government subsidization of expressive activity from First Amendment scrutiny. It also avoided presenting Congress with the choice of funding all art of artistic excellence and merit, regardless of how indecent or disrespectful it might be, or killing the NEA arts funding program, which would be the inevitable consequence of finding that the decency and respect clause denies speakers access to a public or non-public forum on the basis of their viewpoints.

Apart from a debate over which constitutional views were "correct," consideration should be given to which outcome most supports First Amendment values. Confronting the Congress with an all-or-nothing choice might cause it to kill the arts funding program altogether, which could lead to a greatly diminished participation by the artistic community in the great public debates of our time. Giving Congress unlimited power to choose what private viewpoints to subsidize could lead to an erosion of the public forum doctrine, and, given the immense resources of the federal government, severely tilt the debate toward its favored viewpoints without having to take ownership of them. So, it might be argued that the majority fashioned a Solomon-like outcome.

Unfortunately, the majority's solution produces the worst First Amendment consequences. It hints at an outrageous expansion of the government-as-speaker doctrine while signaling to Congress that it can constitutionally enact provisions that will produce the effects of viewpoint discrimination through their in terrorem power as long as they are vague enough to avoid specifying a definite class of protected speech for unfavorable treatment. As Justice Souter so aptly concluded: "The Court . . . preserves the irony of a statutory mandate to deny recognition to virtually any expression capable of causing offense in any quarter as the most recent manifestation of a scheme enacted to 'create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry.'"213

213. Id. at 2196 (quoting from 20 U.S.C. § 951(7)).